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IN THE SUPREME COURT  
STATE OF ARIZONA

In the matter of:

PETITION TO AMEND THE  
RULES OF THE SUPREME  
COURT OF ARIZONA TO ADOPT  
RULE 24--JURY SELECTION

Supreme Court No. R-21-0008

COMMENT SUPPORTING THE  
PETITION TO AMEND THE  
RULES OF THE SUPREME  
COURT TO ADOPT PROPOSED  
RULE 24-JURY SELECTION

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, I submit these comments in support of the Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Rule 24 – Jury Selection.

As a former prosecutor and the current leader of a legal aid center focused on youth and victims of crime, I have great interest improving the odds that every person who appears before a jury in our justice system will have a genuine opportunity to be judged by a fair jury of his or her peers. Importantly, Rule 24 would change the current procedure of evaluating *Batson* challenges by removing the requirement of a finding of purposeful discrimination.<sup>1</sup> Instead, the proposed

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<sup>1</sup> Petition R-21-0008, to Amend the Rules of the Supreme Court of Arizona to Adopt Proposed Rule 24 – Concerning Jury Selection, at 13.

rule permits the court to reject a peremptory challenge if a “reasonable person could view race or another protected status as motivating the strike or waiver.”<sup>2</sup> Rule 24 makes other adjustments to the Arizona *Batson* framework, but my comments focus on this change as the most impactful. Ultimately, Rule 24 would lower the high standard currently set to prevail in a *Batson* challenge. This would make it more difficult to strike people of color from juries based on their group status and would thus improve the diversity of juries.

The value of diverse juries cannot be underestimated in the quest to make our system of courts more just. The proposed rule would not only facilitate more racially diverse juries but also better protect women, the elderly, religious minorities, persons with disabilities, youth, and LGBTQ+ individuals from the discriminatory use of peremptory strikes. It is extremely important for fairness in adjudication that juries include representatives of all populations.<sup>3</sup> I, therefore, support Rule 24 because it improves the odds that defendants and victims will have access to juries with more diverse life experiences and less bias, and provides a key place for the communities I have so often served on jury panels.

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<sup>2</sup> *Id.* at 15.

<sup>3</sup> See Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. Personality Soc. Psych. 597, 609-10 (describing the importance of diversity in juries).

**1. Rule 24 supports the mission of ALWAYS and the groups ALWAYS predominantly serves.**

In my current work, I lead Arizona Legal Women and Youth Services (ALWAYS). The mission of ALWAYS is to provide access to legal services for vulnerable youth ages 24 and younger who have been subjected to homelessness, human trafficking, abuse, or who are within the foster care system. These experiences disproportionately affect people of color, women, youth, and LGBTQ+ individuals.<sup>4</sup> As a result, approximately 75% of ALWAYS's clients are people of color and the vast majority are women or girls. Many also identify as LGBTQ+. In this work, I have observed how little confidence our clients often have in courts because they have too often experienced that the system was built for others, not them. The truth is that the economic and housing instability that they experience on a daily basis already makes it difficult for them to participate as jury members or to attend court for their matters. On top of that, the bias that exists because of how they look, how they speak, how they dress, their tattoos, and the life

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<sup>4</sup> See Ben A. McJunkin, Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping, 52 Ariz. State L. J. 955, 973, 974 (2020) (describing how homelessness is criminalized and how it disproportionately affects LGBT youth and people of color); see also In Our Backyard, Do You See What I See? How to Fight Human Trafficking, YOUTUBE (Feb. 27, 2021), [https://www.youtube.com/watch?v=UEQ2cliZ20&feature=emb\\_logo](https://www.youtube.com/watch?v=UEQ2cliZ20&feature=emb_logo) (stating that 1/5th of all homeless youth experience sex trafficking); see also Susan Chibnall et al., Perspectives from the Child Welfare Community 4 (2003) (showing how minority children are more likely to end up in foster care due to the theory that they are at a greater risk of child abuse and neglect).

experiences they carry with them are often viewed as negative qualities based on stereotypes of people who know little about the courage they've exhibited or the obstacles they've overcome in life. They deserve greater opportunity to sit on juries and, when needed, to appear before juries that include jurors who look like them.

**2. The Petition's proposed Rule 24 furthers the important mission of fair representation on jury panels.**

A jury composed of a defendant's peers is vital to the delivery of justice.<sup>5</sup> Thus, when a racially motivated peremptory strike occurs and lowers the representation of a minority on a jury panel, the justice system fails. Considering this, it is concerning that "60% of unsuccessful *Batson* challenges addressed in Arizona appellate opinions or memorandum decisions involved the removal of Black or Hispanic jurors."<sup>6</sup> This statistic supports national trends of disproportionately excluding people of color from juries. For example, data from the Administrative Office of the Courts for one entire year in Maricopa County showed that in criminal cases, there was only a 3% variation between white jurors and their representation in the population. The story was not the same for minorities, however. Black jurors were underrepresented by 16%, Native American jurors by

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<sup>5</sup> See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (describing a jury of a defendant's peers as an important part of the protection secured by a jury).

<sup>6</sup> Petition, *supra* note 1, at 5.

51%, and Hispanic jurors by 21%. Significant disparities also existed for civil cases.<sup>7</sup> These numbers are troubling and call for immediate action.

There is also a striking contrast between an overrepresentation of Black defendants and an underrepresentation of Black jurors in Arizona. African Americans make up about 5% of the Arizona population, but about 13.5% of persons charged with felonies.<sup>8</sup> This overrepresentation makes it especially important that the system does not have an underrepresentation of people of color on juries. And once again, I am particularly concerned about the fair representation in juries of demographic groups from which ALWAYS draws most of its clients, including women of color. Studies show that black women face disproportionately higher rates of arrest than other demographic groups,<sup>9</sup> so, this makes their

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<sup>7</sup> In civil cases, white jurors only varied .03% from the population, but black jurors were underrepresented by 24%, Native American jurors by 76%, and Hispanic jurors by 16%. Petition 21-R-0020.

<sup>8</sup> Quick Facts, United States Census Bureau (2019), <https://www.census.gov/quickfacts/AZ>; Statistics, Azcourts.gov (2021), <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/Felony-Filings> (click to 6th page in slideshow titled “Felony Filings by Demographic”).

<sup>9</sup> See Michael Males, San Francisco’s Disproportionate Arrest of African American Women Persists, Center on Juvenile and Criminal Justice (Apr. 2015), [http://www.cjcj.org/uploads/cjcj/documents/disproportionate\\_arrests\\_in\\_san\\_francisco.pdf](http://www.cjcj.org/uploads/cjcj/documents/disproportionate_arrests_in_san_francisco.pdf) (showing that black women are arrested at higher rates than other races for the same crimes); see also Hinton et al., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, Vera (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (stating that black people are arrested at higher rates than white people).

representation on juries even more vital to the service of justice, and it reinforces the need for this Court to act now to allow for more fairly representative Arizona juries.

Although other policies may also increase diversity on juries, bias and intentional discrimination in the justice system are best prevented through the *Batson* challenge, enhanced by the safeguards offered in Rule 24.

**3. Rule 24 strengthens the core principle of equality in Arizona’s legal system.**

As the Petition states, “it is important that the law hear and see all people equally.”<sup>10</sup> Equality should exist without protections in the system such as the *Batson* challenge, but the truth is we have not yet achieved this. The *Batson* challenge was designed to be a meaningful solution to discrimination and bias in our judicial system, but too often it is less than that. More than ever, it is difficult to ignore the bias that is built into the system which should represent equal justice for all. Proposed Rule 24 attacks this problem thoughtfully by strengthening existing safeguards to increase fair jury selection.

In conclusion, proposed Rule 24 delivers the confrontation to generations of unequal justice that Arizona is ready for. Proposed Rule 24 sends a strong message that the current procedures of peremptory strikes and *Batson* challenges do not

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<sup>10</sup> Petition R-21-0008, at 1.

provide equal representation on jury panels. When they come before Arizona's courts, members of historically discriminated-against groups such as people of color, women, religious minorities, and those who identify as LGBTQ+ suffer deserve the same opportunity to judge and to be judged fairly. I strongly encourage the Supreme Court to adopt the proposed rule in its entirety to advance such fairness.

Respectfully submitted this 3rd day of May, 2021.

**JANUARY CONTRERAS**

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