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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-21-0020

11 **PETITION TO AMEND RULES 18.4**
12 **AND 18.5 OF THE ARIZONA RULES**
13 **OF CRIMINAL PROCEDURE AND**
14 **RULE 47(e) OF THE ARIZONA RULES**
15 **OF CIVIL PROCEDURE**

COMMENT TO PROPOSED
AMENDMENT OF RULE 47(e) OF THE
ARIZONA RULES OF CIVIL
PROCEDURE

16 Undersigned counsel, on behalf of the Mutual Insurance Company of Arizona
17 (“MICA”) and HonorHealth, oppose the Petition to Amend Rule 47(e), Ariz. R. Civ. P., to
18 eliminate peremptory strikes. Batson challenge procedures, and any reforms thereto, are
19 designed to directly address and remediate the kind of racial, gender and religious bias *in*
20 *litigants* about which the Petitioners are concerned. And they do so without depriving litigants
21 of the valuable peremptory strike tool that allows the parties and the court to ensure that *jurors*
22 are not biased towards or against a party, and are not otherwise ill-suited for the case. If
23 Petitioners are concerned about litigants’ racial, gender, and religious bias even with Batson
24 challenges, then Batson reforms are the answer. Eliminating peremptory strikes actually creates
25 more problems—and potential bias in the jury pool—than it cures.

1 **A. Commenters' interest and position.**

2 MICA and HonorHealth have a deep interest in rule changes like this one that so
3 significantly affect trial practice and procedure. MICA, a physician-owned and directed medical
4 professional liability company, insures the majority of physicians in private practice in the State
5 of Arizona. HonorHealth is a locally owned, nonprofit, integrated health system consisting of
6 six hospitals; primary, specialty and urgent care locations; and research, cancer, and surgery
7 centers. Both entities are involved in defending medical malpractice claims, which are some of
8 the most complex and legally (and judicially) time-consuming claims flowing through Arizona's
9 court system.

10 These types of cases frequently include multiple defendants, require specialized
11 knowledge, and involve millions of dollars in claimed damages. They also often involve heart-
12 wrenching personal injury and death events and thus generate intense feelings on the part of
13 litigants and jurors alike. It is because these cases are emotionally-driven for the parties—and
14 not solely “business decisions”—that they are more likely to go to trial.¹ And it is precisely
15 because these cases can be highly emotional that it is especially important to have the
16 peremptory challenge safety valve for ensuring that the jurors who are seated in these cases are
17 not unfairly biased for or against one side or the other. As Justice Sandra Day O'Connor stated
18 in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994):

19 The principal value of the peremptory is that it helps produce fair
20 and impartial juries. Peremptory challenges, by enabling each side
21 to exclude those jurors it believes will be most partial toward the
22 other side, are a means of eliminat[ing] extremes of partiality on
23 both sides, thereby assuring the selection of a qualified and unbiased
24 jury.

25 511 U.S. at 147 (O'Connor, J. concurring) (citations and quotation marks omitted) (alteration in
26 original).

¹ MICA insureds have taken nearly 400 cases to trial in the last 20 years.

1 Requiring litigants to support their peremptory challenges with an explanation
2 akin to a challenge for cause is not the answer: that would be duplicative of the for-cause
3 challenges the parties already receive (not to mention antithetical to the definition of the word
4 “peremptory”). And eliminating the right to peremptory strikes altogether would undermine the
5 entire goal of ensuring the empaneling of a jury that is fair and impartial to both sides. The use
6 of peremptory strikes does not tilt the scales in favor of one side or the other because plaintiffs
7 and defendants may use them equally. In short, peremptory strikes are a critical tool for the
8 court and the parties to ensure that both sides have a fair trial with impartial jurors.

9 **B. Peremptory strikes are not inherently biased or arbitrary.**

10 Peremptory strikes are not inherently biased or arbitrary, as the Petition asserts.
11 There are many valid, non-discriminatory reasons to exercise peremptory strikes. For example,
12 a juror who expresses extreme frustration or resentment at the prospect of serving (for whatever
13 reason) might be excused in favor of a juror who will dutifully listen to the evidence. A
14 peremptory strike might be used on a juror who seems distractible, especially in a case that
15 involves nuanced details requiring the jury’s full attention. A peremptory strike can even be
16 used for a juror who will feel pressure to end the case quickly because his or her service would
17 create a hardship for someone other than himself or herself (e.g., a small business employer).

18 More common is the use of peremptory strikes for jurors who have reported a
19 history or perspective suggesting bias. These jurors are often easily “rehabilitated”—at least
20 superficially—by answering affirmatively to the leading question, “Do you think you can be fair
21 and impartial?” An affirmative answer is generally sufficient to defeat a challenge for cause, but
22 the truth is that many prospective jurors answer this way to avoid conflict and appearing biased
23 in front of their peers. But the answer does not eliminate the inherent or subconscious bias.
24 Litigants, who have in-depth knowledge of the facts, evidence, and theories of the case, are in
25 the best position to assess whether a juror’s perspectives or prior experiences might result in
26 partiality. An attorney who recognizes this bias potential in a juror who has passed the “for

1 cause” analysis may properly exercise a peremptory strike to avoid an unjust result. The bottom
2 line is that peremptory challenges serve a vital function in our jury selection process. Selecting
3 jurors who will appreciate and do their best to fulfill their responsibilities despite the
4 inconvenience increases public trust and confidence in jury service and makes jury service more
5 effective for everyone.

6 The Petition expresses concern about the use of “hunch-based strikes.” But the
7 fact that an attorney cannot articulate the non-arbitrary, non-discriminatory reason for using a
8 strike does not mean the strike is discriminatory. Many times, a juror’s nonverbal cues—such as
9 facial expressions, gestures, and body language—may reveal information about the juror’s
10 biases that is not evident through words alone. *J.E.B.*, 511 U.S. at 148 (O’Connor, J.
11 concurring) (citing *V. Starr & M. McCormick*, *Jury Selection* 522 (1993)).² While a “hunch”
12 should not be used as a proxy for a litigant’s discriminatory practices, problems like that can be
13 unearthed and addressed through the use of the Batson challenge process.

14 **C. Petitioners’ judicial efficiency argument is not well taken.**

15 Undersigned disagree with the Petition’s assertion that eliminating peremptory
16 strikes will streamline jury selection. It will actually greatly extend voir dire. Litigants will
17 need more time to question the panel about issues related to challenges for cause, and more time
18 to create a record on denied challenges for cause. Appellate practice related to denied
19 challenges will certainly increase. More importantly, because appellate courts greatly defer to
20 trial courts’ decisions on challenges for cause, *State v. Naranjo*, 234 Ariz. 233, 239 ¶ 12 (2014),
21 litigants will have little to no remedy for having had to endure a trial with a biased jury.

22 Additionally, requiring litigants to fully explore jurors’ potential biases rather than
23 relegating those jurors to the peremptory strike list risks alienating jurors – including other
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² In fact, Justice O’Connor expressly endorsed the use of “experienced hunches and
educated guesses.” *J.E.B.*, 511 U.S. at 148 (J. O’Connor, concurring).

1 members of the panel – with the invasive questioning that may be required. This can improperly
2 prejudice the jury against a litigant, which is exactly what jury selection is intended to prevent.

3 Finally, the Petition’s concern about the inconvenience to the extra jurors called to
4 voir dire who are peremptorily struck has little merit. The court deems those jurors to have duly
5 served their community and they will not be called to serve again for several years. It is not as if
6 a peremptorily struck juror must return to court again and again until chosen. Furthermore, as
7 jurors are told in an informational video when they arrive in the jury room, the inconvenience
8 associated with participating in one’s civic duty is a small burden compared with the great risk a
9 biased jury has on the administration of justice and the public’s faith in our justice system.

10 **D. Batson reforms, if any are needed, are a more suitable place to combat**
11 **litigant discrimination.**

12 The Petition’s concerns about litigants’ use of peremptory strikes for improper,
13 discriminatory purposes are legitimate. Indeed, the United States Supreme Court has readily
14 acknowledged that the improper use of peremptory strikes can perpetuate historical patterns of
15 discrimination, invidious group stereotypes, and loss of confidence in the judicial system. *See,*
16 *e.g., J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 130-31 (1994); *Batson v. Kentucky,* 476 U.S.
17 79 (1986). But eliminating peremptory strikes is not the answer; for that does nothing more than
18 substitute the equally iniquitous problem of facilitating the seating of jurors who harbor
19 unspoken or inherent biases in favor or against one of the parties. Substituting bias in the jury
20 for bias of a litigant is not the answer.

21 This Court has shown its commitment to improving jury service and preventing
22 discriminatory practices by establishing the Task Force on Jury Data Collection, Practices, and
23 Procedures. That Task Force should study the different factors that play a role in decreasing
24 juror diversity. If reforms are needed to the Batson challenge process, that is the place to
25 combat potential racial, gender, and/or religious discrimination in litigants. Eliminating
26 peremptory strikes is not the answer.

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CONCLUSION

MICA and HonorHealth appreciate the fact that Arizona has long been a national leader in improving jury practices. *See, e.g.,* Shari Seidman Diamond, et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 Van. L. Rev. 1927 (2006); Valerie Hans, et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. Mich. J.L. Reform 349 (1999). Improvements in jury practices lead to positive, rewarding experiences for jurors. *See* Petition at 10. But when used for valid purposes—which the trial court can certainly assess during the Batson process—peremptory strikes are a critical tool for ensuring that each case is staffed with an impartial, well-suited jury. For the foregoing reasons, undersigned oppose the proposed amendment of Rule 47(e) of the Arizona Rules of Civil Procedure.

DATED this 3rd day of May, 2021.

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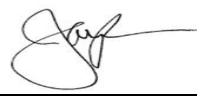
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Electronic copy filed with the
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