

Barry D. Halpern (#005441)
Brett W. Johnson (#021527)
Tracy A. Olson (#034616)
Claudia E. Stedman (#036387)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
E-Mail: bhalpern@swlaw.com
 bwjohnson@swlaw.com
 tolson@swlaw.com
 cstedman@swlaw.com

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

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the matter of:

PETITION 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

Supreme Court No. R-21-0020

COMMENT OF THE ARIZONA
MEDICAL ASSOCIATION, ARIZONA
OSTEOPATHIC MEDICAL
ASSOCIATION, AND ARIZONA
CHAMBER OF COMMERCE &
INDUSTRY OPPOSING THE
PROPOSED RULE CHANGE TO
RULE 47(e) OF THE ARIZONA
RULES OF CIVIL PROCEDURE

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-21-0020, as it applies to civil trials under Arizona Rule of Civil Procedure 47(e) eliminating peremptory challenges to jurors, because the proposed rule would undermine the administration of justice and the legitimacy of jury trials in Arizona. 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 professional 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-21-0020.

I. REASONS PROPOSED RULE AMENDMENT SHOULD NOT BE ADOPTED.

A. There is no evidence of abuse of peremptory strikes in Arizona civil jury trials and elimination of peremptory strikes will result in unfair prejudice to litigants.

Petitioners cite to two studies on capital cases from North Carolina and Philadelphia County to demonstrate the differential rates of exclusion by race in the use of peremptory strikes. Despite admitting that “no academic study of the role of race in peremptories has been conducted in Arizona,” (Petition R-21-0020, at 11), Petitioners still ask the Rules Committee and stakeholders to accept these out-of-state data from criminal trials as reason to eliminate peremptory strikes across-the-board in Arizona.

Even if these data relied upon by Petitioners could potentially be instructive regarding problematic motives behind peremptory jury strikes in capital trials in *those states*, these data cannot and should not be extrapolated to apply to Arizona in the civil jury context. Simply, there is no evidence to support the claim that civil litigants in Arizona are abusing the process of peremptory jury strikes. Moreover,

Arizona differs from the jurisdictions conducting these studies. For example, as the third youngest state, Arizona may not have the same historical vestiges of discriminatory judicial processes as North Carolina and Pennsylvania. The demographics of Arizona are likewise different from the states analyzed in these cited studies.

Without any statistics to support this claim, however, the evidence that Petitioners rely upon is anecdotal at best and should not be a basis upon which to make a sweeping rule change that will disproportionately affect parties involved in complex lawsuits, including medical professionals and corporate litigants who are particularly susceptible to professional liability and high-stakes commercial litigation.

B. Eliminating peremptory jury strikes will not result in efficient administration of justice in Arizona.

The Petition asserts that eliminating peremptory challenges would “substantially streamline the jury system itself.” (Petition R-21-0020, at 4). Eliminating peremptory jury strikes may save a few minutes during voir dire and venire but will ultimately slow down the administration of justice. Not only will the elimination of preemptory challenges in Arizona increase the likelihood of appeals, but it will spur additional for cause challenges, making the jury selection more time consuming, adversarial, tedious, and fraught with inefficiency. In doing so, the elimination of peremptory challenges would endanger litigants’ due process interests

in a fair and efficient trial. ArMA, AOMA, and the Chamber agree with the Arizona Chapter of the American College of Trial Lawyers' comments on this regard: forcing litigants to keep jurors who "hijack deliberations to expound on grievances and world views they bring into the process" will have deleterious consequences on the ultimate disposition of a case. (American College of Trial Lawyers—Arizona Chapter, Comment in Opposition to R-21-0020, at 1). Allowing "unpersuadable persons on a jury, with no possible means of exclusion unless they blurt something so disqualifying as to warrant a challenge for cause, is a very disturbing prospect," and is not efficient to the long-term administration of justice. *Id.* Simply, the Petition unduly elevates the perceived "burdens" over the benefits that peremptory challenges offer to further a litigant's interests in a fair trial.

C. Eliminating peremptory jury strikes does not serve to further the public's trust in the judicial system.

Petitioners argue that eliminating peremptory jury strikes will serve to foster the public's confidence in the judicial system. (Petition R-21-0020, at 13). To the contrary, the elimination of peremptory strikes will only erode public confidence in the judicial system by upsetting the careful balance between litigant rights and interests and the judicial administration of those rights and interests.

Namely, peremptory challenges are an important safeguard in civil jury trials against an intentionally or unintentionally biased juror or judge. Eliminating peremptory challenges would vest the court with all of the power and responsibility

to eliminate bias. But, as noted in the Petition, even well-intentioned people (including judges) can be unintentionally biased. And, as aptly observed by the National Lawyers' Guild, a trial judge may be "unwilling or too uncomfortable to remedy discrimination in jury selection." (National Lawyers Guild, Comment in Opposition of R-21-0020, at 7). Accordingly, vesting all of the power and responsibility to eliminate bias in the judiciary is inappropriate, especially because "lawyers almost always know the case better than the trial judge . . . [and] are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 160 (2010).

Our system is one based on checks and balances. Vesting authority and responsibility in a single individual to root out both explicit and implicit bias in the courtroom will foster public distrust of the judiciary and judicial system as a whole.

D. Eliminating peremptory jury strikes destroys civil litigants' substantive right without any explanation as to why that right is being abrogated.

As Petitioners aptly note, peremptory jury strikes are not constitutionally required. (Petition R-21-0020, at 7). However, "[f]ew 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 (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 substantial right.

II. CONCLUSION

The Petition presents no evidence that the abuses of peremptory strikes and their discriminatory uses in the out-of-state criminal cases is present in Arizona civil cases, or in Arizona at all. If such evidence exists, the Petition should be re-submitted with that evidence included because civil litigants deserve the opportunity to analyze and respond to that data. However, Petition R-21-0020's proposal of eliminating peremptory jury strikes without any evidence is unwarranted and adversely affects civil litigants' rights and interests in obtaining a fair trial. Accordingly, ArMA, AOMA, and the Chamber respectfully oppose rule Petition R-21-0020.

Respectfully submitted this 3rd day of May, 2021.

SNELL & WILMER L.L.P.

By: /s/ Barry D. Halpern

Barry D. Halpern

Brett W. Johnson

Tracy A. Olson

Claudia E. Stedman

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