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

9 PETITION TO AMEND THE
10 RULES OF THE SUPREME COURT
11 OF ARIZONA TO ADOPT RULE 24
12 – JURY SELCTION

Supreme Court No. R-21-0008

13 **COMMENTS IN SUPPORT OF PETITION**
14 **TO AMEND THE RULES OF THE**
15 **SUPREME COURT OF ARIZONA TO**
16 **ADOPT RULE 24, JURY SELECTION**

17 Pursuant to Rule 28 of the Rules of the Supreme Court, the Arizona Center for
18 Disability Law (“ACDL”) hereby submits these comments in support of *the Petition to*
19 *Amend the Rules of The Supreme Court of Arizona to Adopt Rule 24 – Jury Selection* as
20 filed by the State Bar’s Civil and Criminal Practice and Procedure Committees’ Batson
21 Working Group (the “Petition”). ACDL supports the Petition in its entirety and submits
22 these comments for consideration.

23 **I. INTRODUCTION AND STATEMENT OF INTEREST.**

24 The ACDL is a non-profit public interest law firm, dedicated to protecting the
25 rights of individuals with a wide range of physical, mental, psychiatric, sensory and
26 cognitive disabilities. As part of the nationwide protection and advocacy (“P&A”) system,
27 the ACDL provides free legal services, under several major incentives, including but not
28 limited to: Protection & Advocacy for Individuals with Mental Illness (“PAIMI”),

1 Protection & Advocacy for Individuals with Developmental Disabilities (“PADD”), and
2 Protection & Advocacy of Individual Rights (“PAIR”). Through these initiatives, ACDL
3 aims to achieve a society where people with disabilities enjoy full acceptance without
4 barriers.

5 According to the [CDC](#), one in four adults in the United States has a disability.
6 Numbers are higher in places like Arizona where a significant portion of the population is
7 age 65 or older.

8 Though a minority of Arizonans with disabilities may be unable or unwilling to
9 serve on a jury because of their disabilities, [Ariz. Rev. Stat. § 21-202](#), excuses any
10 Arizonans with a disability who are incapable of service. For the majority of Arizonans
11 with disabilities who are fully capable of participating on a jury, allowing preemptory
12 strikes on the basis of disability only serves to perpetuate discrimination and stigma
13 against the disability community. It also precludes Arizonans with disabilities from
14 participating in a central tenet of the American experience. In addition, permitting such
15 challenges prevents defendants with disabilities from being represented by a jury of their
16 peers.

17 **II. COMMENTS ON DISABILITY AND JURY SERVICE.**

18 **A. An Arizonan with a disability who is capable of jury service should not** 19 **be the subject of a preemptory strike on the basis of his or her disability.**

20 Arizonans with disabilities who are capable of jury service, either with or without
21 a reasonable accommodation, should not be discriminated against on the basis of their
22 disability. And Arizona defendants with disabilities are entitled to be represented by a jury
23 of their peers, a significant portion of whom have a disability.

24 The Supreme Court of the United States has ruled that states have a duty under
25 Title II of the ADA to ensure that individuals with disabilities have access to the courts.
26 See [Tennessee v. Lane, 541 U.S. 509, 532 \(2004\)](#). While state courts are not obligated to
27

1 “employ any and all means to make judicial services accessible to persons with
2 disabilities,” they must “take reasonable measures to remove . . . barriers to accessibility”
3 and provide “all individuals a meaningful opportunity to be heard in its courts.” *Id.* at 531-
4 32. *See also* [28 C.F.R. § 35.130\(b\)\(7\)\(i\)](#).

5 “There is a stigma to exclusion because jury service is, ‘with the exception of
6 voting, ... [the] most significant opportunity to participate in the democratic process.’”
7 [Mary A. Lynch, The Application of Equal Protection to Prospective Jurors with](#)
8 [Disabilities: Will Batson Cover Disability-Based Strikes?](#), 57 *Alb. L. Rev.* 289, 355–56
9 [\(1993\)](#) (citing [Powers v. Ohio](#), 499 U.S. 400, 407 (1991)).

10 **B. There is a long history of discrimination against potential jurors with**
11 **disabilities.**

12 In concluding that discrimination against jurors with disabilities, including by use
13 of preemptory strikes, “is wrong and violates judiciary policy, the New Jersey Law against
14 Discrimination (NJLAD) and the American with Disabilities Act (ADA),” the New Jersey
15 Judiciary’s [Bench Manual on Jury Selection](#) summarized the history of disability
16 discrimination in jury selection as follows:

17 Individuals with disabilities have historically been denied the opportunity and right
18 to serve as jurors. This denial has taken many forms. Until recently, many state
19 statutes excluded people with any disabilities. Often statutes used offensive and
20 exclusionary phrases requiring jurors to possess their “natural faculties” and
21 disqualifying persons “afflicted with permanent disease or physical weakness” or
22 “afflicted with a bodily infirmity amounting to a disability.” In addition, the
23 requirement that qualified jurors must be able to read, understand, or speak English
24 historically was interpreted to exclude individuals with disabilities. Those who got
25 as far as the jury pool were often eliminated by challenges “for cause.” Moreover,
26 these same individuals faced practical barriers: inaccessible courtrooms, difficulty
27 in obtaining transportation to court, and a lack of reasonable accommodations, such
28 as sign interpreters or assistive communication devices. People with disabilities
also encountered “humanistic” barriers such as the court officer who “takes care”
of the juror with a disability by trying to help the juror avoid jury duty or the
paternalistic judge who patronizes the juror.

1 Arkansas became the last state to repeal prohibitions against jurors with disabilities
2 in 1994, when it struck language disqualifying people whose “senses of seeing or hearing
3 are substantially impaired.” [Kristi Bleyer, Kathryn Shane McCarty, and Erica Wood,](#)
4 [Access to Jury Service for Persons with Disabilities, 19 Mental & Physical Disability L.](#)
5 [Rep. 249, 250 \(1995\).](#) The year before, a federal court overturned an official policy in
6 Washington D.C. Superior Court excluding all blind people from jury service. [Galloway](#)
7 [v. Superior Court of D.C., 816 F. Supp. 12, 20 \(D.D.C. 1993\).](#)

8 **C. Courts routinely hold that jurors with disabilities are capable of jury**
9 **service.**

10 Last year, the Massachusetts Supreme Judicial Court held that a trial court had not
11 erred in seating a blind juror in an assault and battery case. [Cmmw. v. Heywood, 138](#)
12 [N.E.3d 1020, 1022 \(Mass. 2020\).](#) In so finding, the Court reasoned that Massachusetts’
13 statutory protection against discrimination in jury selection “dovetails well with a
14 defendant’s right to a fair jury of his or her peers, an essential component of which is being
15 able to select jurors from a fair and representative cross section of the community.” *Id.* at
16 1024. In their [amicus curiae brief](#), the National Federation for the Blind had argued that
17 the defendant’s rights were not in conflict with a blind juror’s right to serve on a jury:

18 Framing these cases as a balancing act between defendants’ rights to a fair trial and
19 blind Americans’ rights to serve on a jury can create a false dichotomy. By its very
20 design, jury deliberation is meant to be a collaborative process in which individuals
21 with varying perspectives reach a fair outcome based on their collective wisdom.
22 With assistive technology or, in many cases, without, blind people are fully capable
of serving on juries without depriving criminal defendants of their fundamental
right to a fair trial.

23 Similarly, in [People v. Caldwell](#), a New York court found that that a blind juror
24 was not automatically unqualified for jury service and the court had obligation to
25 reasonably accommodate her pursuant to the ADA she could follow case with only
26 minimal assistance. [603 N.Y.S.2d 713, 714 \(N.Y. Crim. Ct. 1993\).](#)

1 American courts have permitted deaf jurors to serve on juries for decades. *See e.g.*,
2 [U.S. v Dempsey, 830 F.2d 1084 \(10th Cir. 1987\)](#); [State v. Lee, 1997 WL 311593 \(Ohio Ct.](#)
3 [App. 1997\)](#) (affirming defendant's conviction for felonious assault and finding that the
4 trial court did not err in empaneling a deaf juror or allowing an interpreter in the jury room
5 during deliberations); [State v. Marcham, 770 P.2d 356, 356, 358 \(Ariz. Ct. App. 1988\)](#)
6 (upholding Marcham's felony conviction for aggravated assault and finding that the trial
7 court did not err in empaneling a deaf juror where it was "obvious that an interpreter would
8 have to be in the jury room to interpret the discussion for the deaf juror" and no objections
9 to the interpreter being in the jury room were made at any time at the trial level).

10 Today, jurors with hearing impairments continue to serve on juries with the use of
11 interpreters or other reasonable accommodations. *See* [Anderson, Elisha, Deaf Juror Glad](#)
12 [to do her Duty for Justice's Sake \(USA Today May 10, 2015\)](#).

13 **D. Inaccessible courthouses should not excuse preemptory strikes against**
14 **otherwise capable potential jurors with disabilities that effect mobility.**

15 For those Arizonans with disabilities related to mobility, many Arizona
16 courthouses have accessibility issues, including barriers related to signage, courthouse
17 entrances, inaccessible jury boxes, and bathrooms. As a result, many people with
18 disabilities choose not to participate in jury service, to avoid inaccessibility challenges or
19 stigma associated with inadequate accommodations, such as being forced to use a back
20 door to enter a courthouse, or having to sit away from fellow jurors due to an inaccessible
21 jury box. In a 2015 white paper about New York City's inaccessible courthouses entitled,
22 [Ensuring Equal Access to Courthouses for People with Disabilities](#), Jean Ryan, a
23 disabilities rights advocate explained her frustration at not being able to participate in jury
24 service on a panel with her peers:

25 When I called to ask about the accessible entrance, the person on the line told me
26 "You don't need to be on the jury because you're disabled." I wanted to serve as a
27 juror.... The jury box was not accessible. I would have had to sit right out in front
28 where the attorney addresses jurors. I didn't want to feel removed and out in front.
I wanted to be next to my fellow jurors.

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2 This, of course, is no excuse for allowing a preemptory challenge on the basis that
3 a prospective juror has a disability that affects his or her mobility. Jury accessibility issues
4 must be tackled on two fronts. First, we must hold our courthouses, which are often some
5 of the oldest buildings in our communities, to a higher standard of accessibility that allows
6 jurors with mobility issues to participate in the process with dignity. And at the same time,
7 we must ensure that our peers with mobility issues are not stricken and excluded from our
8 judicial process on the basis of their disability.

9 **E. Defendants are entitled to a jury of their peers.**

10 People with mental illness or cognitive and intellectual disabilities represent a
11 significant portion of Arizonans with disabilities. Unless they are incapable of jury service
12 pursuant to [A.R.S. § 21-202](#), it is discriminatory and wrong to strike a juror for having
13 one of these disabilities.

14 Social scientists have only recently begun to examine jury biases against
15 defendants with mental health disorders and intellectual disabilities and whether those
16 biases result in more “guilty” verdicts in criminal cases. As one paper on jurors’ evaluation
17 of defendants with high-functioning autism spectrum disorder summarized:

18 Jurors' attitudes, both positive and negative, have been shown to have strong effects
19 on their decision making and corresponding judgments, especially for perceptions
20 of a defendant's unusual personal characteristics or behavior. Information on a
21 defendant's mental abnormalities significantly impacts jurors' impressions of the
22 personal characteristics of the defendant. Further, research has shown that a
23 defendant's mental health state is one of the most powerful types of mitigating
24 factors for juries when making their judgments, often reducing a defendant's moral
25 culpability. Jurors are especially affected by factors that they identify as
26 “uncontrollable,” such as intellectual disability, age when an offense occurred, and
27 diagnosis with a mental disorder.

28 *See* [Colleen M. Berryessa,* Lauren C. Milner, Nanibaa' A. Garrison, and Mildred K. Cho,
Impact of Psychiatric Information on Potential Jurors in Evaluating High-Functioning
Autism Spectrum Disorder \(hfASD\), J Ment Health Res Intellect Disabil. 2015 Jul 1; 8\(3-](#)

1 [4\): 140–167](#) (internal citations omitted). These biases and effects on juror decision-making
2 play a role in civil matters as well.

3 Jurors are often asked to weigh evidence related to the mental health or the
4 cognitive state of a criminal defendant, which will often affect their decisions related to
5 the defendant’s culpability or mitigating factors. Allowing discrimination against jurors
6 with disabilities – especially those with mental illness or cognitive and intellectual
7 disabilities – prevents defendants with disabilities from the opportunity to make their case
8 in front of a jury of their peers.

9 **III. CONCLUSION.**

10 Our society has tolerated discrimination and exclusion on the basis of disability for
11 far too long. Jury service is a right and responsibility that should be accessible to all
12 Arizonans – not just the nondisabled.

13 Accordingly, the ACDL respectfully requests that the Court approve the Petition
14 filed by the State Bar’s Civil and Criminal Practice and Procedure Committees’ Batson
15 Working Group.

16 DATED this 2nd day of May, 2021.

17 **ARIZONA CENTER FOR DISABILITY LAW**

18 /s/ Meaghan K. Kramer

19 J.J. Rico

20 Meaghan Kramer

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24 By: /s/ Meaghan Kramer