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On behalf of the AZ- LGBT Bar Association

ARIZONA SUPREME COURT

In the matter of:

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

Arizona Supreme Court
No. R-21-0008

**COMMENT IN SUPPORT OF
THE PETITION TO AMEND
THE RULES OF THE
SUPREME COURT**

Pursuant to Rule 28(D), Rules of the Supreme Court, the AZ-LGBT Bar Association (“LGBT Bar”) respectfully submits this Comment in support of Rule Change Petition R-21-0008 (“Petition”) for the Court’s consideration. The AZ-LGBT Bar Association is an organization comprised of gay, lesbian, bisexual and transgender (“LGBT”) persons in the Arizona legal profession and in the community at large who are committed to community, visibility, and equality through education, legal advocacy, and participation in political, civic, and social activities.

For most of American history, “[g]ays and lesbians have been systematically excluded from the most important institutions of self-governance.” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). Despite much

progress toward eliminating bias based on sexual orientation and gender identity, LGBT people continue to experience significant discrimination. Such discrimination is particularly discouraging when it is experienced within a system “committed to an impartial judiciary that provides due process and equal justice to all.” Chief Justice Robert Brutinel, *2019-2024 Strategic Agenda: Justice for the Future* (<https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf>).

Government discrimination against LGBT people has a long history. From 1953 until 1975, the federal government required that private contractors “search out and terminate” LGBT individuals working for them. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014). Even after this ban on LGBT federal contractors was lifted, the federal government permitted its agencies to freely discriminate based on sexual orientation until 1998. *Id.* LGBT people have also frequently been denied a raft of private and government benefits based on their sexual orientation. Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 Women’s Rts. L. Rep. 143, 157 (1988) (“Being identified with homosexuality has been the basis of refusals to hire, the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, to the custody of children and visitation rights, denials of national security clearances and denials of the right to enter the country.”).

Indeed, federal immigration policy reflected that identifying as LGBT was a mental illness as late as 1990. *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014); *see also Boutilier v. I.N.S.*, 387 U.S. 118, 122 (1967) (concluding that the legislative history of the Immigration and Nationality Act of 1952 “indicated beyond a shadow of a doubt that Congress intended the phrase ‘psychopathic personality’ to include homosexuals”). Even after this prohibition was removed, the Defense of Marriage Act (“DOMA”) prevented LGBT people in the United States from reuniting with their partners of different nationalities until it was struck down in 2013. *See United States v. Windsor*, 570 U.S. 744, 765 (2013).

Discrimination against LGBT people has also been prevalent in the private sector. “For centuries, the prevailing attitude toward gay persons has been one of strong disapproval, frequent ostracism, social . . . discrimination, and at times ferocious punishment,” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (internal quotation marks omitted), adversely affecting gay people’s access to jobs, housing, and public accommodations. *See Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 933 (S.D. Miss. 2014) (recognizing that being open about one’s sexual orientation “invited scrutiny and professional consequences”); *Bassett*, 59 F. Supp. 3d at 848 (noting that gay people in Michigan “have a 27 percent chance of experiencing discrimination in obtaining housing”); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 988 (S.D. Ohio 2013) (“In the midtwentieth century, bars in major

American cities posted signs telling potential gay customers they were not welcome”), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Despite trends toward acceptance, bias against LGBT people is still a reality in many workplaces: Forty-two percent of LGBT people report experiencing at least one form of employment discrimination, such as harassment or losing a job. Christy Mallory & Brad Sears, *Employment Discrimination Against LGBT People*, in *Gender Identity & Sexual Orientation in the Workplace: A Practical Guide* (Christine Michelle Duffy & Denise M. Visconti eds. 2014).

The injury inflicted by discrimination within the judicial system is pernicious because that is “where the law itself unfolds.” *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991). Discrimination within the criminal justice system begins with law enforcement. Interactions between LGBT people and the police who profile and target them has historically involved harassment and violence. Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, The Williams Institute, 6–11 (2015) (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>). A 2011 study found that LGBT youth were 53% more likely to be stopped by police, 60% more likely to be arrested before the age of 18, 90% more likely to have had a juvenile conviction, and 41% more likely

to have had an adult conviction that heterosexual youth—even when controlling for race, socioeconomic status, and criminal behavior. Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 51, 53 (2011). In a 2008 study, 62% of police chiefs surveyed believed that being gay constitutes “moral turpitude,” and 56% viewed it as a “perversion.” Christy Mallory et al., *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2000 to 2013*, The Williams Institute, 2 (2013), (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Law-Enforcement-SOGI-Nov-2013.pdf>); see also Christine M. Anthony et al., *Police Judgments of Culpability and Homophobia*, *Applied Psych. Crim. Just.* 9 (2005) (noting that 32% of officers believe gay men are “disgusting”).

Studies have shown that bias based on sexual orientation has significantly and negatively affected court users’ experiences in the court system. 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 LGBT people with the court system). In a California study of LGBT 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. *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). 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 judges, lawyers, or court employees.” *Id.* at 19. More than a third of lesbian, gay, and bisexual court users “felt threatened in the court setting because of their sexual orientation.” *Id.* at 5. Likewise, in a study from Arizona, 29% of LGBT court employees reported hearing “negative remarks” about gay people. 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, 327 (2001). Thirteen percent of judges and attorneys surveyed had witnessed negative treatment by judges in open court toward those perceived to be LGBT. *Id.*

A 2012 community survey conducted by Lambda Legal of 965 LGBT or HIV-affected respondents who had recently been involved with the court system confirms these findings. 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)

https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf). Nineteen percent of those surveyed indicated they had heard negative comments about sexual orientation, gender identity, or gender expression come from judges, attorneys, or court staff. *Id.* Sixteen percent reported having their sexual orientation or gender identity raised in court when it was not relevant. *Id.* In sum, several studies have concluded that “the majority of gay and lesbian litigants experienced courthouses as hostile and threatening environments, whether in criminal or civil cases.” Joey L. Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* 74 (2011).

Biases against LGBT people are also frequently expressed by potential jurors. Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407, 427–34 (2014) (collecting instances of on-the-record admissions of bias by jurors or prospective jurors). “It remains the case that ‘[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive.’” *United States v. Bates*, 590 F. App’x 882, 886 (11th Cir. 2014) (quoting *State v. Ford*, 926 P.2d 245, 250 (Mont. 1996)); *see also Berthiaume v. Smith*, 875 F.3d 1354, 1359 (11th Cir. 2017) (“Given the long history of cultural disapprobation and prior legal condemnation of same-sex relationships, the risk that jurors might harbor latent prejudices on the basis of sexual orientation is not trivial.”). A jury research firm found that, of jurors who

participated in mock trials between 2002 and 2008, 45% believed that being gay “is not an acceptable lifestyle,” 33% thought that sexual orientation should not be a protected characteristic under civil rights laws, between 15 and 20% thought that employers should be able to refuse to hire workers because of their sexual orientation, and between 15 and 20% said “it would bother them if a gay or lesbian couple moved in next door to them.” Sean Overland, *Strategies for Combating Anti-Gay Sentiment in the Courtroom*, The Jury Expert, Mar. 2009 (<https://www.thejuryexpert.com/2009/03/strategies-for-combating-anti-gay-sentiment-in-the-courtroom/>).

Implicit bias, of course, poses a separate problem. Despite the significant strides in acceptance made by LGBT people in the last several years, studies show that many who profess to harbor no biases still hold implicit biases against LGBT people. Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DePaul L. Rev. 599, 600–02 (2009) (collecting studies demonstrating that “many Americans harbor implicit . . . biases that frequently conflict with their self-reported . . . attitudes.”). Additionally, “social desirability bias” skews polls that explicitly ask about bias. Chan Tov McNamarah, *Sexuality on Trial: Expanding Peña-Rodriguez to Combat Juror Queerphobia*, 17 Dukeminier Awards J. Sexual Orientation & Gender Identity L. 393, 398–99 (2018) (collecting studies “suggest[ing] that trends in self-reported attitudes are attributed to a growing reluctance

to admit anti-queer sentiment due to apprehension of societal consequences, rather than due to true attitude shifts.”). Because the *Batson* framework addresses only “purposeful . . . discrimination,” 476 U.S. at 96, and permits the party utilizing the peremptory strike to articulate a “neutral explanation” for the challenge, *id.* at 97, it nonetheless permits peremptory strikes which may be made in good faith, but based on unspoken or unconscious bias.

Implicit in the right to a jury trial is the right to a jury “composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder v. W. Virginia*, 100 U.S. 303, 308 (1879)). As the profile and visibility of LGBT people increases, it is vitally important that our courts protect their right to a fair and impartial jury. Where LGBT people serve as jurors, they provide a counterweight to jurors who hold biases toward LGBT people. *Cf.* Anna L. Tayman, *Looking Beyond Batson: A Different Method of Combating Bias Against Queer Jurors*, 61 Wm. & Mary L. Rev. 1759, 1768 (2020) (“While all-white juries convicted black defendants 81 percent of the time and white defendants 66 percent of the time, juries with at least one black juror convicted black and white defendants at nearly identical rates (71 percent and 73 percent respectively).”). When LGBT people are excluded from juries, “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 unknowable.” *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

In addition to protecting the rights of LGBT litigants (or those who may be perceived as LGBT), the proposed rule would protect LGBT jurors themselves and reinforce the public’s perception of a fair and impartial judiciary. Strikes exercised on the basis of sexual orientation “tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently.” *SmithKline*, 740 F.3d at 485; *see also Batson*, 476 U.S. at 87 (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”).

As the Petition notes (at 10-11), several states protect LGBT jurors from discriminatory strikes. Arizona is not currently one of those states. The Petition would change that, protecting LGBT litigants by ensuring that people like them will not be improperly struck from juries. The Petition would also provide a more effective vehicle for protecting against implicit or unstated biases.

For the reasons set for in this comment, the AZ-LGBT Bar Association strongly encourages the Supreme Court to adopt the proposed rule in its entirety.

Respectfully submitted this 3rd Day of May, 2021.

By: /s/ Randal McDonald

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