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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-21-0008

10 **PETITION TO AMEND THE**  
11 **ARIZONA RULES OF SUPREME**  
12 **COURT TO ADOPT NEW RULE**  
13 **24 – JURY SELECTION**

14 **COMMENT OF**  
15 **THE STATE BAR OF ARIZONA**

16 The *Batson* Working Group has petitioned for a new Arizona Supreme Court  
17 Rule 24, concerning the exercise or waiver of peremptory jury strikes that result in  
18 removal from civil or criminal juries specified classes of prospective jurors.  
19 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of  
20 Arizona hereby submits its comment in support.

21 **A. Introduction.**

22 The working group behind Petition R-21-0008 included members of the State  
23 Bar’s Civil and Criminal Practice and Procedure Committees, judges from the  
24 Maricopa and Pima Superior Courts, prosecutors, criminal defense attorneys, civil  
25 attorneys from urban and rural counties, an Arizona Court of Appeals judge, a law

1 professor, and other interested parties.<sup>1</sup> Their Petition proposes modifications to jury  
2 selection procedures in all courts via new Arizona Supreme Court Rule 24, which  
3 would substantially alter procedures for exercising peremptory challenges in both  
4 civil and criminal cases. The purpose is to address the shortcomings of existing rules  
5 and practices aimed at unlawful discrimination in the exclusion of prospective jurors,  
6 and to increase public confidence in the judicial system, consistent with *Batson v.*  
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8 *Kentucky*, 476 U.S. 79 (1986) and its progeny.  
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10 The Petition asserts, and Courts and Commentators agree, that *Batson* is  
11 widely regarded as a failure.<sup>2</sup> Moreover, more than thirty years after it was decided,  
12 the exact scope of *Batson*'s prohibition on the discriminatory use of peremptory  
13 challenges, and its application at trial and in the appellate courts, may yet be regarded  
14 as somewhat uncertain, or in a state of flux.  
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16 *Batson* held that the Constitution forbids a criminal prosecutor's exercise of  
17 peremptory challenges in a racially discriminatory manner. The Court has extended  
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21 <sup>1</sup> See Petition at Appendix B.

22 <sup>2</sup> "There is now a broad scholarly consensus that *Batson* has failed to meaningfully  
23 limit systemic racial exclusion in jury selection." Thomas Ward Frampton, *For*  
24 *Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785,  
25 788 (2020). See also *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013) (Evidence shows that *Batson* has done very little to make juries more diverse or to prevent race-based peremptory strikes.).

1 *Batson* to civil litigants<sup>3</sup> and held that criminal defendants cannot exercise  
2 peremptory challenges in a racially discriminatory manner.<sup>4</sup> In a case involving the  
3 alleged discriminatory use of peremptory strikes against prospective “Latino” or  
4 “Hispanic” jurors, the Court said, “If true, the prosecutor’s discriminatory use of  
5 peremptory strikes would violate the Equal Protection Clause as interpreted ... in  
6 *Batson*[.]”<sup>5</sup> The Court, in *J.E.B. v. Alabama*, has since extended *Batson* to  
7 discrimination on the basis of gender.<sup>6</sup>

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10 In *J.E.B.*, the Court partly explained the scope of its decision to prohibit  
11 discrimination on the basis of gender by affirming that “[p]arties may also exercise  
12 their peremptory challenges to remove from the *venire* any group or class of  
13 individuals normally subject to ‘rational basis’ review.”<sup>7</sup> Although the Supreme  
14 Court has yet to apply *Batson* to prohibit discrimination in jury selection based on  
15 religion, it has held in other contexts that laws impeding the free exercise of religion  
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21 <sup>3</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

22 <sup>4</sup> *Georgia v. McCollum*, 505 U.S. 42 (1992).

23 <sup>5</sup> *Hernandez v. New York*, 500 U.S. 352, 355 (1991).

24 <sup>6</sup> *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (“[G]ender, like race, is an  
unconstitutional proxy for juror competence and impartiality.”).

25 <sup>7</sup> *J.E.B. v. Alabama*, 511 U.S. at 143.

1 are subject to strict scrutiny.<sup>8</sup> It must be noted, however, that this Court has ruled  
2 that *Batson* applies to peremptory strikes based upon religious membership or  
3 affiliation.<sup>9</sup>  
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5 The Supreme Court’s most recent decision, *United States v. Windsor*,  
6 concerning equal protection and classifications based on sexual orientation did not  
7 characterize the level of scrutiny it applied to the equal protection claim.<sup>10</sup> Although  
8 the dissent objected that the Court’s “opinion does not apply strict scrutiny, and its  
9 central propositions are taken from rational-basis cases,” it also recognized that “the  
10 Court certainly does not *apply* anything that resembles that deferential  
11 framework.”<sup>11</sup> *Windsor* was subsequently interpreted to conclude that “we are  
12 required by *Windsor* to apply heightened scrutiny to classifications based on sexual  
13 orientation for purposes of equal protection” and that “equal protection forbids  
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18 <sup>8</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,  
19 546 (1993) (“A law burdening religious practice that is not neutral or not of general  
20 application must undergo the most rigorous of scrutiny”).

21 <sup>9</sup> *State v. Purcell*, 199 Ariz. 319, 328 ¶29 (2001).

22 <sup>10</sup> 570 U.S. 744 (2013). The Court in *Windsor* twice suggested that  
23 “[d]iscriminations of an unusual character’ especially require careful consideration  
24 to determine whether they are obnoxious to the constitutional provision,” *id.* at 768  
25 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996), and *Louisville Gas & Elec. Co.*  
*v. Coleman*, 277 U.S. 32, 37-38 (1928)), without expressly adopting a standard of  
heightened scrutiny for discrimination based on sexual orientation.

<sup>11</sup> *Windsor* at 794 (Scalia, dissenting) (emphasis in original).

1 striking a juror on the basis of his sexual orientation.”<sup>12</sup> In *SmithKline Beecham*, the  
2 Ninth Circuit Court of Appeals recognized that the decision in *J.E.B.* “did not state  
3 definitively whether heightened scrutiny is sufficient to warrant *Batson*’s protection  
4 or merely necessary.”<sup>13</sup>

6 **B. The State Bar Supports The Batson Working Group Petition.**

7 The proposed rule would substantially modify the *Batson* framework for  
8 peremptory challenges, to accomplish the purpose of bringing equality to jury  
9 service and improving confidence in the judicial system. The Petition includes an  
10 extensive discussion of the state of the law and practice in Arizona and elsewhere, a  
11 review of efforts made in other states to reform or correct *Batson* rule deficiencies,  
12 and well-founded reasons for each of the major provisions of the proposed Rule.  
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15 **1. Extending Protections Against Discrimination.**

16 First, the Petition would extend the protection against discrimination to the  
17 exercise of peremptory challenges made on the basis of race, sex, gender, religion,  
18 national origin, ethnicity, disability, age, or sexual orientation – categories of  
19 persons already protected against discrimination in the courtroom under the Arizona  
20 Code of Judicial Conduct, Canon 2, Rule 2.3(C) of Judicial Conduct.  
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24 <sup>12</sup> *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F. 3d 471, 484 (9th Cir.  
2014).

25 <sup>13</sup> *Id.*

1                                   **2. Elimination of the *Prima Facie* Requirement.**

2                   Second, the Petition would ease the procedure for objecting to a peremptory  
3 challenge by eliminating the requirement that the objecting party make a *prima facie*  
4 showing of discrimination before an objection can be considered. Instead, the rule  
5 would require only that the objection be made by “simple citation to this rule,” with  
6 further discussion conducted outside the presence of the jury panel.  
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8                   *Batson* was intended “to produce actual answers to suspicions and inferences  
9 that discrimination may have infected the jury process.”<sup>14</sup> Unfortunately, the *prima*  
10 *facie* showing of purposeful discrimination required by *Batson* has served at times  
11 as a barrier to discussion of meaningful objections to peremptory challenges. By  
12 eliminating the *prima facie* requirement, the reasons for all strikes that may be  
13 grounded in discrimination will be addressed on the record and an appellate court  
14 will always have the benefit of a complete record to review on appeal.  
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17                                   **3. Modification of the Standard for Determining Discriminatory**  
18                                   **Intent.**

19                   The Petition also does away with the main shortcoming of *Batson*, the  
20 purposeful discrimination requirement whereby, in order to deny a strike, the judge  
21 must make the unpalatable finding that the striking attorney has acted unethically by  
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<sup>14</sup> *Johnson v. California*, 545 U.S. 162, 172 (2005).

1 misleading the court and intentionally violating the constitutional rights of the  
2 stricken juror. In place of the purposeful discrimination requirement, the Petition  
3 proposes that the determination of whether a strike may stand instead be based upon  
4 the following analysis:  
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6           **e) Determination.** The court must then evaluate the  
7 reasons given to justify the peremptory challenge or  
8 waiver in light of the totality of circumstances. If the court  
9 determines that any reasonable person could view any of  
10 race, sex, gender, religion, national origin, ethnicity,  
11 disability, age, or sexual orientation, as a conscious or  
12 unconscious factor in the use or waiver of a peremptory  
13 challenge, then the objection must be sustained, even if  
14 other valid reasons are offered. The court need not find  
15 purposeful discrimination to sustain the objection. The  
16 court must explain its ruling on the record.

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Petition R-21-0008, Appendix A at 2.

          In essence, the judge’s analysis is: If, under the totality of the circumstances,  
any reasonable person could view the strike as based on conscious or unconscious  
discrimination against a protected class, the peremptory will be disallowed.

          The proposed procedure improves on the *Batson* process because the  
“reasonable person” standard in step three – coupled with the inclusion of the  
possible existence of unconscious bias – softens the accusation of discrimination  
underlying the objection and recognizes that discrimination does not have to be overt  
and intentional and can arise from implicit biases. Under this procedure, a judge  
may deny the strike without the unspoken determination that the striking attorney

1 has knowingly engaged in discrimination and then intentionally misled the court by  
2 offering a pretextual reason for the strike.

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4 The concept of unconscious discrimination is hardly new. Justice Marshall  
5 addressed it 35 years ago in his concurring opinion in *Batson* when he noted that an  
6 individual’s unconscious racism may lead him to conclusions that would not have  
7 come to mind if the prospective juror was of a different color.<sup>15</sup>

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9 The standards provided for in the proposed rule are familiar and workable.  
10 The “totality of the circumstances” test is used to determine whether parental rights  
11 should be terminated<sup>16</sup> and whether error in a criminal case may be considered  
12 fundamental.<sup>17</sup> The “reasonable person” standard is applied in many contexts.<sup>18</sup>  
13 Likewise, the “could” standard is workable and in use, applied in Arizona in cases  
14 involving both juror and prosecutorial misconduct. In juror misconduct cases,  
15 prejudice is presumed where there is a reasonable possibility that the misconduct  
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20 <sup>15</sup> *Batson v. Kentucky*, 476 U.S. at 106 (Marshall, J. concurring).

21 <sup>16</sup> *Alma S. v. Dep’t of Child Safety*, 245 Ariz. 146, 148 ¶ 1 (2018).

22 <sup>17</sup> *State v. Escalante*, 245 Ariz. 135, 142 ¶ 21 (2018).

23 <sup>18</sup> *See, e.g., Bird v. Rothman*, 128 Ariz. 599, 602 (App. 1981) (Whether facts in a  
24 malicious prosecution case are sufficient to constitute probable cause is determined  
25 using a reasonable person test.); *Ariz. Dept. of Revenue v. Arizona Outdoor  
Advertisers*, 202 Ariz. 93, 100 ¶ 38 (App. 2002) (Reasonable person test used to  
determine the existence of a fixture.).

1 “could” have affected the verdict.<sup>19</sup> In prosecutorial misconduct cases, the reviewing  
2 court determines whether a reasonable likelihood exists that misconduct “could”  
3 have affected the jury’s verdict.<sup>20</sup>  
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#### 5 **4. Consideration of Relevant Circumstances.**

6 It has been recognized since day one that the party challenging the strike may  
7 rely on “any . . . relevant circumstances” and “a combination of factors” to establish  
8 a claim of discrimination. Judges should consider “all relevant circumstances” when  
9 deciding whether discrimination has been shown.<sup>21</sup> In light of this, the proposed  
10 Rule outlines circumstances a judge may consider in making that determination.  
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12 The circumstances listed for consideration derive from case law and are  
13 intended to provide guidance to the judge in determining whether discrimination  
14 may be a motivating factor in the removal of the prospective juror. For example,  
15 “questions and statements during *voir dire* . . . may support or refute an inference of  
16 discriminatory purpose.”<sup>22</sup> Further, comparisons between challenged jurors and  
17 similarly situated, unchallenged jurors can be probative of whether a peremptory  
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22 <sup>19</sup> *State v. Lang*, 176 Ariz. 475, 482 (App. 1993), citing *Marino v. Vasquez*, 812 F.2d  
499 (9<sup>th</sup> Cir. 1987).

23 <sup>20</sup> *State v. Moody*, 208 Ariz. 424, 459 ¶145 (2004).

24 <sup>21</sup> *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

25 <sup>22</sup> *Batson*, 476 U.S. at 97.

1 challenge is rooted in discrimination.<sup>23</sup> In addition, discrimination may be  
2 discovered by analyzing “the contrasting *voir dire* questions posed respectively to  
3 black and nonblack panel members” of the venire.<sup>24</sup> Courts have even taken into  
4 account the relevant history of the striking party to determine discriminatory intent.<sup>25</sup>

6 Essentially, the circumstances set forth in the proposed rule highlight relevant  
7 considerations that are already recognized in the law. Inclusion of the circumstances  
8 will aid judges and lawyers by providing a head-start in determining what factors  
9 may be relevant to evaluating discriminatory intent.

11 The test set forth in the Petition for determining whether discrimination was  
12 a factor in striking a juror requires a judge to have a high degree of confidence before  
13 a peremptory strike is permitted to stand.

### 15 **5. Reasons Presumptively Invalid.**

16 The proposed rule sets forth six reasons that render peremptory strikes  
17 presumptively invalid. The Petition explains that these reasons have historically  
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22 <sup>23</sup> *Miller-El v. Dretke*, 545 U.S. 231, 232 (2005).

23 <sup>24</sup> *Miller-El v. Dretke*, 545 U.S. at 233.

24 <sup>25</sup> *See, e.g., Miller-El v. Dretke*, 545 U.S. at 263 (Court considered the fact that the  
25 Dallas County District Attorney’s office had for decades “followed a specific policy  
of systematically excluding blacks from juries.”).

1 been associated with improper discrimination in jury selection.<sup>26</sup> Importantly, unlike  
2 Washington General Rule 37, the proposed rule does not prohibit these reasons  
3 altogether, but establishes a rebuttable presumption of invalidity, and provides the  
4 striking party an opportunity to show, by clear and convincing evidence, that the  
5 strike is unrelated to race, sex, gender, religion, national origin, ethnicity, disability,  
6 age, or sexual orientation.  
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## 8 **6. Reliance on Conduct.**

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10 Prospective jurors are often stricken based on unverifiable assertions about  
11 demeanor or behavior. The most recent example of this is found in *State v. Ross*,<sup>27</sup>  
12 where the only African-American individual was removed from the venire as the  
13 result of an unverifiable claim that he entered the courtroom, “blessed” the  
14 defendant, and either said “good luck” or nodded “good luck” to the defendant.<sup>28</sup>  
15 No one else saw this happen.  
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17 Instead of moving to strike the prospective juror for cause or, alternatively,  
18 questioning the prospective juror about his conduct during *voir dire*, the prosecutor  
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22 <sup>26</sup> Petition at pp. 16-18; *See, also, e.g.,* Vida B. Johnson, *Arresting Batson: How*  
23 *Striking Jurors Based on Arrest Records Violates Batson*, 34 *Yale L. & Pol’y Rev.*  
24 387, 394 (2016) (“[S]tudies verify the prominent impact of negative police contacts  
on the citizenry’s general perceptions of fairness and bias in our justice system.”).

25 <sup>27</sup> \_\_\_ Ariz. \_\_\_ (App. 2021), 1-CA-CR 19-0214 (Filed March 9, 2021).

<sup>28</sup> *Id.*, Slip Op. at 2 ¶ 1.

1 first mentioned the behavior when providing a reason for the exercise of a  
2 peremptory strike following a *Batson* objection.<sup>29</sup> On the basis of the prosecutor's  
3 avowal, the Judge let the strike stand. On appeal, a divided Court of Appeals  
4 reversed and ruled that upholding a peremptory strike in the context of a *Batson*  
5 objection requires evidence in support of the reason given for the strike and that an  
6 avowal by counsel is not evidence.<sup>30</sup>

7  
8 The Petition notes that demeanor/behavior-based justifications for  
9 peremptory strikes should be treated with suspicion because they are often rooted in  
10 discrimination.<sup>31</sup> Pursuant to the proposed rule, to rely on behavior or demeanor as  
11 the justification for a peremptory strike, a party must provide reasonable notice of  
12 the conduct to provide an opportunity for verification and, absent corroboration by  
13 the judge or opposing counsel, a conduct-based reason will be invalid.

#### 16 **7. Preservation of Existing Law.**

17 The Petition does not propose to alter any statutory ground for excusing  
18 potential jurors. Nor does it alter procedures for objecting to the use or waiver of a  
19 peremptory challenge on the basis of purposeful discrimination under the United  
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24 <sup>29</sup> *Id.* at pp. 3 ¶¶ 6-7, 4 ¶¶ 10-11, 9 ¶26.

25 <sup>30</sup> *Id.* at pp. 6 ¶ 24, 10-11 ¶¶ 27-30.

<sup>31</sup> *See* Proposed Rule, Subsection H, Reliance on Conduct.

1 States and Arizona Constitutions, objections that must be separately stated and  
2 established.

3  
4 **CONCLUSION**

5 Because proposed Supreme Court Rule 24, as outlined in the Petition,  
6 substantially modifies the *Batson* framework for peremptory challenges, to  
7 accomplish the purpose of bringing equality to jury service and improving  
8 confidence in the judicial system, the State Bar of Arizona respectfully requests that  
9 the Court grant the Petition.  
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12 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of April, 2021.

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15 Lisa M. Panahi  
16 General Counsel

17 Electronic copy filed with the  
18 Clerk of the Supreme Court of Arizona  
19 this 30<sup>th</sup> day of April 2021.

20 by: PSeguin  
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