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9 **IN THE SUPREME COURT**  
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-21-0020

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

18 **COMMENT OF**  
19 **THE ARIZONA ATTORNEY**  
20 **GENERAL’S OFFICE**

21 The proposed rule change would eliminate preemptory challenges in all  
22 criminal matters by striking Arizona Rule of Criminal Procedure 18.4(c) for use in:  
23 (1) capital cases; (2) non-capital cases tried in superior court; and (3) non-felony  
24 matters tried in limited jurisdiction courts.<sup>1</sup> The Attorney General’s Office opposes  
25 the Petition because preemptory challenges are an integral part the current jury  
selection procedure. *See Wilson v. Wiggins*, 54 Ariz. 240, 241–42 (1939) (“The law

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<sup>1</sup> The Petition also proposes removing preemptory challenges in civil cases. This comment focuses only on criminal cases because the Petition would significantly affect trials conducted by the Criminal Division of the Attorney General’s Office. The reasons for retaining preemptory challenges in criminal cases are equally applicable to civil trials, however.

1 gives each party to a civil action four peremptory challenges and an unlimited  
2 number for cause. The purpose is to secure a fair and impartial jury.” (internal  
3 citation omitted)), *superseded by rule as stated in State v. Dickens*, 187 Ariz. 1  
4 (1886). Removing peremptory challenges, without more, will not advance the  
5 Petition’s goal of delivering “impartial results . . . [and] respect for citizens who  
6 are called to serve.” Pet. R-21-0020, at 14.  
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9 “Experience has shown that one of the most effective means to free the  
10 jurybox from [persons] unfit to be there is the exercise of the peremptory  
11 challenge.” *Hayes v. Mississippi*, 120 U.S. 68, 70 (1887). The reason is simple:  
12 peremptory challenges “provide[] a margin of protection for challenges for cause.”  
13 Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose*  
14 *Right is it, Anyway?*, 92 Colum. L. Rev. 725, 771 (1992). As such, the peremptory  
15 challenge has very old credentials,” and has been part of American criminal law  
16 since the colonial-era. *See Swain v. Alabama*, 380 U.S. 202, 212–13 (1965),  
17 *overruled by Batson v. Kentucky*, 476 U.S. (1986). Unsurprisingly then, Arizona  
18 has authorized peremptory challenges in criminal cases since it was a territory. *See*  
19 *Elias v. Territory*, 9 Ariz. 1, 7 (1904).  
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22 Today, peremptory challenges are an essential part of jury selection in  
23 Arizona criminal cases because they ensure the court “seat[s] a fair and impartial  
24 jury.” *State ex rel. Romley v. Superior Court (Mendevil)*, 181 Ariz. 271, 275 (App.  
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1 1995). In fact, all 50 states, the District of Columbia, and federal courts allow some  
2 type of peremptory challenge in criminal cases. Fed. R. Crim. P. 24(b); Alaska R.  
3 Crim. P. 24(d); Ark. Code Ann. § 16-33-305; Cal Civ. Proc. § 231(a)-(b); Colo.  
4 Rev. Stat. § 16-10-104; Colo. R. Crim. P. 24(d); Conn. Gen. Stat. § 54-82h(a); Del.  
5 Const., art. 1, § 7; D.C. Code § 23-105(a); Fla. Stat. § 913.08(1)(a)-(c); Ga. Code  
6 Ann. §§ 15-12-165 & 15-12-125; Haw. Rev. Stat. § 635-30; Idaho Code Ann. §§  
7 19-2016 & 19-2030; Ill. Sup. Ct. R. 434(d); Ind. Code §§ 35-37-1-3(a)-(d) & 35-  
8 37-1-4; Ind. Jury R. 18(a)(1)-(3); Iowa Ct. R. 2.18(9); Kan. Stat. Ann. § 22-  
9 3412(a)(2); Ky. R. Crim. P. 9.4(1)-(3); La. Code Crim. Proc. Ann. art. 799; La.  
10 Code Crim. Proc. Ann. art. 789; Me. R. U. Crim. P. 24(c); Md. Code Ann. Cts. &  
11 Jud. Proc. § 8-420; Md. Rule 4-313; Mass. R. Super. Ct. 6(4)(i); Mich. Comp.  
12 Laws §§ 768.12(1) & 768.13; Minn. R. Crim. P. 26.02(6)-(7); Miss. Code Ann. §  
13 99-17-3; Mo. Rev. Stat. § 494.480(2); Mont. Code Ann. § 46-16-116; Neb. Rev.  
14 Stat. § 29-2005; Nev. Rev. Stat. § 175.051; N.H. Rev. Stat. Ann. §§ 606:3 to  
15 606:4; N.J. Stat. Ann. § 2B:23-13(b)-(c); N.M. Stat. Ann. § 38-5-14; N.M. R.  
16 Crim. P. 5-606(D); N.Y. Crim. Proc. Law § 270.25; N.C. Gen. Stat. § 15A-1217;  
17 N.D. R. Crim. P. 24(2); Ohio R. Crim. P. 24(D); Okla. Stat. tit. 22, § 655; Or. Rev.  
18 Stat. § 136.230; Pa. R. Crim. P. 634; R.I. Super. Ct. R. Crim. P. 24(b); S.C. Code  
19 Ann. § 14-7-1110; S.D. Codified Laws § 23A-20-20; Tenn. Code Ann. § 40-18-  
20 118; Tex. Code Crim. Proc. Ann. art. 35.15; Utah R. Crim. P. 18(d); Vt. R. Crim.

1 P. 24(c)(3); Va. Code Ann. § 19.2-262(B); Wash. Super. Ct. Crim. R. 6.4(e)(1); W.  
2 Va. R. Crim. P. 24(b)(1); Wis. Crim. P. 972.03; Wyo. Stat. Ann. § 7-11-103(a).

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4 The Petition notes that England and Canada have abolished peremptory  
5 challenges. Pet. R-21-0020, at 3–4. England, however, permits judges to accept  
6 “nonunanimous verdicts of 10-2 after two hours [and 10 minutes] of deliberation.”  
7 William T. Pizzi, *The Failure of the Criminal Procedure Revolution*, 51 U. Pac. L.  
8 Rev. 823, 829 (2020). England’s approach thus eliminates unnecessary hung juries  
9 that peremptory challenges may otherwise prevent. *See State v. Shores*, 7 S.E. 413,  
10 417 (W. Va. 1888) (“There can be no doubt that giving the prosecuting attorney a  
11 peremptory challenge of two jurors tends to prevent hung–juries and mistrials and  
12 to lessen the expense of criminal trials, and thus protect the public treasury.”).  
13 Non-unanimous jury verdicts in criminal cases, however, violate the United States  
14 Constitution. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (“There can be no  
15 question either that the Sixth Amendment’s unanimity requirement applies to state  
16 and federal criminal trials equally.”). Canada’s act abolishing peremptory  
17 challenges was accompanied by an expansion of the “authority of the judge  
18 presiding over jury selection” to grant challenges for cause to “maintain[] public  
19 confidence in the administration of justice.” *R. v. Chouhan*, 149 O.R. 3d 365, ¶ 28  
20 (Ontario Ct. App. 2020), *reversed by R. v. Couhan*, 2020 S.C.J. 101 (2020). The  
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1 petition before this Court makes no similar alteration to the for-cause challenge  
2 provision in Arizona's rules of criminal procedure.

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4 Wholesale removing preemptory challenges without corresponding changes  
5 to the jury selection procedure will not ensure fair and impartial juries. A  
6 comprehensive approach can be better addressed by this Court's Task Force on  
7 Jury Data Collection, Practices and Procedures, which was tasked with considering  
8 "[w]hether preemptory challenges of jurors systemically reduce the representation  
9 of minorities and whether changes to the preemptory challenge rules should be  
10 made." As such, the Attorney General's Office opposes Petition R-21-0020.  
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14 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2021.

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17 Nicholas Klingerman, #028231  
18 Section Chief Counsel  
19 Arizona Attorney General's Office

20 Electronic copy filed with the  
21 Clerk of the Arizona Supreme Court  
22 this 3<sup>rd</sup> day of May, 2021:

23 By: MJimenez  
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