



Pursuant to Rule 28(D), Rules of the Supreme Court, the American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) respectfully submits this Comment in support of the Petition to Adopt Ariz. R. Sup. Ct. 24 related to jury selection as proposed by the State Bar’s *Batson* Working Group. Unlike rule change Petition R-21-0020, which seeks to abolish peremptory strikes altogether – a proposal yet to be adopted in any U.S. jurisdiction – an almost identical rule change to this Petition has been successfully adopted in Washington. Moreover, this proposed rule change addresses both explicit and implicit bias in jury selection and is, therefore, necessary to effectuate the constitutional guarantee of racially bias-free jury selection.

**I. The Proposed Rule Change is Necessary to Effectuate the Constitutional Guarantee of Racially Bias-Free Jury Selection.**

Almost two decades ago, this Court warned of the need to strengthen protections against racially discriminatory jury selection “lest *Batson*’s guarantee of equal protection become nothing more than empty words.”<sup>1</sup> Since that time, however, courts in Arizona have failed to do so.<sup>2</sup> The proposed amendment to Rule

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<sup>1</sup> *State v. Cruz*, 175 Ariz. 395, 400 (1993) (adopting an “independent verification” requirement for any “wholly subjective” reason for a peremptory strike).

<sup>2</sup> *E.g. State v. Gentry*, 247 Ariz. 381, ¶¶ 11-13 (App. 2019) (holding prosecutor’s peremptory strike of “only remaining African-American juror did not violate *Batson*” and rejecting call to strengthen Arizona’s *Batson* procedures), *review denied* January 7, 2020; *State v. Ybarra*, 2019 WL 2233299, ¶ 26 (mem., May 22, 2019) (holding prosecutor’s peremptory strike of only African American juror did not violate *Batson*), *review denied* March 3, 2020.

24 is a necessary first step toward accomplishing this goal in Arizona. This proposed rule provides detailed guidance to parties and courts by outlining the procedures for conducting a *Batson* inquiry while accounting for implicit bias that impacts even the most well-intentioned attorneys.<sup>3</sup> As modified, Rule 24 may help alleviate some of the racial disparities in Arizona’s criminal legal system and will begin to fulfill *Batson*’s promise of eliminating the discriminatory use of peremptory challenges. Moreover, amendments to court rules such as this are contemplated under *Batson* and similar amendments have proven successful in other states.<sup>4</sup>

**a. Racial Disparities Continue to Plague Arizona’s Criminal Legal System.**

Arizona courts are tasked with providing “justice for all.”<sup>5</sup> Yet Arizona’s criminal legal system is plagued by racial disparities. Arizona has the highest rate of imprisoned Latinos and the sixth highest rate of imprisoned Black persons in the

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<sup>3</sup> See Stephanie Russell-Kraft, “Lawyers Are Uniquely Challenging Audience for Anti-Bias Training,” BLOOMBERG LAW (May 13, 2019), *available at*: <https://news.bloomberglaw.com/us-law-week/lawyers-are-uniquely-challenging-audience-for-anti-bias-training>.

<sup>4</sup> See Wash. Gen. R. 37 (2018).

<sup>5</sup> Supreme Court of Arizona, Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies, 13 (2016).

nation.<sup>6</sup> Such racial disparities wreak havoc on communities of color.<sup>7</sup> From increased harassment by police<sup>8</sup> to arrest rates,<sup>9</sup> from pre-trial detention rates<sup>10</sup> to sentencing outcomes,<sup>11</sup> the statistics on racial disparities confirm that justice is not equal for all.

In Arizona, sentencing disparities are particularly troublesome. Overall, communities of color in Arizona experience imprisonment at higher rates than white people.<sup>12</sup> In 2017, Latinos made up 31% of Arizona's population, but 37% of those imprisoned.<sup>13</sup> Black people made up 5% of the state's population, but comprised

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<sup>6</sup> The Sentencing Project, *The Color of Race and Justice: Racial and Ethnic Disparity in State Prisons* (Jun. 14, 2016), available at: <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>7</sup> See e.g. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 6-7, 13, 16-19 (The New Press) (2010); Chris Hayes, *A Colony in a Nation* 23, 32-39 (W. W. Norton and Co.) (2017).

<sup>8</sup> See Philip Bump, *The Facts About Stop-and-Frisk in New York City*, Wash. Post, Sep. 26, 2016, available at: [https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convicted-donald-trump-that-stop-and-frisk-actually-works/?utm\\_term=.298d46a6863f](https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convicted-donald-trump-that-stop-and-frisk-actually-works/?utm_term=.298d46a6863f).

<sup>9</sup> Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, National Council on Crime and Delinquency, 2009, at 3, available at: [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

<sup>10</sup> Pretrial Justice Institute, "Race and Bail," available at: <http://projects.pretrial.org/racialjustice/>.

<sup>11</sup> See The Sentencing Project, *supra* note 6; Brandon L. Garrett, *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice* 1147-49, 192 (Harvard University Press) (2017) (discussing racial disparities in capital sentencing and execution rates).

<sup>12</sup> FWD.us, *Arizona's Imprisonment Crisis: Part 2, The Cost to Communities*, Nov. 2018 at 10-16, available at: <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf>.

<sup>13</sup> *Id.* at 10.

13% of the prison population.<sup>14</sup> White people, on the other hand, made up 55% of the overall state population but only 40% of the prison population.<sup>15</sup> In addition to the “stark differences” in who is sent to prison, there are also racial and ethnic disparities in how much time people spend in prison.<sup>16</sup> After controlling for gender, offense type, and the number of prior felonies, Black people receive the longest average prison sentences in Arizona.<sup>17</sup> Such disparities have wide-ranging effects that “touch the entire community.”<sup>18</sup>

Although the problems of racial disparities and racial discrimination in the criminal legal system do not begin nor end with proper jury selection, juries provide a functional and symbolic bulwark against the misuse of government power. Indeed, “[i]t is the jury that is a criminal defendant’s fundamental protection of life and liberty against race or color prejudice.”<sup>19</sup> For these reasons, it is urgent and necessary that Arizona strengthens the process of effectuating the constitutional guarantee of racially bias-free jury selection by amending Rule 24.

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<sup>14</sup> *Id.*

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

<sup>16</sup> *Id.* at 13-14.

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

<sup>19</sup> *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

**b. *Batson* Provides an Inadequate Framework for Ensuring Racially Bias-Free Jury Selection.**

The United States Supreme Court held in *Batson* that the Equal Protection Clause of the Fourteenth Amendment is violated when the government exercises peremptory strikes in a discriminatory manner.<sup>20</sup> In evaluating whether a prosecutor struck a juror for discriminatory reasons, a reviewing court engages in a three-step process:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.<sup>21</sup>

Unfortunately, the procedures established in *Batson* have failed to protect against racial discrimination, particularly implicit bias, in jury selection. Numerous studies have shown that *Batson*'s "guarantee of equal protection [has] become nothing more than empty words."<sup>22</sup> One study examined "all opinions and orders between January 1, 2000, and December 31, 2009, in which a federal court evaluated

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<sup>20</sup> 476 U.S. at 85-68.

<sup>21</sup> *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)).

<sup>22</sup> *Cruz*, 175 Ariz. at 400.

a race-based *Batson* challenge in either a civil or criminal case....”<sup>23</sup> The study, which included 269 court decisions, concluded that reviewing federal courts granted new trials in only 6.69% of cases reviewed and rejected *Batson* claims entirely in 85.1% of cases.<sup>24</sup> A thorough review of 160 appellate court decisions by the State Bar’s *Batson* Working Group shows an even higher rate of rejected *Batson* claims by reviewing courts in Arizona.<sup>25</sup>

This is not surprising, given the “charade that has become the *Batson* process” in the criminal context, which allows prosecutors to

provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, “Handy Race-Neutral Explanations” or “20 Time-Tested Race-Neutral Explanations.” It might include: too old, too young, divorced, “long, unkempt hair,” free-lance writer, religion, social worker, renter, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same “age bracket” as defendant, deceased father, and prospective juror’s aunt receiving psychiatric care.<sup>26</sup>

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<sup>23</sup> Jeffery Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1975, 1092 (2011).

<sup>24</sup> *Id.*

<sup>25</sup> *Batson* Working Group’s Pet. To Adopt Rule 24 – Jury Selection at 3-4.

<sup>26</sup> *People v. Randall*, 283 Ill.App.3d 1019, 1025-26 (1996).

The “race-neutral” justifications that courts have found to satisfy *Batson*’s second step are as numerous as they are often ridiculous. Such justifications need not be “persuasive, or even plausible,”<sup>27</sup> and can include inappropriate dress, physical appearance, age, body language, attitude, lack of family contact, and living in an area consisting predominantly of apartment complexes.<sup>28</sup>

Arizona courts have allowed peremptory strikes for similar reasons. The Arizona Supreme Court has rejected *Batson* challenges in cases where a prosecutor struck Black jurors for looking “stern” and “angry,” failing to make eye contact with prosecutors, and being “sympathetic” to drug users.<sup>29</sup> The court has also accepted having family members with prior felony convictions and having a “blended” family as acceptable race-neutral justifications for a peremptory strike.<sup>30</sup> Finally, Arizona courts have found “antipathy toward police alone may constitute a valid reason to strike jurors when the State’s case relies on police testimony”<sup>31</sup> – a finding that discredits the lived experiences of many people of color to the detriment of a fair

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<sup>27</sup> *State v. Lucas*, 199 Ariz. 366, ¶ 7 (App. 2001) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

<sup>28</sup> *Randall*, 283 Ill.App.3d at 1025; Kyle C. Barry, *Prosecutors’ ‘O.J. Simpson question’ and the case against peremptory strikes*, The Daily Appeal (Mar. 5, 2020), <https://mailchi.mp/theappeal/daily-appeal-347787?e=f12f515f5c>.

<sup>29</sup> *State v. Gay*, 214 Ariz. 214, 220-21, ¶¶18-19 (App. 2007).

<sup>30</sup> *Gentry*, 247 Ariz. 381, ¶¶11-12.

<sup>31</sup> *State v. Roque*, 213 Ariz. 193, ¶ 15 (2006), *overruled on other grounds by State v. Escalante-Orozco*, 214 Ariz. 254, ¶¶13-15 (2017).

system of justice.<sup>32</sup> In fact, many of these purported justifications are connected historically to the lived experiences of jurors of color. If such pat excuses can extinguish an allegation of racial discrimination in jury selection, *Batson* is surely not working as it was intended. To remedy this problem, this Court should adopt the proposal of the *Batson* Working Group, which includes subsection (g), “Reasons Presumptively Invalid.” Such a rule will help end the practice of courts accepting nominally race-neutral justifications that have racially discriminatory effects.

Again, the need to strengthen *Batson* procedures cannot be understated. Overwhelming evidence exists that racial discrimination infects jury selection throughout the United States and in Arizona, as documented in the *Batson* Working Group’s 85-page bibliography.<sup>33</sup> Yet, the Arizona Prosecuting Attorneys Advisory Council (APAAC) claims, without citation to any authority, that jury selection throughout Arizona is conducted “in an unbiased and fair manner” and further argues

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<sup>32</sup> Drew DeSilver, Michael Lipka, & Dalia Fahmy, “10 Things We Know About Race and Policing in the U.S.,” Pew Research Center, Jun. 3, 2020 (showing drastically different views of policing between Black and white Americans, many of which are attributed to the experiences of police interactions involving Black Americans), available at: <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/>; John Gramlich, “From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System,” Pew Research Center, May 29, 2019 (showing divergent views between black and white Americans on many aspects of the criminal justice system), available at: <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/>.

<sup>33</sup> *Batson* Working Group’s Pet. To Adopt Rule 24 – Jury Selection at 35-118.

that claims to the contrary are “nothing but conjecture.”<sup>34</sup> Again, such claims ignore the overwhelming evidence as meticulously documented by the State Bar’s *Batson* Working Group – a group that included several prosecutors.<sup>35</sup>

This Court should accept the well-documented conclusion that *Batson* is not working and must be strengthened. By adopting the proposed amendment to Rule 24, this Court will be taking a much-needed step towards ending the “charade” that has become the *Batson* process by helping ensure that race-based peremptory challenges become a thing of the past.

**c. *Batson* Allows States to Adopt Procedures to Better Effectuate the Constitutional Guarantee of a Fair Jury Selection Process Free from Racial Bias.**

The Supreme Court has left it to state courts to create their own procedures “to be followed upon a defendant’s timely objection to a prosecutor’s challenge.”<sup>36</sup> Indeed, the Supreme Court made “no attempt to instruct” state or federal courts about how they should implement the Court’s holding in *Batson*.<sup>37</sup> Thus, courts across the

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<sup>34</sup> Comment in Opposition of R-21-0008 by Arizona Prosecuting Attorneys Advisory Council at 2.

<sup>35</sup> Appendix B: Working Group Members, *Batson* Working Group’s Pet. To Adopt Rule 24 – Jury Selection at 32-34.

<sup>36</sup> *Batson*, 476 U.S. at 99.

<sup>37</sup> *Id.*

country have taken this opportunity to devise various approaches to better combat racially biased jury selection.<sup>38</sup>

Washington is one state that has taken a such a step.<sup>39</sup> In 2018, Washington adopted General Rule 37 (GR 37), which is nearly identical to the proposed amendment to Rule 24. Like this proposed rule change, Washington’s adoption of GR 37 was aimed at eliminating both implicit and intentional racial bias in jury selection and was adopted after extensive review and study through the Washington Supreme Court’s Minority Justice Symposium.<sup>40</sup> As in Washington, the adoption of this rule change in Arizona is necessary to protect the right of the criminally accused to a fair and impartial jury selection process.<sup>41</sup> Indeed, “jury selection in Washington has become more fair and less discriminatory in the three years since GR 37 was adopted.”<sup>42</sup>

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<sup>38</sup> *Cruz*, 175 Ariz. at 397-98 (acknowledging that “many state and federal cases since *Batson* have extended its application”); *State v. Urrea*, 244 Ariz. 443, ¶¶ 11-16 (acknowledging that “the trial court plays a ‘pivotal role’ in the *Batson* process” and noting the variety of approaches state courts have taken in the *Batson* context).

<sup>39</sup> California is another. See Kyle C. Barry, “California Adopts New Laws to Fight Racism in Jury Selection,” THE APPEAL, Sep. 30, 2020, available at: <https://theappeal.org/politicalreport/california-jury-selection-racial-discrimination/>.

<sup>40</sup> Proceedings of the Washington Supreme Court’s Minority Justice Symposium are available here: <https://www.tvw.org/watch/?eventID=2017051090>.

<sup>41</sup> See *State v. Superior Court (Gardner)*, 157 Ariz. 541, 545-46 (1988) (finding the constitutional guarantee of trial by jury supports courts in applying “the *Batson* principle ... to situations going beyond *Batson*’s specific facts....”).

<sup>42</sup> Comment in Support of R-21-0008 by Washington Association of Criminal Defense Lawyers at 2.

Importantly, the adoption of this rule change will also protect the rights of jurors to serve, as “[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.”<sup>43</sup> Moreover, adoption of this rule change will build public confidence in the fairness of our courts and our system of justice. As the Supreme Court has repeatedly observed, “[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality.”<sup>44</sup> For these reasons, Arizona should join Washington in adopting this necessary rule change.

## **II. References to Implicit and Unconscious Bias Should Remain in the Rule.**

For months, a Working Group formed by the State Bar’s Civil and Criminal Practice and Procedure Committees studied the proposed rule.<sup>45</sup> In addition to providing ample evidence in support of the adoption of Rule 24, the Working Group also proposed an alternative that would remove reference to implicit and unconscious bias in Sections (a) and (e).<sup>46</sup>

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<sup>43</sup> *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970).

<sup>44</sup> *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

<sup>45</sup> *Batson Working Group’s Pet. To Adopt Rule 24 – Jury Selection* at 2.

<sup>46</sup> *Id.* at 20.

However, removing the reference to implicit and unconscious bias would undermine the purpose of the proposed rule, which is to remove all bias from jury selection. Indeed, unconscious and implicit bias is more pernicious than explicit bias in jury selection.<sup>47</sup> Thus, reference to these types of bias is necessary to their elimination. Moreover, the inclusion of the terms “implicit” and “unconscious” work in tandem with the other sections of the rule, which emphasize that “[t]he court need not find purposeful discrimination to sustain [an] objection.”<sup>48</sup> As argued above, because of the almost inexhaustible list of pat race-neutral reasons courts have accepted to overcome a *Batson* challenge,<sup>49</sup> it is necessary to explicitly acknowledge the existence and impact of both unconscious and explicit bias while leaving no room for race-neutral explanations that hide biased actions.

### **III. A Petition to Eliminate Peremptory Strikes Altogether is not a Preferred Remedy to Address Racial Bias in Jury Selection.**

Another Petition currently before this Court that would completely eliminate peremptory challenges, R-21-0020, argues that doing so would “implement a

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<sup>47</sup> Anthony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, B.U. L. Rev. 155, 191 (2005) (explaining that individuals are not aware of their implicit biases and that these biases are often inconsistent with the individual’s public or private attitudes).

<sup>48</sup> Proposed Supreme Court Rule 24(e).

<sup>49</sup> See *Randall*, 283 Ill.App.3d at 1025-26; Jeffery Bellin & Junichi P. Semitsu, *supra*, note 23.

simpler system of jury selection that is inherently fair.”<sup>50</sup> Yet, as the Petition acknowledges, “no American jurisdiction has yet eliminated these strikes outright,”<sup>51</sup> and thus, no research exists to assume jury selection without peremptory strikes will be inherently fair. Moreover, the Petition relies on the experience of the United Kingdom which abolished peremptory strikes in 1988.<sup>52</sup> Yet this has not led to a system of jury selection that is “inherently fair.” To the contrary, there is evidence that suggests that bias, both implicit and explicit, continues to infect jury selection and jury service in the United Kingdom.<sup>53</sup>

Additionally, that Petition fails to adequately address the history and purpose of peremptory strikes in America. A further and more complete review would suggest that peremptory strikes should be abolished, but only for the prosecution. The Petition acknowledges that, historically, criminal defendants were entitled to peremptory strikes whereas the prosecution was not and correctly notes that this was to address the imbalance of power “between the government and the individual.”<sup>54</sup> Yet, without providing any support – either historic context or legal argument, the

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<sup>50</sup> Pet. to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure (“Pet. to Eliminate Peremptory Challenges”) at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3-4.

<sup>53</sup> Gillian Daly & Rosemary Pattenden, *Racial Bias and the English Criminal Trial Jury*, 64 Cambridge L.J. 678, 679-82 (discussing how race influences English juries and the “myth of impartiality” of those juries).

<sup>54</sup> Pet. to Eliminate Peremptory Challenges, R-21-0020 at 5.

Petition assumes such power imbalances no longer exist in our criminal legal system.<sup>55</sup> They most certainly do.

First, as the United States Supreme Court has noted, “plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>56</sup> Within this system of plea bargaining, prosecutors possess all the power.<sup>57</sup> Indeed, such a system is fueled by the grossly divergent sentences offered to defendants who plead guilty versus those who don’t — often called the “trial penalty.”<sup>58</sup> Moreover, even for those criminal defendants who get their day in court at a jury trial, the resource disparities between public defenders and the prosecution can often mean defense attorneys are “overworked, underpaid, undertrained, and lack adequate support resources.”<sup>59</sup> Although such resource disparities exist throughout

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<sup>55</sup> *See id.*

<sup>56</sup> *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

<sup>57</sup> *See* Dylan Walsh, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, THE ATLANTIC, May 2, 2017 (discussing a system of plea bargaining that invests prosecutors with “broad, opaque powers” and lack of judicial oversight of the process), *available at*:

<https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/>.

<sup>58</sup> *See* Emma Andersson & Jeffrey Robinson, *The Insidious Injustice of the Trial Penalty: “It is Not the Intensity but the Duration of Pain that Breaks the Will to Resist”*, FEDERAL SENTENCING REPORTER (2019) 21 (4-5) 222-25.

<sup>59</sup> Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center for Justice at New York University School of Law, Sep. 9, 2019, *available at*:

[https://www.brennancenter.org/sites/default/files/publications/2019\\_09\\_Defender%20Parity%20AnalysisV7.pdf?utm\\_source=The+Appeal&utm\\_campaign=747aae](https://www.brennancenter.org/sites/default/files/publications/2019_09_Defender%20Parity%20AnalysisV7.pdf?utm_source=The+Appeal&utm_campaign=747aae)

the state, they are particularly acute in Arizona's rural counties.<sup>60</sup> Rather than offering support for a proposal to abolish peremptory strikes altogether, the continued power imbalance between the government and the individual in criminal prosecutions supports a return to a time when only the accused could exercise them.

Moreover, the history of prosecutors being given the power of peremptory strikes further supports removing that power from the government, not the accused. The Petition correctly notes that most American states did not provide the prosecution with the power of peremptory strikes until the years following the Civil War. Yet, it is not just a "cynical observer" who "might note that the power came into being in the years after black Americans obtained the right to serve on juries."<sup>61</sup> Rather, it is almost certainly the precise reason why states empowered prosecutors with peremptory challenges.<sup>62</sup> Indeed, the United States Supreme Court, in upholding a Missouri statute that gave prosecutors more peremptory challenges in large cities than in other areas of the state, explicitly relied on race as a reason for upholding the law, stating:

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<sup>60</sup> Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 Ariz. L. Rev. 219 (2010).

<sup>61</sup> Pet. to Eliminate Peremptory Challenges, R-21-0020 at 6.

<sup>62</sup> See Jon M. Van Dyke, *Peremptory Challenges Revisited*, 12 Nat'l Black L.J. 114 (1990).

In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors.<sup>63</sup>

Acknowledging the historical reason – the exclusion of Black Americans from jury service – further supports abolishing peremptory strikes for the prosecution alone.

At the very least, this troubling history and the continued power imbalance between the government and the individual in criminal prosecutions should caution this Court against taking the unprecedented step of eliminating peremptory challenges entirely without first conducting additional research into the effects of such a change will have to our system of jury selection.

#### **IV. Conclusion**

It is clear from decades of research and caselaw that the procedures implementing *Batson* are not foolproof in protecting against race-based jury selection. At the same time, it is far from clear that abolishing peremptory strikes altogether will fix this problem. As such, this Court should adopt the proposed rule change submitted by the State Bar’s *Batson* Working Group. This proposal, which was developed after months of research and discussion by a broad and diverse group

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<sup>63</sup> *Hayes v. Missouri*, 120 U.S. 68, 71 (1887).

of stakeholders, is the best attempt to fix the flaws in *Batson*'s procedures and is a rule already tried in other states. It is clear that additional, more robust protections are needed to prevent race-based discrimination in jury selection in Arizona. The proposed adoption of Rule 24 is a first step in realizing the constitutional guarantee of racially bias-free jury selection and should be adopted.

Respectfully submitted, this 3rd day of May 2021.

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