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On behalf of the Arizona Medical Association, the Arizona Osteopathic Medical Association and the Arizona Chamber of Commerce and Industry

IN THE SUPREME COURT
STATE OF ARIZONA

In the matter of: PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA TO ADOPT RULE 24—JURY SELECTION	Supreme Court No. R-21-0008 COMMENT OF THE ARIZONA MEDICAL ASSOCIATION, ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, AND ARIZONA CHAMBER OF COMMERCE & INDUSTRY OPPOSING THE ADOPTION OF PROPOSED RULE 24—JURY SELECTION

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Arizona Medical Association, the Arizona Osteopathic Medical Association and the Arizona Chamber of Commerce and Industry respectfully submit the following comment in opposition to Petition R-21-0008 to adopt Rule 24 as it applies to civil jury trials. The proposed Rule so significantly undermines peremptory jury strikes that it renders them illusory. This Petition should be rejected.

I. STATEMENT OF INTEREST

The Arizona Medical Association ("ArMA") is a voluntary membership organization for Arizona physicians. Its mission is to promote leadership in the art and science of medicine and to advocate for economically sustainable medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans. ArMA frequently represents physicians and the profession at the state capitol on legislative issues affecting physicians and their patients.

The Arizona Osteopathic Medical Association ("AOMA") is a voluntary membership organization for Arizona osteopathic physicians. Its mission is to promote the osteopathic medical profession, serve its members, provide osteopathic continuing medical education, and advocate for access to high quality, cost-effective healthcare. AOMA frequently provides effective advocacy on behalf of its members at the local, state, and national level to defeat legislation and regulations detrimental to patients and the profession.

Because they are key stakeholders in a highly regulated profession, both ArMA and AOMA have a unique perspective on laws impacting the medical community. Likewise, because their members are inevitable targets of profession liability lawsuits, these organizations have a keen interest in the rules which impact the discourse and fairness of civil litigation. Namely, rules that promote fairness to both parties in a civil action is essential in professional liability lawsuits because the outcome of the case can have far-reaching collateral consequences on a physician's ability to serve their communities, obtain insurance, and, ultimately earn a living.

The Arizona Chamber of Commerce and Industry (the "Chamber") is a diverse organization with its members employing over 250,000 Arizonans in all business and economic sectors, from manufacturing to services, and includes small, medium, and large employers. The Chamber is the leading voice of business, including various economic sectors which are essential, necessary and productive employers in Arizona. The Chamber frequently represents the interest of commerce and industry at the state legislature and is committed to advancing Arizona's competitive position in the global economy. The Chamber's members are likely targets of complex and costly civil litigation and thus have a stake in rules which affect the fairness and uniformity of civil jury trials. These trials, like professional liability lawsuits, have the potential to affect not just large corporations, but

individual and family-owned businesses and those individuals' ability promote a diverse economic landscape in Arizona.

Accordingly, ArMA's, AOMA's, and the Chamber's membership have a vested interest in opposing rule Petition R-21-0008's proposal to modify the peremptory strike system.

II. REASONS PROPOSED RULE AMENDMENT SHOULD NOT BE ADOPTED.

A. The proposed framework of Rule 24 means a challenge might be successful even if there is only a bare showing of perceived bias underlying the peremptory strike.

The three-step process proposed by the *Batson* Working Group ("BWG") is problematic for a variety of reasons.

Most importantly, by expanding the list of protected classes under *Batson* to include religion, national origin, disability, age, sex, and sexual orientation, identifying number of reasons which would become presumptively invalid grounds for striking a juror,[1] and identifying a list of conduct that is historically linked to improper jury selection,[2] the list of presumptively invalid reasons for striking a juror

[1] Presumptively invalid reasons for striking a juror include, "previous unfavorable experiences with police offices; having a close relationship with someone who has been stopped, arrested, or convicted of a crime; living in a high crime neighborhood; having a child outside of marriage; receiving state benefits, and not being a native English speaker." (Petition R-21-0008, at 16-18).

[2] Conduct of a prospective juror that has historically been linked with improper discrimination in jury selection includes, "a prospective juror being sleepy or

becomes too broad. As noted by the judges of the Mohave Superior Court, "[v]irtually all prospective jurors are members of the 'protected group' which suggests that all peremptory strikes will be motivated for inappropriate reasons." (Mohave County Superior Court Judges, Comment in Opposition of Petition R-21-0008, at 1). Moreover, the proposed rule shifts the burden of proof from the challenger to the party exercising the strike and requires proof that no implicit biases exist, further widening the breadth of the proposed rule. Together, these changes render the existence of peremptory strikes all but illusory.

In addition, the proposed rule vests the judge with the power and responsibility to decide whether a peremptory strike was either consciously or unconsciously discriminatory towards a protected group. This change shifts too much unchecked power to an individual to determine whether an attorney holds an implicit bias, when judges, through no fault of their own, may also suffer from known or unknown implicit biases.

From a pragmatic standpoint, the proposed rule ignores the fact that many civil matters, including professional liability and high-stakes commercial cases, are extremely complex and involve expert opinions. For example, seasoned attorneys

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inattentive, staring or failing to make eye contact, exhibiting a problematic attitude, body language, and unintelligent or confused answers." (Petition R-21-0008, at 18-19).

may seek to strike a juror due to his or her body language if it indicates that he or she will be disengaged or not take the matter seriously. A peremptory strike on these grounds has nothing to do with race or any of the other protected classes listed in the Petition. Rather, striking a juror who may not have the attention or motivation to engage with the technical details of a case ensures that the case is fairly decided on the merits, however, technical they may be.

Nevertheless, under the proposed standard, if any reasonable person can conceive of an implicit bias or potentially discriminatory reason why a litigant chooses to strike a prospective juror exhibiting disengaged body-language, that challenge to the peremptory strike will be upheld. This is especially harmful to litigants exercising their peremptory strikes on the grounds of disengaged body language because, although the proposed rule requires the party exercising the strike to articulate on the record the subjective reasons for a strike, the record cannot memorialize the precise way a juror is sitting or physically reacting.

B. There is no evidence to justify the application of Proposed Rule 24 to civil jury trials in Arizona.

The BWG argue that Appendices D and E show a pervasive problem with the *Batson* framework in Arizona appellate case since the late 1980s. However, simply because 93.1% of appellate *Batson* challenges have been unsuccessful does not mean that those 149 challenges or the presumably larger number of *unchallenged*

peremptory strikes were wrongly decided.[3] Indeed, the BWG explains that "system-wide data on the rate at which minority jurors are stricken, as compared to non-minority jurors, is not readily available" in Arizona. (Petition R-21-0008, at 5, fn 2). As such, this data is incomplete and cannot serve as an authoritative basis to evaluate whether the use of peremptory strikes presents a "pervasive" problem in Arizona civil jury trials.

Moreover, the BWG explains that there has been no review of individual case files and juror strikes in Arizona, but even if there was, the outcome would likely be the same in the studies conducted across California and North Carolina federal felony trials. *Id*. However, the Petition presents *no evidence* that supports their assumption that the use of peremptory strikes is being abused in Arizona civil trials in the same way that the out-of-state studies suggests they are being abused in the criminal context. Such a sweeping rule change should not be based on incomplete and anecdotal data where there is no indication that the problem exists in Arizona civil trial courts.

[3] Notably, the BWG's aggregation of appellate data is almost entirely derived from challenges made in criminal jury trials.

C. The proposed modification to peremptory jury strikes guts the rule such that it destroys civil litigants' substantive right without any explanation as to why that right is being abrogated.

"Few institutions of the trial court have as distinguished and time-tested a history as the peremptory challenge" and many scholars believe that this tool was first used "over 700 years ago." Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 965 (1998). In the United States, the peremptory jury strike has "very long credentials" and was authorized by Congress for use in federal court in 1790. *Swain v. Alabama*, 380 U.S. 202, 212-214 (1965) (overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986)). Indeed, the history of peremptory jury strikes and their use in Arizona is likewise time-tested, with the practice dating back to 1923. *See Encinas v. State*, 26 Ariz. 24, 221 P. 232, 233 (1923).

While peremptory strikes may be legislatively created, that does not make them any less important in ensuring a litigant's access to a fair and efficient trial. Peremptory jury strikes *are* a substantive right "rather than a mere procedural or technical right and should be fully enforced as an aid in securing an impartial jury." *State v. Thompson*, 68 Ariz. 386, 206 P.2d 1037 (1949); *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (2003) (finding that although the right to peremptory jury strikes is not substantial, it *is* a right which must be reviewed for harmless error.). Access to this critical process is essential in civil jury trials. The Court, and our judicial

system as a whole, should take pause and consider input from the litigants and stakeholders who will be severely negatively affected by denial of this substantial right. Before such a bedrock principle of impaneling a fair and impartial jury is discarded, litigants should have an opportunity to understand *why* they are being deprived of such a substantive right that keeps faith in the judicial process.

D. The BWG should have included diverse stakeholders.

According to Appendix B to the Petition, the BWG is comprised of several members of the Arizona bar. Despite including a handful of practitioners who are members of the civil bar, the BWG did not include any practitioners or representatives of professional or business communities. Rather, the majority of the BWG are members of the criminal bar or attorneys familiar with the criticisms the *Batson* framework has received in criminal settings. In the past, when the Court has convened task forces to evaluate and amend the civil judicial process status quo, it has included a wider section of representation from the various other communities—including the business community and trade associations—that would be impacted. Should the Court convene the same or similar working group in the future, ArMA, AOMA, and the Chamber would respectfully urge it to include a wider selection of representatives to adequately reflect the diverse set of interests that a rule change would impact.

III. CONCLUSION

While the BWG's proposal to adopt Rule 24 is not as radical as the rule proposed in Petition R-21-0020, it still presents a solution looking for a problem. Without evidence supporting the rule change, there is no justification to eliminate the availability of peremptory strikes. Indeed, peremptory strikes still serve litigants' interests in a fair trial. These interests are especially important to ArMA's, AOMA's, and the Chamber's membership, whose profession and livelihoods depend on the fair adjudication of professional liability and complex civil cases.

Respectfully submitted this 3rd day of May, 2021.

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