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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

REPLY IN SUPPORT OF PETITION R-21-0008 TO AMEND RULES OF THE ARIZONA SUPREME COURT TO ADD RULE 24-JURY SELECTION

INTRODUCTION

As Chief Justice John Roberts wrote in opposing affirmative action remedies in *Parents Involved in Community Schools v. Seattle School District No. 1*, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 551 U.S. 701 (2007) (Roberts, C.J., concurring). The same logic applies in combating the racially disparate strikes in jury selection that flow inexorably from the failure that is *Batson*. Now that the Maricopa County Superior Court has released data showing that throughout 2019, prosecutors in its downtown courthouse disproportionately struck Blacks from juries 40% more than their population in the venire, and Native Americans 50% more than their population in the venire, this Court should apply Chief Justice Roberts' maxim and cure the systematic exclusion of minorities from Arizona juries those data show. It should adopt Rule 24, and remove the thumb on the scale against communities of color that indisputably results from the badly broken law of *Batson*.

Almost every commenter favors the Petition. The County Attorney for Arizona's second largest county. The Commission on Diversity, Equality, and Justice this Court constituted to advise on such issues. A host of bars representing Arizona's lawyers and people of color. The State Bar, including its criminal practice committee consisting half of prosecutors, which did not propose a split recommendation hedging against the Petition. This Court's last Chief Justice. The Maricopa County Defender's Office. Every single commenter from Washington state, which has used a prototype of proposed Rule 24 since 2018 – including Chief Justice Stephen González (who, like former Chief Justice Bales, is a former prosecutor who prefers eliminating peremptories altogether).

The handful of comments against the Petition ignore compelling data that peremptories skew racially in America, and incorrectly claim that Arizona has no such data. But now Arizona has public data (the Swann-McMurdie petition, R-21-0020, alluded to Arizona data about minority underrepresentation in juries, which these

commenters ignored). Arizona's newly public data – concerning 81,745 Arizonans called to jury service and randomly assigned to become part of criminal and civil case venires in Maricopa County's downtown courthouse in 2019 – confirm that in Arizona, as in other jurisdictions where such data exists, peremptory strikes are disproportionately exercised to exclude minorities. These few commenters also claim proposed Rule 24 would be unworkable. Yet Washington's prototype of Rule 24, its GR 37, has operated smoothly and achieved its objective of reducing the discriminatory use of peremptory strikes, according to the Chief Justice of the State of Washington, the Honorable Stephen González, and every other Washington state commenter.

Chief Justice Roberts was right. To stop discrimination against Arizona's prospective jurors on the basis of race, this Court need only stop trial lawyers from discriminating against prospective jurors on the basis of race – whether consciously or not – by disproportionately striking people of color from juries. The adoption of proposed Rule 24 would rebalance Arizona's juries, turning them far more representative of Arizona's population, and also of the venire. ***Both matter.*** It would remove pretextual demeanor strikes and other implausible justifications that the too-generous rule of *Batson* unwisely forces Arizona trial courts to credit, in the absence of proposed Rule 24. As the Judicial Council's Committee on Diversity, Equality, and Justice so eloquently stated, "The time to act is now. The proposed rule has been studied." Its adoption would "send a clear message to [the Court's] constituents, to the people of Arizona, that our state-wide judiciary is committed to confronting systemic inequities." (Comm'n on Minorities Cmt. at 6). This Court can and should do better for Arizona, whose citizens deserve representative juries.

I. THE PETITION'S WIDE-RANGING AND OVERWHELMING SUPPORT SHOWS THE PROPOSAL'S GREAT MERIT.

This Court has a wise and inclusive process for considering amendments to Arizona's court rules. *See* Ariz. Sup. Ct. R. 28. This Court allows "any person [to]

petition the Arizona Supreme Court to adopt, amend, or abrogate a court rule that has statewide application." Ariz. Sup. Ct. R. 28(a)(1). Keeping this process open and democratic, this Court invites public comment and maintains a forum to promote debate among stakeholders, to inform this Court's judgment about what it chooses to do or not do. Ariz. Sup. Ct. R. 28(c), (e). The Court requires that Petitions be sent to dozens of stakeholders for their comment, ranging from the Governor to academic, judicial, and bar leaders, to make that debate robust and helpful. Ariz. Sup. Ct. R. 28(d). Finally, this Court's Comment to Rule 28 recognizes the historical role of the State Bar as a leading proposer of rule changes, and expressly invites that continued participation.

Within that Rule 28 framework, the extraordinary support for proposed Rule 24 underscores its considerable merit. For the County Attorney for the second-largest county in the state to welcome Rule 24's deterrence and correction of improper peremptory strikes speaks volumes to its reasonability and workability. (Conover Cmt.). This Court constituted the Commission on Diversity, Equality, and Justice to analyze and make proposals about issues just like those in the Petition. So when that Commission comments to this Court that the Petition is a sound, well-studied, reasonable solution to a real problem, that should matter in the Rule 28 process. (Comm'n on Minorities Cmt.). And it should likewise matter that the Arizona Black Bar, Los Abogados, and the Arizona Asian American Bar Association – all of which represent the interests of prosecutors, defense attorneys, and civil attorneys of all specialties – see the problem, the need for action, and that Rule 24 is the right solution. No representative of minority communities has written against proposed Rule 24. Washington State's Chief Justice, associations of lawyers working with Washington's analogous rule, and groups studying it, have thoughtfully explained to this Court that it works well. (C.J. González Cmt.). They have debunked the parade of horribles that attends any reform proposal – that it will clog the courts with collateral disputes or excessive appeals.

Finally, the State Bar – which includes prosecutors and defenders, as well as civil practitioners – favors Rule 24. The criminal practice committee of the State Bar, which consists of roughly equal proportions of prosecution and defense practitioners, did not offer a split or hedged recommendation. It proposed adopting Rule 24. The Board of Governors, which speaks for all of the Bar – prosecution, defense, liberal, conservative, urban, rural – then recommended it to this Court. Given the State Bar's traditional role in assisting this Court by proposing rule changes and comments on them, memorialized in this Court's comment to Rule 28, that too should matter here.

II. THE ARGUMENTS OF THE SMALL NUMBER OF COMMENTERS OPPOSED TO PROPOSED RULE 24 FAIL BADLY.

A. While Even Some Opponents of the Proposal Agree That the Data Support Reform, the Very Few Opponents Who Claim There Are No Arizona Data Supporting the Proposal Are Wrong.

The primary argument of the proposal's few opponents is that there is no racial discrimination in the selection of Arizona juries because there are no Arizona data proving this point – as if Arizona were unmoored to broader American culture and the proofs of racially biased jury selection in other states. These commenters ignore ample data from across the country showing that *Batson* results in the disproportionate striking of minority jurors, and the mountains of academic literature discussing why *Batson's* flawed framework fosters discrimination, without explaining why Arizona would be any different. Thus, the Mohave County Judges "reject[] the proposition that *Batson* is 'widely recognized as a failure' in mitigating a party's use of peremptory challenges to intentionally strike prospective jurors based on race." (Mohave Cty. Cmt. at 2). The Arizona Prosecuting Attorneys' Advisory Council (APAAC) agrees: "It is likely Arizona prosecutors and trial courts are selecting juries in an unbiased and fair manner…. [T]here is nothing but conjecture and limited anecdotal evidence presented that there is a real problem with Arizona's jury selection in 2021." (APAAC Cmt. at 2). Without addressing the data in the Petition concerning racial bias in American jury selection,

another comment dismisses Petition R-21-0008 as "a solution looking for a problem." (AMA/Chamber Cmt. at 10). While conceding that "peremptory challenges may be a source of bias," the MCAO asserts that the claimed absence of "actual Arizona data" makes the Petition's premise "guesswork." (MCAO Cmt. at 4).

The data cited in the Petition are ample to support the proposed reforms in Arizona. *But there is more.* After the Petition was filed, Maricopa County released data showing that prosecution peremptory strikes in 2019 in Maricopa County's downtown courthouse disproportionately removed racial minorities from Arizona juries. The percentage of minority jurors in Maricopa County is substantially less than their share of the population. Thus, following the data, as even the few stakeholders who mistakenly dismiss the problem as fictive argue we should, this Court must act.

1. Maricopa County's 2019 Data Powerfully Demonstrate the Disproportionate Use of Peremptories Against Black and Native American Venirepersons

On May 14, the Maricopa County Superior Court put to rest for once and for all the false defense that peremptory challenges in Arizona are not used to disproportionately, and systematically, exclude jurors of color from Arizona juries. On that day, that Court released 2019 data for its large downtown Phoenix courthouse, covering the treatment of 81,745 persons summoned for criminal jury duty, showing the use of peremptory challenges by race (though not by Hispanic non-white status[1]). While the Black population in Maricopa County in 2018 was 5.92%, the venire in 2019 in the downtown Phoenix courthouse in Maricopa County was only 4.15% Black. *See* App'x 1 ("Demographic Descriptive Analysis of Jury Pool and Jurors in an Arizona Superior Court"); App'x 2 ("May 2021 Report: Racial and Ethnic Representation

[1] The Batson Working Group requested these data from the Maricopa County Superior Court on May 17, and will supplement this Reply after June 1 with statistical analysis of the treatment of Hispanic venirepersons in criminal matters after the data are received.

Through the Jury Selection Process").[2] The prosecution used 5.82% of its peremptories against Black venirepersons, ***thus striking them 40.2% more frequently than the Black share of the venire***. (*See* App'x 2, 3). While the Native American population in Maricopa County in 2018 was 2.09% (*see* App'x 1), the venire in all of 2019 in the downtown Phoenix courthouse in Maricopa County was only 1.36% Native American. Yet the prosecution used 2.04% of their peremptory strikes against Native Americans ***– thus striking them 50% more frequently than the Native American share of the venire***. (*See* App'x 2, 3). This disproportionate exercise of peremptory strikes also exists in the 2019 Maricopa County civil case data, although not to the same degree. Blacks are not struck meaningfully disproportionately by civil defense lawyers, though Native Americans and Hispanics of any race are. (*See* App'x 2, 3).

Thus, it is undeniable that minority jurors are being disproportionately stricken from Arizona juries, and it matters not whether such exclusion results from conscious or unconscious bias or is simply the byproduct of *Batson's* flawed framework. This data thus answers this Court's question as to "whether peremptory challenges of jurors systematically reduce the representation of minorities…". Admin. Order 2021-135, at (f). ***They do.*** If the prosecution had used peremptories against Black venirepersons at precisely the frequency of Black persons in the venire (4.15%) instead of overstriking them with peremptories by 40%, the prosecution would have removed 97 Black venirepersons instead of 137 Black venirepersons. Adding those 40 Black jurors into empaneled juries would have raised the number of Black jurors empaneled from 238 to 278 – so they would equal 5.82% of seated jurors. ***That is almost exactly the 5.92% of Maricopa County that is Black, per 2018 Census data***. The analysis is similar for Native Americans, who the prosecution struck by 50% more than their population in the venire. If the prosecution had used peremptories against Native Americans in

[2] Appendix 3 ("Mathematical Notes") shows the derivation of each of the percentages set forth in this Reply from the data in Appendices 1 and 2.

proportion to their presence in the venire (1.36%), they would have removed 32 rather than 48 Native American venirepersons. Adding in those missing 16 Native American jurors would have adjusted the total of Native Americans empaneled from 49 to 65 – so they would equal 1.36% of seated jurors. While that would not restore Native American representation to that in Maricopa County's general population, it would restore it to the level in the venire. Our current *Batson*-grounded system of peremptory challenges pushes Black and Native American representation further from the levels of those minorities in Maricopa County's population. The current system of peremptories thus "systematically excludes" these minorities – this Court's question in A.O. 2021-35.[3]

It is also important to note, as emphasized in Petition R-21-0020, that the Maricopa data also demonstrates that minority jurors are significantly underrepresented on juries as compared to their percentages in the corresponding population. *See* Petition R-21-0020 at pp. 12-13 (Black, Native American, and Hispanic jurors underrepresented by 16%, 51%, and 21% in criminal cases, and by 24%, 76%, and 16% in civil cases). Although other factors may contribute to those stark statistics, the disproportionate use of peremptory challenges is certainly one of them. By increasing the representation of minorities on Arizona juries, proposed Rule 24 will operate to address both the disproportionate use of peremptory strikes that is now established by the foregoing

[3] Any suggestion that these data do not show systematic exclusion is spurious. It may be suggested by opponents of this reform that because the eventual representation of Black jurors among empaneled jurors (5.0%) exceeds their representation in the venire (4.15%), there is no *aggregate* racism because the defense's *understrikes* of minorities balance out the prosecution's *overstrikes* of minorities. But the defense isn't chafing against *Batson*'s limits when it strikes a White juror in what remains a mostly White jury. Moreover, the disproportionate exercise of such strikes by the prosecution is on top of the already-reduced representation of Black jurors in the overall venire as compared to the population, which the proposed Rule will help address. If pointing to "dueling racisms" is the best defense for the current system, it is even clearer than it was before the Maricopa data were released that this Court must act to curb the ills *Batson* fosters.

"specific" data, as well as the overall imbalance between population percentages and the percentage of seated jurors of color. That can only be a good thing.

2. Arizona Case Law Shows the Profound Weakness of *Batson*

The Batson Working Group trusts that the data discussed above will reframe for this Court the profound weakness of *Batson* as applied in Arizona. As the Petition demonstrated in its Appendix D, Arizona's *Batson* law is littered with strikes based on demeanor or attributed judgments about minority jurors that result in their systematic exclusion. Indeed, it is unfathomable that a legal system truly designed to prevent underrepresented groups from being unfairly stricken from juries could result in nearly all (149 out of 160) appellate *Batson* cases in Arizona upholding the strike. And it is not even that these Arizona appellate decisions were necessarily decided incorrectly under current law; instead, the *Batson* framework dictates these results far too often.

Batson thus upholds the following "neutral" explanations:

- *State v. Brown*, No. 1CA-CR 13-0608, 2014 WL 2565551 (Ct. App. Jun. 5, 2014) (no *Batson* violation for unproven statements by striking party that there were "serious concerns about [Asian American juror's] ability to understand English, legal terminology, and also keep up with the speed at which trial proceeds based on... his ability to articulate the English language" during jury voir dire; concern that juror would not understand "slang terminology and lingo, cop talk, and all the likes" during trial. The juror spoke no "more than a sentence or two during voir dire" and did not require the assistance of an interpreter.).
- *State v. Young*, No. 1CA–CR 12–0455, 2013 WL 4828246 (Ariz. Ct. App. Sept. 10, 2013) (no *Batson* violation where objecting party justified strike of Black juror with allegations that juror's demeanor was inattentive, did not seem to care, and made no eye contact, had offered little information to questions, and had not attended college).
- *State v. Palafox*, No. 2CA–CR 2012–0101, 2013 WL 709624 (Ariz. Ct. App. Feb. 26, 2013) (no *Batson* violation when objecting party stated that one juror seemed nonchalant and "the kind of person who might...think this amount of drugs would be very trivial").

- *State v. Soto*, No. 2CA–CR 2008–0405, 2011 WL 1733531 (Ariz. Ct. App. May 5, 2011) (no *Batson* violation when objecting party referred to Hispanic juror as "a slob, sleeps all day, and he takes tickets for a couple of hours at the movie theatre.").
- *State v. Garcia*, No. 2CA-CR 2009-0278, 2010 WL 3169411 (Ariz. Ct. App. Aug. 11, 2010) (no *Batson* violation when the objecting party claimed that Hispanic male juror was not being honest in describing his neighborhood which the state asserted was gang-oriented).
- *State v. Vasquez*, No. 2 CA-CR 2007-0363, 2008 WL 4767191 (Ariz. Ct. App. Oct. 31, 2008) (Hispanic juror stricken for being too quiet, lacking eye contact, and employment as a UPS driver which may be associated with an increased likelihood of driving under the influence).

Reading those cases and knowing that prosecution peremptory strikes are disproportionately used to exclude communities of color, the continued use of our current system is difficult to justify. Does Arizona want a predominantly White-preferring system of juror-screening that – when strikes of minorities are questioned under *Batson*, however rarely – adopts demeanor, attitude, and class-based disparagements of the minority jurors? Even if cast as "neutral," the above demeanor-based explanations are a kind of "neutrality" that operates at the margins to protect a system of proven overstriking of persons of color, shown by the only relevant Arizona data a public authority has collected. That should be enough. This Court should adopt Rule 24, to deter and correct the discriminatory effects of the use of peremptory strikes.

3. One Objector Agrees That the Petition's Data Are Enough to Justify Action, While the Other Objectors Arguing "No Data" Fail to Rebut or Address Other Data Showing Bias in the Use of Peremptory Strikes.

Importantly, the only substantive response by any of the five objectors to the data in the Petition about the misuse of peremptory strikes ***is to agree with the Batson Working Group and Judges Swann and McMurdie that the data reflect a real problem***. *See* Committee on Super. Ct. Cmt. on Pet. R-21-0020 ("Petition R-21-0020 and competing Petition R-21-0008 present strong evidence of how peremptory strikes

have been misused and have resulted in juries that are not representative."). This Court is hearing from Court of Appeals judges and two Supreme Court-constituted Commissions (on Minorities, on the Superior Court) that there is a real problem. The remaining four commenters who profess to prefer data as the basis for decision-making do not discuss or rebut the convincing data in the Petition, or Petition R-21-0020. *See* MCAO Cmt., at 2-3 (claiming "the absence of any specific data" and omitting mention of Petition's data); AMA/Chamber Cmt., at 7 (asserting without explanation that out-of-state data cannot suggest that Arizona has like problems); Mohave Cty. Cmt. (omitting to mention or discuss data); APAAC Cmt. (same). These objectors have no data to support their speculation that while *Batson* may be broken elsewhere, it is somehow working in Arizona. Any such speculation is now firmly rebutted by the newly-produced Maricopa County data.

B. The Rule Is Not "Unworkable" – It Works Well in Washington State, Where There Is Not More Appellate Litigation Over GR 37 Than There Was Over Peremptories Before GR 37.

Opponents of Petition R-21-0008 are united in conclusorily asserting that the proposed rule is somehow unworkable. (Mohave Cty. Judges Cmt. at 1: calling Rule 24 "impracticable"; MCAO Cmt. at 2: "untenable and illogical"; APAAC Cmt. at 3: "unworkable"). The unfounded concerns include these: "Every strike will be challenged." Mohave Cty. Judges Cmt. at 1. The rule will somehow be impossible for trial judges to use. (APAAC Cmt. at 3: "The presumptions being recommended would be difficult, if not impossible, for a trial court to monitor."). And there will be too many appeals. (MCAO Cmt at 5: Rule 24 will "serve only to keep appellate courts busy").

This is all wrong. These opponents are right to suggest that this Court should be guided by how GR 37 is operating in Washington. (*See* MCAO Cmt. at 5). Washington's experience is precisely the opposite of the ominous outcome the comments invoke.

The Chief Justice of Washington's Supreme Court, Stephen González, explained Washington GR 37's effectiveness in his Comment:

> Our state's experience with General Rule 37 has been positive in multiple intersecting ways. Based on what I have been hearing from other judges and based on the cases my court has reviewed, the rule appears to be working to deter and mitigate racial discrimination in the use of peremptory challenges. Suspect challenges are now being subjected to meaningful scrutiny and oversight for the first time. More importantly, the work that our state's entire legal community has been undertaking to effectively implement the rule has been both impressive and invaluable. . . . All of this has brought the issue of racial bias to the forefront in ways it was not before and would not be today without the new rule. … This, standing alone, has more than justified our state's new rule.

(C.J. González Cmt.)

In addition to the endorsement of Chief Justice González, three other reputable Washington organizations have submitted supporting Comments: the Loren Miller Bar Association (LMBA), the oldest minority bar association and largest organization of African-American attorneys in the United States; the Korematsu Center for Law and Equality at Seattle University School of Law (Korematsu Center); and Washington Association of Criminal Defense Lawyers (WACDL). These Washington commenters all confirm – with far more context, specificity, and detail than is present in the critical comments filed against Rule 24 – that GR 37 is working as intended and has not resulted in any of the problems incorrectly anticipated by opponents of proposed Rule 24.

1. GR 37 Has Not Increased the Time Spent on Jury Selection.

The Korematsu Center reports: "Practitioners have reported that the rule is triggered in cases only from time to time; that the rule has been followed without fanfare or disruption; and that the rule appears to be accomplishing its purpose, in large part because peremptories are being attempted far less often in circumstances that would raise concerns about potential racial bias." (Korematsu Center Cmt. at 2). Likewise, WACDL reports that "the rule has greatly increased awareness of the issue, and this

educational effect appears to have resulted in a much more careful, limited exercise of peremptory challenges by attorneys." (WACDL Cmt. at 2).

2. GR 37 Has Not Proven Difficult for Judges to Implement. To the contrary, reports indicate that GR 37 is easier for judges to implement than prior, *Batson*-dominated practice: "[W]hen attorneys do exercise questionable peremptory strikes, judges are much more willing to sustain GR 37 objections than they were under *Batson*'s impossible standard." (WACDL Cmt. at 2). "Judges have also reported applying the rule to preclude suspect peremptories, which in itself is a departure from prior practice, and a very promising one." (Korematsu Center Cmt. at 2).

3. GR 37 Is Not Increasing Appeals. The Korematsu Center notes that the number of appellate decisions made thus far under GR 37 is comparable to the number under the prior *Batson* framework. (Korematsu Center Cmt. at 2). Significantly, WACDL reports that: "while appellate courts had never reversed for a *Batson* violation in the decades prior to *Saintcalle*, 309 P.3d at 335, they have enforced GR 37 when both prosecutors and defense attorneys have attempted to skirt its anti-bias imperatives." *See State v. Listoe*, 475 P.3d 534, 536 (Wash. Ct. App. 2020) (reversing where objective observer "could view race as a factor in the State's use of the peremptory challenge); *State v. Omar*, 460 P.3d 225, 226, review denied, 475 P.3d 164 (2020) (affirming trial court's disallowance of defense peremptory challenge because "an objective observer could view race as a factor in the use of the challenge"). (WACDL Cmt. at 2).

4. GR 37 Works, in Part Because Washington's Courts Undertook Robust Education of its Bar, as This Court Did Before it Implemented Civil Justice Reforms in 2018. Notably, Washington's adoption of GR 37 was accompanied by robust education efforts. (C.J. González Cmt. at 2). Because adopting Rule 24 would be a significant change, it would likewise be prudent here as well. That education would help ensure that any rule this Court adopts would operate smoothly and would serve its intended purpose, as GR 37 does in Washington.

C. The Objectors' Suggestion That Rule 24 Would Require "Mini-Trials" Is Wrong, as Rule 24's Procedure Is Either More Streamlined or No Less Efficient Than *Batson*.

The objectors argue that Rule 24 will be difficult to apply, resulting in "mini-trials" and excessive appeals – arguments inevitably raised when any significant rule change is proposed. In 1993, this Court adopted Rule 26.1's disclosure requirements over opposition arguing that the new rule would somehow drown civil suits in "satellite litigation." These complaints sounded again in 2018 when a commission established by this Court proposed Ariz. R. Civ. P. 26.2's tiering regime. In both cases, the new rules worked well, the sky did not fall, and "satellite litigation" did not flood our courts.

Commenters concerned about the supposed complexity of Rule 24 do not compare it to *Batson*. Yet, if one does, one sees that Rule 24 is no more complex than *Batson*, and likely simpler. Just as current *Batson* procedures require no invasive individual questioning of jurors, Rule 24's procedures likewise require no such thing. If a peremptory challenge is made and an objection lodged under Rule 24, the Superior Court must evaluate whether, under a totality of the circumstances, a reasonable person could view race or another protected status as a factor in the exercise of the strike. This is an objective inquiry, which requires less "fact-finding" than the current *Batson* procedures requiring the trial court to delve into the subjective intent of the striking lawyer to assess "intentional" bias, which is likewise a question of inference, as no one announces their subjective, intentional bias while making peremptory strikes.

Two comments claim that Rule 24 would somehow usher in a requirement that judges quiz jurors about their group status to implement the Rule – though they don't point to any language making it so, for there is none. (APAAC Cmt. at 4; MCAO Cmt. at 5-6). Nothing could be further from the truth. Under *Batson* and the Arizona Constitution, race, gender, and religion are already all barred as grounds to strike a juror. Yet under *Batson*, the Court is not required to quiz every juror about their race, gender,

or religion. A juror's current protected status based on race, gender, or religion is either apparent or not, and the Court decides any *Batson* challenge based on information offered by the juror, observed by the Court, or elicited in voir dire.

Rule 24 is just the same. If nothing stated by a juror, elicited in voir dire, or observed by the Court shows that a juror has a protected status under the rule, there is no basis for overturning a strike. As under *Batson*, the issue presented in the trial court is whether any relevant status is apparent from the existing record and could reasonably be viewed as a factor in the strike. That objective inquiry in no way requires the trial court to ferret out information from the juror concerning their status, any more than a *Batson* challenge requires the Court to ask ethnically ambiguous jurors if they are Black, Hispanic, Asian, or Native American.[4] In current law and under Rule 24, the Court judges what it can see, and what is argued to it – like *Batson*, Rule 24 does not authorize or require anything more or less.

D. Arizona Courts Will Not Have Difficulty Using a Rule Based on a Reasonable Person Standard, One of Law's Most Venerable and Widely Used Tests.

Painting tried and true concepts and standards as suddenly problematic, MCAO argues that Rule 24's requirement that the trial court determine, under a "totality of the circumstances," whether any "reasonable person" could view a juror's protected status as a factor in exercising the strike, is "concerningly vague." This objection lacks merit, as the Rule's "reasonable person" test is familiar not only to trial judges, but to anyone who has taken Torts. The same is true of the Rule's "totality of the circumstances" test, which Arizona courts use, *inter alia*, to determine the termination of parental rights and

[4] For example, if a strike is exercised, the striking lawyer must explain the basis for the strike, and the opposing lawyer then has an opportunity to explain the basis for the objection. (*See* App'x A to Petition, at Rule 24(d), (e)). If a juror has a status not apparent in the record which is not known by the lawyers and the judge, the objection necessarily fails; in that case, no reasonable person could view any such juror's unknown status as the basis for a strike.

whether error in a criminal case may be considered fundamental. (*See* State Bar Cmt. at 8). The Rule's standard requiring a determination of whether bias "could" be a factor in the use of a strike is also well-established in other contexts, such as juror and prosecutorial misconduct. (*See id.*). GR 37's similar "objective observer" standard has proven simple to apply, as evidenced by Washington's Supreme Court extending it to other contexts. *See State v. Jefferson,* 429 P.3d 467, 480 (2018) (extending "objective observer test" of GR 37 to 14th amendment *Batson* analysis); *State v. Berhe,* 444 P.3d 1172, 1180-81 (2019) (extending GR 37 standard to analysis of juror misconduct).

E. The Objectors' Remaining Arguments Lack Merit.

1. Rule 24's Requirement that Demeanor-Based Objections be Corroborated are Sensible and Necessary to Prevent Pretextual Strikes. One commenter argues that Rule 24 will preclude all peremptory strikes based on juror demeanor, claiming that demeanor may signal that a juror "may not have the attention or motivation" to engage in the case. (AMA/Chamber Cmt. at 6). But Rule 24 allows demeanor-based strikes, so long as demeanor is not a proxy for improper racial or other discrimination. Rule 24 thus strikes a fair balance between these competing concerns, retaining the peremptory strike, but requiring that the striking party give reasonable notice so that the demeanor-based objection can be corroborated by opposing counsel or by the judge. *See* Proposed Rule 24(h). If someone can corroborate the demeanor-based reasons, the strike will stand. If not, the strike will fail. All this does is undo *Batson's* grant of unilateral power to the lawyer making the peremptory strike to place the strike beyond question by proffering any superficially neutral reason for it. Washington's GR 37 contains a virtually identical procedure, which by all accounts is operating as intended.

2. The Rule's Provisions on the Timing of Objections are Sensible. The MCAO objects to the Rule's provision requiring that an objection be made "before the jury is empaneled, unless information becomes known that could not

reasonably have been known before the jury was empaneled." This provision was drawn from Washington's GR 37 and the law of other states, which permit a *Batson* challenge to be raised after the jury is empaneled in limited circumstances. *See* Petition R-21-0008 at p. 14. In the case of such an objection, the remedy is a mistrial. Though there is no Arizona law on point, the Rule's requirement that the objection be made before empaneling unless the basis could not reasonably have been known until later, is sensible and would only come into play in rare cases where facts which could not reasonably have been learned earlier come to light after a jury is sworn. This provision could also be removed from the proposed Rule without impacting its other provisions.

3. *The Rule Does Not Render Peremptories – Which Are a Creature of Rule and Not Constitutional Right – Illusory, But Properly Subordinates Them to the Constitutional Right to Fair Trial by a Jury of One's Peers.* Several objectors complain that the Rule imposes too high a burden on the exercise of peremptory strikes, rendering them "all but illusory." (*See, e.g.,* AMA/Chamber Cmt. at 5). They argue that peremptory challenges are a "bedrock principle of empaneling a fair and impartial jury," and complain that the Rule effectively "destroys" it. (*Id.* at 8-9). They conclusorily assert that it is unfair to shift the burden of proof to the party exercising the strike and that the Rule gives trial courts "unchecked power" to decide whether a peremptory strike is discriminatory. (*Id.* at 5)

It is *Batson*, of course, that vests "unchecked power." Any neutral explanation works under it. And it functions to systematically exclude minorities, as the Maricopa County data discussed in Section II.A.1. demonstrate, as Black and Native American jurors are struck 40% and 50% more by prosecutors than their share of the venire. If those strikes are challenged under *Batson*, the very un-neutral sounding "neutral" explanations illustratively listed on pages 7-8 of this Reply are all sufficient to justify the strike. As the Petition demonstrated, there are almost no successful *Batson* challenges

sustained through appeal in Arizona. (*See* Petition, App'x D). Thus, it is the promise of *Batson* that is illusory and vests "unchecked power," which Rule 24 aims to correct.

More fundamentally, these comments ignore that peremptory challenges are not a constitutional right, whereas the right to jury service and to a jury free from the effects of improper bias are constitutionally protected. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 128 (1994) ("Potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice"). The proposed Rule achieves the right balance, preserving the practice of peremptory strikes with reasonable limitations, while ensuring that such challenges do not emanate from conscious or unconscious bias.

4. The Objection That the Rule Protects Too Many Arizonans From Discrimination Is a Poor One. The objectors argue that the Rule is overbroad, claiming it will insulate "virtually every juror" from peremptory challenges. (*E.g.,* Mohave County Judges Cmt. ("virtually all jurors are members of a 'protected group'"); AMA/Chamber Cmt. at 4-5 (same)). First, this reflects a fundamental misunderstanding of the concept of discrimination. White people are also protected from race discrimination in jury selection and under this Court's Canon 2.3(C). Thus, the O.J. Simpson criminal case voir dire, in which one White juror made it to the jury from a 40% white venire, evidenced discrimination. Anti-White jury discrimination is not a common problem, but that is not because some people are not protected from race or gender discrimination. All are. This Petition is simply about how to structure that protection. Second, the objectors never grapple with this Court's Canon 2.3(C), which recognizes that no juror should be excluded from jury service based on attributes generally protected by the constitution or other law. Third, the objectors never explain why – contrary to Canon 2.3(C) – it would be a good policy to ignore discrimination against a potential juror by reason of their disability, age, or sexual orientation in the exercise of peremptory challenges. No commenter disputes that the aged, the disabled,

and LGBT persons face discrimination. *See, e.g.,* Arizona Center for Disability Law Cmt. at 3-5 (explaining history of discrimination against the disabled and the capability of disabled persons to serve on juries); AZ-LGBT Bar Association Cmt. at 6-10 (summarizing studies); Lambda Legal Cmt. at 4 (exercise of peremptory strikes against gay jurors). The objectors fail to justify breaking Canon 2.3(C)'s promise that Arizona's courts will not ratify bias based on group status. Rule 24 makes that promise real.

III. PROPOSED RULE 24 IS A BETTER SOLUTION TO THE DISCRIMINATORY USE OF PEREMPTORY STRIKES THAN OTHER ALTERNATIVES.

A. Rule 24 Is a Better Solution than the Wholesale Elimination of Peremptory Challenges Proposed in Petition R-21-0020.

Petition R-21-0020 suggests abrogating peremptory challenges as a means to eliminate discriminatory use of peremptory strikes. Yet peremptory strikes serve an important function. They allow parties to strike potential jurors who could not be excused for cause, but who may not get along with other jurors, or who may have, or think they have, specialized knowledge, or who indicate a partiality. Moreover, the safety valve of the peremptory strike eliminates automatic reversal on appeal from an erroneous denial of a for-cause challenge. As the State Bar pointed out:

> The principal value of the peremptory is that it helps produce fair and impartial juries. [Citation omitted.] 'Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.'

(State Bar of Arizona Cmt. at 2) (citations omitted).

Wholesale elimination of peremptory challenges would lengthen voir dire due to the need for more in-depth questioning to root out information relevant to a for-cause challenge. Without peremptory challenges, the number of challenges for cause will likely increase as will appeals from the denial of challenges for cause.

By contrast, retention of peremptory strikes and adoption of proposed Rule 24 will not unreasonably burden the Court, but will refocus voir dire on legitimate challenges for cause that should be addressed. Under Rule 24, parties can still use peremptory strikes to remove jurors the Court declines to strike. Further, the Rule 24 procedure addressing an objection is like the procedure utilized when addressing a *Batson* objection. If adopted, successful Rule 24 challenges will result in empanelment of qualified jurors who will safeguard the jury's diversity. The abrogation of peremptory challenges, however, produces no such benefit and makes it more likely the empaneled jury will contain jurors with hidden implicit biases or even explicit biases that are not disqualifying because the juror then offers assurances of impartiality. Thus, elimination of peremptory strikes increases the likelihood "that biased jurors will be allowed onto the jury" due to the lack of an articulable challenge for cause, or a challenge that is insufficient to overcome a prospective juror's assurance of impartiality. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring).

The breadth of opposition to Petition R-21-0020 speaks volumes. Judges, prosecutors, defense attorneys, professional legal associations, business organizations, and many attorneys are strongly opposed to the abrogation of peremptory challenges. While the Arizona Black Bar (ABB) took no official position on the proposed rule, the ABB did express "concern that complete abolition of peremptory strikes could have unintended and undesirable consequences, including eliminating the process of validly striking biased jurors, prolonging voir dire, and increasing appeal rates. . . ." (ABB Cmt. to Petition R-21-0020). Reforming the *Batson* procedure through the adoption of Proposed Rule 24 provides an efficient and effective framework for rooting out intentional and unintentional discrimination against prospective jurors while still retaining the benefits of the peremptory challenge.

B. Merely Reducing the Number of Permitted Peremptory Strikes Does Not Solve the Problem of *Batson* Unless Coupled With the Adoption of Proposed Rule 24.

Proposals to retain the reduced number of peremptory strikes put in place during the pandemic by this Court's Administrative Orders fail to address the differential exclusion of minority jurors evident in the 2019 Maricopa County data. The problem is that *Batson* fosters disproportionate strikes of minority jurors by prosecutors and civil defense lawyers. Merely reducing peremptories would not remedy the problem. Without proposed Rule 24, the *Batson* challenge will remain the sole remedy for discrimination in jury selection, and as the Petition and this Reply show, the *Batson* challenge is a weak and failed remedy. If this Court continues with reduced peremptory strikes, it should also adopt proposed Rule 24 to cure the exclusions *Batson* engenders.

C. Permanent Study Is the Avoidance of Solution.

Several opposing comments urge the Court to delay reforms until after the work of this Court's Task Force on Jury Data Collection, Practices & Procedures is completed and can be studied. Yet this Court's Task Force is not undertaking more data collection, and this Court's Administrative Order doesn't direct it to undertake any. As Pima County Attorney Conover aptly observed, "approving the Petition now would not preclude [other] improvements if and when further data becomes available." (Conover Cmt. at 2) The newly-produced Maricopa data are striking and seemingly without analog elsewhere. Maricopa County not only comprises more than half of all litigation in Arizona but is also more diverse than many counties. These data are thus particularly helpful to this Court in understanding the perils of *Batson*. Thus understood, this Court has compelling reasons to act, and to act now.

CONCLUSION

For all of these reasons, those in the original Petition, and in any supplement containing later-provided data, this Court should adopt the proposed Rule 24.

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Respectfully submitted,

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Copy of the foregoing electronically filed
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on June 1, 2021

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