



May 3, 2021

Arizona Supreme Court
1501 W. Washington St.
Phoenix, AZ 85007

Comments of Lambda Legal in Support of R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection

Submitted via Arizona Court Rules Forum E-portal

Dear Justices,

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) appreciates the opportunity to submit this Public Comment in support of R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and everyone living with HIV through impact litigation, policy advocacy, and public education. Lambda Legal has been serving people in Arizona through our Western Regional Office in Los Angeles for more than thirty years, and also has offices in Texas, Georgia, Illinois, New York, and Washington, D.C. The communities served by Lambda Legal depend on access to fair and impartial courts. In 2005, Lambda Legal established its Fair Courts Project to advocate for fairness and justice within the legal system itself. We offer these comments to express our strong support for implementation of the proposed rule and to recommend explicit inclusion of “gender identity” in the list of protected characteristics in the final rule.

Implementation of proposed rule 24 would broaden the protections against discrimination in jury service in Arizona, reforming the system created by *Batson v. Kentucky* and bringing necessary change to create a fairer system for all. By altering the process used to evaluate challenges to peremptory strikes of jurors, the proposed rule would:

- (1) eliminate the initial and often insurmountable barrier of requiring the challenging party to provide evidence of discrimination before the striking party is questioned about their motive for the strike,
- (2) modify the traditional third step of *Batson* review by introducing a reasonable person standard that would require judges to determine whether any reasonable person could view a protected personal characteristic as a factor used by a party in exercising a peremptory strike, thus eliminating the need for a finding of intentional discrimination,

- (3) enumerate some of the circumstances the court should consider when ruling on a challenge to a peremptory strike under the “totality of the circumstances,”
- (4) identify presumptively invalid, but rebuttable motives for a peremptory strike that have been used in the past to eliminate jurors based on race and ethnicity, and
- (5) require courts to make a record of their reasoning in reaching their decisions on challenges to peremptory strikes.

Importantly, the proposed rule also extends protections to characteristics that may not already be explicitly prohibited grounds of discrimination in jury service in Arizona, including sexual orientation and gender identity. These changes to the current system and new protections are vital to ensuring that jury service is free from bias and discrimination.

While the following comments focus on the necessity and importance of Proposed New Rule 24 to people who are LGBT, Lambda Legal recognizes the necessity for these reforms for everyone who is part of a minority group in a given circumstance. The LGBT community is made up of people of all racial and ethnic backgrounds, national origins, genders, religions, physical and mental disabilities, and ages. Full protection from discrimination based on the enumerated characteristics is necessary to ensure all members of the LGBT community, and all Arizonans, are protected from wrongful discrimination in jury service.

Experiences of Discrimination Based on Sexual Orientation or Gender Identity in the Courts

Lambda Legal conducted a national survey¹ of LGBT people across the United States to assess their experiences with government institutions. Of the more than 1,000 survey respondents who had been in contact with the courts during the preceding five years, nineteen percent (19%) reported hearing a judge, attorney or other court employee make negative comments about a person’s sexual orientation, gender identity or gender expression. People of color and transgender people reported higher incidences of negative language: While nineteen percent of respondents overall heard these anti-LGBT comments, 53% of transgender and gender-nonconforming people of color and 66% of transgender women reported experiencing these comments while using the courts. This survey also solicited information regarding the level of trust respondents had in a range of government institutions. Only 28% of transgender and gender-nonconforming respondents “generally trusted” the courts, which was lower than the 38% percent who indicated trust in the police.²

¹ Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), available at www.lambdalegal.org/protected-and-served.

² *Id.*

Another national survey of transgender and nonbinary people found that 13% of respondents who had visited a court in the previous year before the survey and where employees thought or knew that they were transgender, experienced at least one type of negative experience, including being denied equal treatment or service, verbally harassed, and/or physically attacked.³ Additionally, more than one-third (36%) of those surveyed who interacted with judges or court staff during their name change process reported having at least one of these negative experiences.⁴

Empirical studies by judicial commissions and bar associations have found that bias based on sexual orientation significantly and negatively affected court users' experiences in the court system.⁵ In a California study of lesbian, gay, and bisexual court users, 30% of respondents believed those who knew their sexual orientation did not treat them with respect and 39% believed their sexual orientation was used to diminish their credibility when it became known.⁶ Twenty percent of lesbian, gay, and bisexual court employees reported hearing "derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by lawyers, or court employees."⁷ More than a third of lesbian, gay, and bisexual court users "felt threatened in the court setting because of their sexual orientation."⁸

In 1999, the State Bar of Arizona Board of Governors' Gay and Lesbian Task Force also created a survey to explore experiences of sexual orientation bias in the court system and legal profession.⁹ Similar to the other studies, the Arizona Study found that "Arizona courtrooms were

³ Sandy E. James, et al., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey 16* (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> ("2015 U.S. Transgender Survey").

⁴ *Id.* at 84.

⁵ See Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 674 (2011) (examining empirical studies in California and New Jersey that evaluated the experiences of lesbian, gay, and bisexual people with the court system).

⁶ Judicial Council of State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee*, 5 (2001), https://www.courts.ca.gov/documents/sexualorient_report.pdf.

⁷ *Id.* at 19.

⁸ *Id.* at 5.

⁹ Michael B. Shortnancy, Note, *Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 Am. U.L. Rev. 309, 326-327 (2001) (citing Gay and Lesbian Task Force, Report to the Board of Governors, State Bar of Arizona (Apr. 1999) (on file with author Michael B. Shortnancy)).

hostile places for gay and lesbian litigants, court users, attorneys, judges, and employees.”¹⁰ In the Arizona Study, 77% of judges and attorneys surveyed said they had heard disparaging comments about gay men and lesbians,¹¹ 47% of those hearing these comments reported hearing them in public spaces within the courthouse,¹² and 13% of judges and attorneys had observed negative treatment by judges in open court toward those perceived to be gay or lesbian.¹³

In the specific context of jury selection, LGBT people continue to face bias and discrimination. In one illustrative case, a prospective juror, who was likely transgender, was struck because the prosecutor perceived the juror had “identification issues” and “seemed to be a man dressed as a woman.” *Commonwealth of Massachusetts v. Smith*, 879 N.E.2d 87 (2008). In another, the only self-identified gay juror was struck from the venire in an action alleging that the manufacturer of an HIV medication had unlawfully increased the price of this drug, an issue the court found to be of consequence to the gay community. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014). There, the Ninth Circuit reversed the jury’s verdict and remanded for a new trial.

In California, the Third District Court of Appeal reversed the conviction of Brady Dee Douglas and remanded for a new trial, after finding that the prosecutor used peremptory strikes against the two openly gay jurors, in part, because the alleged victim was a closeted gay man and he believed they would be biased against him because they were openly gay. The defendant also was an openly gay man. The prosecutor never asked these jurors about their ability to be fair before striking them. *People v. Brady Dee Douglas*, 22 Cal.App.5th 1162 (2018). And in a case regarding excessive use of force by police, the plaintiff, a gay man in Florida, raised a *Batson* challenge to the defendants’ use of peremptory challenges against two potential jurors, both of whom the plaintiff believed to be gay men. *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017). While the Eleventh Circuit did not reach this issue, it did remand for a new trial on the basis that the trial court refused to allow any *voir dire* to address potential anti-gay bias of the jurors.

Like discrimination in jury selection on other bases, discriminatory use of peremptory strikes based on sexual orientation or gender identity denies people the ability to participate in one of the most important civic duties and casts doubt on the legitimacy of the courts for those who are impacted. Protections from discrimination in jury service are necessary to remedy these harms.

¹⁰ *Id.* at 327.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

LGBT People are Entitled to Protection from Discrimination in Jury Service

In *Batson v. Kentucky*, the U.S. Supreme Court held that peremptory challenges to prospective jurors cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race. 476 U.S. 79 (1986). The Court concluded that *voir dire* – like all government action – is “subject to the commands of the Equal Protection Clause.” *Id.* Since *Batson*, the Court has reaffirmed that “potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) (collecting cases). *Batson* has evolved to prohibit peremptory challenges based on any classification that warrants heightened judicial scrutiny. *See J.E.B.*, 511 U.S. at 143 (“[p]arties may ... exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”)

In *SmithKline*, the Ninth Circuit analyzed whether sexual orientation classifications should be subjected to heightened scrutiny in the context of peremptory challenges. Using the factors outlined by the U.S. Supreme Court in *J.E.B.*, the Ninth Circuit concluded that heightened scrutiny does apply to antigay classifications and thus *Batson* precludes peremptory challenges on that basis. 740 F.3d 471 (reversing jury verdict due to striking of only openly gay venire juror because “heightened scrutiny applies to classifications based on sexual orientation”).

Many other courts similarly have recognized that government classifications based on sexual orientation or gender identity trigger heightened scrutiny. *E.g.*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (holding that sexual orientation classifications are constitutionally suspect as a matter of equal protection and noting that “*Windsor’s* balancing is not the work of rational basis review.”) (quoting *SmithKline*, 740 F.3d 483); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) (holding that classifications based on sexual orientation warrant heightened scrutiny); *Bd. of Educ. of Highland v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Oh. 2016) (classifications based on transgender status warrant heightened scrutiny); *Evancho v. Pine-Richland*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *F.V. v. Barron*, 286 F.Supp.3d 1131, 1145 (D. Idaho 2018) (“transgender people bear all of the characteristics of a quasi-suspect class and any rule developed and implemented by IDHW should withstand heightened scrutiny review to be constitutionally sound.”). Recently, the Ninth Circuit has joined the district courts in holding that discrimination against transgender people requires heightened equal protection review. *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (“We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.”).

This conclusion is consistent with the U.S. Supreme Court’s recognition last year in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), that discrimination because of sexual orientation or

gender identity is sex-based discrimination. As discrimination based on sex is impermissible in jury service, *J.E.B.*, 511 U.S. at 127, discrimination against would-be LGBT jurors is similarly impermissible because discrimination against them is sex discrimination.

Arizona as a Leader in Jury Service Protections

In 1996, Wisconsin became the first state to prohibit discrimination against jurors on the basis of their sexual orientation.¹⁴ California then did so in *People v. Garcia*, 77 Cal.App.4th 1269 (2000) (holding that lesbians and gay men are a cognizable class, for purposes of rule that jury must be drawn from a representative cross-section of the community and, thus, exclusion of lesbians and gay men from juries on the basis of group bias violates the California Constitution), which was later codified in the civil code.¹⁵ The Ninth Circuit followed suit in 2014. *SmithKline*, 740 F.3d 471 (9th Cir. 2014) (citing *People v. Garcia* and extending *Batson* to sexual orientation).

In addition, several other states have passed laws prohibiting the use of peremptory challenges on the basis of sexual orientation or gender identity. Colorado, Minnesota, Oregon, Washington, and Maine each have statutes which bar using peremptory strikes against LGBT people.¹⁶ In 2018, the American Bar Association adopted a resolution urging “federal, state, local, territorial and tribal courts to extend *Batson v. Kentucky*, 476 U.S. 79 (1986), to prohibit discrimination against jurors on the basis of sexual orientation or gender identity/expression.”¹⁷ Most recently, Illinois passed legislation that went into effect on January 1, 2020 that bars exclusion from jury service on the basis of sexual orientation or gender identity.¹⁸ In implementing the proposed rule, Arizona would join the small but growing number of states that have explicitly prohibited the use of peremptory challenges on the basis of sexual orientation or gender identity, leading the way in fairness for all in the courthouse.

Washington State was the first to pass the type of *Batson* reform which changed the process for determining whether a peremptory strike was used against a juror for improper reasons.¹⁹ While Washington’s General Rule 37 only applies to racial and ethnic bias in jury service, Washington already prohibited discrimination in jury selection on the basis of sexual orientation or gender

¹⁴ Wis. Stat. § 756.001(3).

¹⁵ CAL. CIV. PROC. CODE § 231.5.

¹⁶ COLO. REV. STAT. § 13-71-104(3)(a); MINN. STAT. § 593.32; OR. REV. STAT. § 10.030; WA. STAT. § 2.36.080; ME. REV. STAT. Title 14 § 1202-A (the definition of sexual orientation in each of these statutes includes gender identity).

¹⁷ ABA Resolution 108D (adopted June 29, 2018) available at <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/108d.pdf>.

¹⁸ 705 ILCS § 305/2 (the definition of sexual orientation in this statute also includes gender identity).

¹⁹ WA. R. GEN. APP. GR 37.

identity. Following Washington's reforms, California passed similar reforms in 2020 that apply not only to race and ethnicity, but also sexual orientation and gender identity, among others.²⁰ Additionally, the Connecticut Supreme Court formed a committee to study and make recommendations on *Batson* reform. The Committee issued a report to the Connecticut Supreme Court in December 2020, making numerous recommendations to reform jury selection in the state.²¹ Just last month, the New York State Justice Task Force formed by the Chief Judge of the New York Court of Appeals announced it had formed a Jury Selection Working Group to consider *Batson* Reform.²²

In implementing the proposed rule, Arizona would join the increasing number of states that have reformed or are in the process of reforming the *Batson* process to eliminate discrimination from jury service and thereby enhance the integrity and soundness of its jury verdicts.

Recommendation to Make “Gender Identity” Protection Explicit

The proposed rule in its current version protects from discrimination based on “sex” and “gender” among other characteristics. Based on *Bostock* and numerous other court decisions, gender identity is covered under laws which provide protections against “sex” and “gender” discrimination. While the proposed rule does protect jurors from discrimination based on their gender identity, for clarity, Lambda Legal recommends that “gender identity” be explicitly added in the final rule. Inclusion of the words “gender identity” in the rule would prevent future argument about whether the rule protects transgender and nonbinary jurors. As detailed above transgender and nonbinary people experience significant discrimination in the courts. They deserve clear protections and those who would engage in such bias also will benefit from clear notice that doing so is ill-advised. We thus recommend the rule make explicit that transgender and nonbinary people are to receive equal protection from discrimination in jury service.

Conclusion

As Justice Thurgood Marshall explained, “[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps

²⁰ CAL. CIV. PROC. CODE § 231.7.

²¹ Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, Connecticut, December 31, 2020, *available at* https://www.jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

²² Carmen Beauchamp Ciparick and Deborah A. Kaplan, ‘*Batson*’ Review Already Underway by Chief Judge’s Justice Task Force, *New York Law Journal*, April 21, 2021, *available at* <https://www.law.com/newyorklawjournal/2021/04/12/batson-review-already-underway-by-chief-judges-justice-task-force/>.



unknowable.” *Peters v. Kiff*, 407 U.S. 493, 503 (1972). Implementing the proposed rule would not only expand the classifications of the jury service discrimination ban but would also help to ensure that bias and discrimination can truly be rooted out of one of the most important hallmarks of our democracy. For all the reasons above, Lambda Legal urges the adoption of the proposed rule and recommends adding “gender identity” explicitly to the enumerated antibias classifications in the rule.

Respectfully Submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

Ethan Rice
Senior Attorney, Fair Courts Project
erice@lambdalegal.org
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585