APPENDIX

APPENDIX

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APPENDIX A

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI

JEAN FINNEY, 536 Hackberry Street Amazonia, Missouri 64506 Plaintiff, v. MISSOURI DEPARTMENT OF CORRECTIONS, Defendant.	)	Case No.: 18BU-CV04465

FIRST AMENDED PETITION FOR DAMAGES

Plaintiff, JEAN FINNEY, by and through undersigned counsel, states the following as her First Amended Petition for Damages:

1. Plaintiff is, and was at all relevant times, an individual residing in Amazonia, Andrew County, Missouri.

2. Defendant, Missouri Department of Corrections ("Defendant MDOC") is a state governmental agency with a principal place of business at 3401 Faraon Street, St. Joseph, Buchanan County, Missouri 64506.

3. At all relevant times, Defendant MDOC had in excess of six (6) employees.

4. At all relevant times, Defendant MDOC was, and is, Plaintiff's employer as defined by, and within the meaning of, the Missouri Human Rights Act (MHRA), MO. REV. STAT. § 213.010(7).

5. Plaintiff's cause of action is filed against Defendant pursuant to the MHRA, MO. REV. STAT. § 213.010 et seq.

6. Plaintiff's cause of action accrued before August 28, 2017.

7. On or about January 23, 2018, Plaintiff timely filed her initial Charge of Discrimination with the Missouri Commission on Human Rights ("MCHR") in which she complained of ongoing and continuous actions by Defendant, alleged Defendant discriminated against her on the basis of her sex, that Defendant created a hostile work environment, and that Defendant retaliated against her based on her

objections to and/or complaints regarding Defendant's discrimination against her.

8. The Charge of Discrimination Plaintiff filed with the MCHR alleged Defendant engaged in discriminatory actions that are being raised in this lawsuit or, alternatively, alleged conduct within the scope of the administrative investigation which could reasonably be expected to grow out of the Charge of Discrimination.

9. On or about July 24, 2018, the MCHR issued its Notice of Right to Sue, and Plaintiff is filing her Petition within 90 days of her receipt of said Notice.

10. On or about March 18, 2019, Plaintiff timely filed her second Charge of Discrimination with the Missouri Commission on Human Rights ("MCHR") in which she complained of ongoing and continuous actions by Defendant, alleged Defendant discriminated against her on the basis of her sex, that Defendant created a hostile work environment, and that Defendant retaliated against her based on her objections to and/or complaints regarding Defendant's discrimination against her.

11. The second Charge of Discrimination Plaintiff filed with the MCHR alleged Defendant engaged in discriminatory actions that are being raised in this lawsuit or, alternatively, alleged conduct within the scope of the administrative

investigation which could reasonably be expected to grow out of the second Charge of Discrimination.

12. Plaintiff has not yet received the Right to Sue from the MCHR for her second Charge of Discrimination.

13. The harassment, discriminatory acts, and/or retaliatory acts complained of in Plaintiff's Charges of Discrimination and in this Petition are part of an ongoing and continuous pattern and practice of discrimination and/or retaliation by Defendant.

14. Pursuant to MO. REV. STAT. §§ 213.111.1, venue is appropriate in this Court because the discrimination conduct alleged herein took place in Buchanan County, Missouri.

15. Plaintiff has fulfilled all conditions precedent to the bringing of her causes of action and has duly exhausted all administrative procedures prior to instituting this lawsuit in accordance with the law.

FACTS COMMON TO ALL COUNTS

16. Plaintiff is a lesbian.

17. Plaintiff's behavior and appearance is not stereotypical of non-lesbian and/or feminine women in that she carries herself more like a man, and wears her hair short in a style similar to that of a typical man.

18. In addition, or in the alternative, Defendant perceived Plaintiff's behavior and appearance as not that which they expected of a woman in that Plaintiff does not dress or act in a stereotypical female manner and wears her hair shorter than what Defendants perceived to be appropriate for a woman.

19. Throughout Plaintiff's employment with Defendant MDOC, she has been subject to jokes, negative comments, and harassment about her appearance and behavior.

20. At all relevant times, Ryan Crews (Crews) and Major Christopher Brewer ("Brewer") supervised Plaintiff.

21. Plaintiff began her employment with Defendant MDOC on July 1, 2002, working as a Correctional Officer at Western Reception, Diagnostic, and Correctional Center (WRDCC).

22. In or around the beginning of 2011, Plaintiff began working as Correctional Officer III ("COIII") with Defendant MDOC.

23. Jon Colborn ("Mr. Colborn") has been Plaintiff's coworker since she began working as a COIII.

24. In or around the beginning of 2011, Plaintiff began a relationship Gaye Colborn ("Ms. Colborn"), Mr. Colborn's ex-wife.

25. Ms. Colborn worked for Defendant MDOC as a Functional Unit Manager.

26. When Plaintiff began a relationship with Ms. Colborn, Mr. Colborn began sending derogatory messages about Plaintiff to Ms. Colborn, including but not limited to the following:

a. Mr. Colborn indicated he would try and take Plaintiff's job away from her;

b. Mr. Colborn indicated he would try to convince others to file complaints about Plaintiff; and/or

c. Mr. Colborn referred to Plaintiff as Ms. Colborn's "boyfriend" and "hubby."

27. Mr. Colborn also made threatening comments to Ms. Colborn, including but not limited to the following:

a. He threatened to take Ms. Colborn's job away from her;

b. He threatened to take Ms. Colborn's house away from her; and/or

c. He threatened to take Ms. Colborn's children away from her.

28. From approximately 2008 to 2015, Mr. Colborn consistently attempted tointerfere with

Plaintiff's work productivity by doing, among other things, the following:

a. Not sharing necessary information between shifts;

b. Not being present to give Plaintiff needed keys;

c. Throwing keys at Plaintiff;

d. Ignoring plaintiff when she communicated critical information; and

e. Telling subordinates pertinent information before telling Plaintiff.

29. In or about September 2015, Plaintiff and Mr. Colborn applied for the same promotion to Corrections Supervisor.

30. Mr. Colborn sent Ms. Colborn messages saying he would do what he could to keep Plaintiff from getting promoted.

31. Defendant MDOC offered the promotion to Plaintiff, and she started her new position as Corrections Supervisor on or about November 1, 2015.

32. Mr. Colborn filed a grievance with Brewer and Defendant MDOC's Human Resources Department regarding Plaintiff's the promotion to Corrections Supervisor.

33. In or about March 2016, Plaintiff was on an interview panel and Carissa Staabs ("Staabs") was being interviewed.

34. As a result of the interview process in or about March 2016, Mr. Colborn made some of the following derogatory remarks regarding Plaintiff:

a. "Tardo boy;"

b. "Your tardo boy is working real hard to get in Staabs's pants;"

c. "Guess she's been chasing that for awhile;" and

d. "You may lose your roommate and lover;"

35. On or about August 23, 2016 and multiple times thereafter, Plaintiff complained to Brewer about Mr. Colborn's comments.

36. Brewer responded by directing Plaintiff to prove it or stating Plaintiff couldn't prove it.

37. Brewer told Plaintiff that Human Resources did not investigate her complaint because it did not affect her job, and that it was a supervisor issue.

38. To the best of Plaintiff's knowledge and belief, Brewer took Plaintiff's complaint to Defendant Crews, who then took Plaintiff's complaint to Cyndi Prudden ("Prudden").

39. To the best of Plaintiff's knowledge and belief, Prudden never took Plaintiff's complaint to the Human Resources Department.

40. Prudden told Ms. Colborn that Ms. Colborn acted inappropriately when she told Plaintiff about the messages from Mr. Colborn.

41. Crews told Plaintiff the Human Resources Department did not want to mediate the situation between Mr. Colborn and Plaintiff.

42. In or about September 2016, Mr. Colborn made a complaint to Defendant MDOC's Human Resources Department in which he accused complained Plaintiff of making derogatory remarks about him to subordinate staff.

43. Mr. Colborn's allegations that Plaintiff made derogatory remarks about him to subordinate staff was false.

44. Plaintiff was questioned by the Human Resources Department about Mr. Colborn's allegations.

45. On several occasions in or about October 2016, Plaintiff discovered her name was manually blacked out on the Institutional Phone list in the shared office space.

46. At least once weekly for approximately six to seven months in 2016, Plaintiff's name tag went missing from her locker.

47. On multiple occasions, Mr. Colborn made false complaints on behalf of third parties against Plaintiff.

48. In or about November 2016, Plaintiff met with Crystal Rardon ("Rardon") regarding Mr. Colborn's complaints on behalf of third parties.

49. In or about February 2017, Crews told Plaintiff she was found guilty of unprofessional conduct without any further explanation.

50. Defendants required Plaintiff to attend a class regarding professionalism.

51. On or about May 9, 2017, after Plaintiff made another complaint to Brewer, Crews announced during a shift meeting that a camera would be put in Plaintiff's office if the harassment didn't stop.

52. Plaintiff's coworkers became angry at a camera being placed in the office, causing Plaintiff to admit she was making complaints about Mr. Colborn.

53. In or around September 2017, Mr. Colborn made a complaint to Defendant MDOC's Human Resources Department in which he accused Plaintiff of calling his children names, such as "fat fucking cow" and "lazy."

54. Mr. Colborn's allegation that Plaintiff called his children names was false.

55. The Human Resources Department investigated Mr. Colborn's false complaint regarding Plaintiff's remarks about Mr. Colborn's children.

56. During the investigation into Mr. Colborn's complaint that Plaintiff called his children names, Plaintiff complained to the Human Resources Department about Mr. Colborn's discriminatory and harassing behavior.

57. Mr. Colborn also harasses and discriminates against other lesbian employees of Defendant.

58. On or around September 21, 2018, Plaintiff interviewed for a promotion within Defendant DOC.

59. In or around the middle of October 2018, the recommendations for the position were sent to Jefferson City for approval.

60. Plaintiff filed her lawsuit against Defendant MDOC on October 22, 2018.

61. On or around November 9, 2018, Defendant DOC was served the summons in this case.

62. The same day Defendant was served, Plaintiff was notified she did not receive the position.

63. The candidate that received the promotion was a male. He previously was unprofessional with a co-worker in front of subordinates, which was reported.

64. On December 10, 2018, Plaintiff was contacted by Samantha Lewis ("Lewis") from the Office of Professional Standards/Civil Rights Unit. Plaintiff was told they had completed an investigation and that a CAO or higher would meet with her to go over the findings.

65. On January 9, 2019, Plaintiff had still not been told about the investigation findings.

66. On February 8, 2019, Plaintiff received another email from Lewis stating it was the 30-day review from the investigation.

67. On February 12, 2019, Plaintiff against told Lewis she had not yet been spoken to concerning the outcome of the investigation. Plaintiff copied Matt Briesacher to this email.

68. On February 14, 2019, Plaintiff met with Warden Rick Stepanek ("Stepanek") about the investigation outcome.

69. Stepanek did not know all the details of the investigation. Plaintiff believes she should have met with Alana Boyles or Ryan Crews.

70. Upon Plaintiff's information and belief, none of Defendant MDOC's employees have been disciplined for the harassment and discriminatory treatment towards Plaintiff or any other lesbian employees of Defendant.

71. Defendant harassed Plaintiff, discriminated against Plaintiff, treated Plaintiff differently from her coworkers because of her gender, treated Plaintiff differently than her coworkers based on sex stereotyping, retaliated against Plaintiff, and/or created a hostile working environment in at least the following ways:

a. Sending derogatory messages about Plaintiff to Plaintiff's coworkers;

b. Making threatening comments to Plaintiff's coworkers;

c. Consistently interfering with Plaintiff's ability to work effectively;

d. Making threatening comments about Plaintiff;

e. Falsely accusing Plaintiff;

f. Filing false grievances about Plaintiff;

g. Making derogatory remarks about Plaintiff;

h. Blacking out Plaintiff's name on the Institutional Phone List;

i. Taking Plaintiff's name tag from her locker;

j. Making false complaints against Plaintiff on behalf of third parties;

k. Finding Plaintiff guilty of unprofessional conduct without explanation;

l. Mandating Plaintiff take a class regarding professionalism;

m. Humiliating Plaintiff in a shift meeting;

n. Passing Plaintiff over for promotions with a male;

o. Failing to adequately investigate Plaintiff's complaints of discrimination;

p. Failing to remedy the discrimination and/or hostile work environment about which Plaintiff complained; and

q. Permitting a sexually charged, sexual stereotyped, and/or hostile work environment to exist without attempting to remedy the situation.

72. Defendant had a reasonable opportunity to respond to and/or correct the harassment, discrimination, retaliation, and/or hostile work environment to which Plaintiff was subjected.

COUNT I
DISCRIMINATION BASED ON SEX IN VIOLATION OF THE MHRA

73. Plaintiff incorporates by reference all allegations of this Petition as if fully set forth herein.

74. Plaintiff, as a woman, is a member of a protected class within the meaning of MHRA, MO. REV. STAT. § 213.055.1.

75. Plaintiff's gender, the stereotypes accompanying her gender, and/or Defendant's perceptions regarding the stereotypes associated with being female, were contributing factors in Defendant's discriminatory actions, inactions, decisions, and/or conduct as alleged herein.

76. Defendant's discriminatory actions, inactions, decisions, and/or conduct affected the terms, conditions, and privileges of Plaintiff's employment as described herein.

77. Defendant's actions, inactions, decisions, and/or conduct constitute unlawful employment discrimination against Plaintiff in violation of the MHRA.

78. Defendant knew or should have known of the discrimination against Plaintiff based on Plaintiff's gender, the stereotypes accompanying her gender, and/or Defendant's perceptions regarding the stereotypes associated with being female.

79. Defendant failed to implement prompt and effective remedial action when they knew, or should have known, of the discrimination to which Plaintiff was subjected.

80. Defendant's actions and/or inactions occurred by and/or through their agents, servants, and/or employees acting within the course and scope of their employment.

81. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered, and will continue to suffer, damages including past and future lost wages and benefits; a detrimental job record; career damage and diminished career potential; garden-variety mental and emotional distress in the form of embarrassment, degradation, humiliation, anxiety, loss of enjoyment of life, and loss of sleep; pain and suffering; and other nonpecuniary losses. Plaintiff is also entitled to other appropriate equitable relief.

82. Defendant's conduct was intentional, malicious, and/or outrageous and evidenced an evil motive, complete indifference to, or conscious disregard for, the rights of Plaintiff and others similarly situation, thereby entitling Plaintiff to an award of punitive damages.

WHEREFORE, Plaintiff prays for Judgment against Defendant, finding the acts and practices of the Defendants violated MO. REV. STAT. § 213.010 et

seq., (2016); for actual, compensatory, and punitive damages; all costs, expenses, expert witness fees, and attorneys' fees incurred herein; prejudgment and post-judgment interest at the highest lawful rate; appropriate equitable relief including, but not limited to, requiring Defendant to place Plaintiff in the same position she would have been absent the illegal discrimination; and for such other and further relief as the Court deems just and proper.

COUNT II
HOSTILE WORK ENVIRONMENT IN VIOLATION OF THE MHRA

83. Plaintiff incorporates by reference all allegations of this Petition as if fully set forth herein.

84. Plaintiff, as a woman, is a member of a protected class within the meaning of the MHRA.

85. Plaintiff was subjected to unwelcome harassment on the basis of her sex, the stereotypes accompanying her gender, and/or Defendant's perceptions regarding the stereotypes associated with being female as alleged herein.

86. Defendant subjected Plaintiff to discrimination, harassment, and/or retaliation on a continuous and/or ongoing basis once Plaintiff made complaints to Defendant concerning sex discrimination.

87. Plaintiff's gender, the stereotypes accompanying her gender, and/or Defendant's

perceptions regarding the stereotypes associated with being female contributed to the harassment, discrimination, and/or retaliation alleged herein.

88. The discrimination, harassment, and/or retaliation to which Plaintiff was subjected affected the terms, conditions, and or privileges of Plaintiff's employment.

89. The discrimination, harassment, and/or retaliation to which Plaintiff was subjected created a hostile work environment.

90. The harassment, discrimination, retaliation, and/or hostile working environment substantially interfered with Plaintiff's work performance.

91. Defendant knew, or should have known, of the discrimination, harassment, retaliation, and/or the hostile work environment to which Plaintiff was subjected.

92. Defendant failed to implement prompt and effective remedial action to end the discrimination, harassment, an/or the hostile work environment to which Plaintiff was subjected when they knew, or should have known, of the discrimination, harassment, retaliation, and/or the hostile work environment.

93. Defendant's actions and/or inactions constitute unlawful employment discrimination against Plaintiff in violation of the MHRA.

94. Defendant's actions and/or inactions occurred by and/or through its agents, servants, or employees acting within the course and scope of employment.

95. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered, and will continue to suffer, damages including past and future lost wages and benefits; a detrimental job record; career damage and diminished career potential; garden-variety mental and emotional distress in the form of embarrassment, degradation, humiliation, anxiety, loss of enjoyment of life, and loss of sleep; pain and suffering; and other nonpecuniary losses. Plaintiff is also entitled to other appropriate equitable relief.

96. Defendant's conduct was intentional, malicious, and/or outrageous and evidenced an evil motive, complete indifference to, or conscious disregard for, the rights of Plaintiff and others similarly situated, thereby entitling Plaintiff to an award of punitive damages.

97. Plaintiff is entitled to recover all costs, expenses, expert witness fees, and attorneys' fees incurred in this matter as well as other appropriate equitable relief.

WHEREFORE, Plaintiff prays for Judgment against Defendant, finding the acts and practices of the Defendant violated MO. REV. STAT. § 213.010 et seq., (2016); for actual, compensatory, and punitive

damages; all costs, expenses, expert witness fees, and attorneys' fees incurred herein; prejudgment and post-judgment interest at the highest lawful rate; appropriate equitable relief including, but not limited to, requiring Defendant to place Plaintiff in the same position he would have been absent the illegal discrimination; and for such other and further relief as the Court deems just and proper.

COUNT III
ILLEGAL RETALIATION IN VIOLATION OF THE MHRA AS AGAINST ALL DEFENDANTS

98. Plaintiff incorporates by reference all allegations of this Petition as if set forth herein.

99. During her employment, Plaintiff complained to Defendant, objected to and/or opposed the discrimination and/or harassment by, among other things, complaining to Defendant, Brewer, Rardon, Defendant MDOC's Human Resources Department, filing a Charge of Discrimination with the MHRA, and filing a lawsuit against Defendant.

100. Plaintiff's complaints to Defendant about discrimination and/or harassment are protected activities under the MHRA.

101. Plaintiff's complaints of harassment and/or discrimination contributed to Defendant's actions, inactions, decisions, and/or conduct that affected the terms, conditions, and privileges of Plaintiff's employment as alleged herein.

102. Defendant's actions and/or inactions constitute unlawful retaliation against Plaintiff in violation of the MHRA.

103. Defendant's actions and/or inactions occurred by and/or through its agents, servants, and/or employees acting within the course and scope of their employment.

104. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered, and will continue to suffer, damages past and future lost wages and benefits; a detrimental job record; career damage and diminished career potential; garden-variety mental and emotional distress in the form of embarrassment, degradation, humiliation, anxiety, loss of enjoyment of life, and loss of sleep; pain and suffering; and other nonpecuniary losses. Plaintiff is also entitled to other appropriate equitable relief.

105. Defendant's conduct was intentional, malicious, and/or outrageous and evidenced an evil motive, complete indifference to, or conscious disregard for, the rights of Plaintiff and others similarly situated, thereby entitling Plaintiff to an award of punitive damages.

WHEREFORE, Plaintiff prays for Judgment against Defendant, finding the acts and practices of the Defendant violated MO. REV. STAT. § 213.010 et seq., (2016); for actual, compensatory, and punitive

damages; all costs, expenses, expert witness fees, and attorneys' fees incurred herein; prejudgment and post-judgment interest at the highest lawful rate; appropriate equitable relief including, but not limited to, requiring Defendant to place Plaintiff in the same position she would have been absent the illegal discrimination; and for such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on issues herein.

Respectfully submitted,
LUNCEFORD LAW FIRM, LLC
by:/s/ Taylor L. Myers
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ATTORNEYS FOR PLAINTIFF

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	Case No. WD84949
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Appellant.	)	
_____	)	

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI FIFTH JUDICIAL DISTRICT, DIVISION NO. 1
Honorable Kate Schaefer, Circuit Judge

JEAN FINNEY,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Case No. 18BU-CV04465
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Defendant.	)	
_____	)	

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RECORD ON APPEAL - TRANSCRIPT

VOLUME 1 of 2

APPEARANCES

Attorneys for Plaintiff:	**Attorneys for Defendant:**
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VOLUME 1 OF 2

DAY 1 OF TRIAL -- MONDAY, AUGUST 23, 2021

This matter came on for trial on Monday, August 23, 2021 before the Honorable Kate Schaefer, Judge of Division No. 1 of the Circuit Court of Buchanan County, Missouri, Fifth Judicial Circuit, at St. Joseph.

The plaintiff appeared in person and by attorneys David A. Lunceford, Rachel C. Rutter and Peter Gardner. The defendant appeared by attorneys Abbie E. Rothermich, John P. Sullivan and Derek Spencer.

PROCEEDINGS

MONDAY, AUGUST 23, 2021

(The venire panel and all parties being present in the courtroom, the following proceedings were held:)

THE COURT: Good morning. In the matter of Jean Finney and the Missouri Department of Corrections. Is the plaintiff ready to proceed?

MR. LUNCEFORD: We are, Your Honor.

THE COURT: Thank you. Is the defendant ready to proceed?

MR. SULLIVAN: We are, Your Honor.

THE COURT: Ladies and gentlemen, good morning. I am Circuit Judge Kate Schaefer, and I will be presiding

* * *

[18]

[THE COURT:] There's Annette now, so if anybody -- oh, maybe Melody. I can't see through the bar. This is Melody. So she's up there with a microphone if we need to get some amplification.

One more thing, the trial is expected to last seven, possibly eight, days. We'll start at 9 AM every day, most generally right on the dot, unless there are some last-minute issues. But you'll be advised if we're running late on anything.

We'll take a mid-morning break, usually about an hour-and-a-half to two hours after we begin, and the same thing in the afternoon. You'll get a lunch break. Sometimes the lunch time varies depending on the witnesses. If the attorneys are in the middle of a witness and we want to finish up that witness, you might go later on lunch.

Same thing with night. I want to end every night by 5 PM, but if we're in the middle of a witness and we want to make sure that witness finishes, we might go a little late. Sometimes that means we might end a little earlier, too, if the attorneys think, hey, I finished this witness and I want to wait until tomorrow to call the next witness. But we'll get

through everybody in those days.

Okay. I would like to introduce counsel. Lead [19] counsel for the plaintiff is Rachel Rutter.

MS. RUTTER: Good morning, everybody. My name is Rachel Rutter. This is David Lunceford who will also be working as one of the attorneys on this case, and Mr. Peter Gardner. We office out of the Kansas City area, and we represent individuals and folks in Clay County and Buchanan County as well. Thank you.

THE COURT: Thank you. And your client, Ms. Rutter?

MS. RUTTER: Oh, yes. This is Capt. Jean Finney from the Missouri Department of Corrections.

THE COURT: Thank you, ma'am. And on behalf of the defendant is John Sullivan. Mr. Sullivan?

MR. SULLIVAN: Good morning, everyone. My name is Patrick Sullivan.

THE COURT: Oh, I'm sorry.

MR. SULLIVAN: My first name is John. So, Your Honor, you're not wrong, but I go by Patrick. I'm with the Attorney General's Office. This is my colleague, Derek Spencer. This is my colleague, Abbie Rothermich. And this is Neil Wolfford, who's the Deputy Warden at the prison. And then seated over here is Erin Miller, who is a paralegal

representing the Attorney General's office. And we represent the Department of Corrections.

THE COURT: Thank you, sir. All right. When you

* * *

[105]

[(12) VENIREPERSON CUNNING:] [. . .] first plan of attack, but back to what was just said. We shouldn't be judged on certain things, just job performance, things like that.

MR. LUNCEFORD: How many people believe that you ought to be judged on job performance and not necessarily your race or your skin color or things of that nature?

Okay. How many don't believe that? Well, that's easy, I didn't see any hands. Okay. All right.

Now, I'm going to ask you a tricky question. How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did? How many people went to a hell, fire and brimstone church like that growing up and that's what they taught? Okay, 3, 4, 12, 14, 8, 20, 19, 2. Anybody else down here?

All right, how about up here, went to a conservative Christian church and that's what they

taught? 35, 40, 56, 52, 35, 40 -- I already got that, and 59.

All right, so let me ask you all the way at the back. Is that No. 50? 56, you're the HR Manager. How do you reconcile the law that says that people that are gay are entitled to their civil rights, and yet we have [106] our religious institutions that tell us something different? How do we differentiate that, or reconcile that, when it comes to treating people in the corporate world?

(56) VENIREPERSON MONTFORD: Being in HR, I have to –

MR. LUNCEFORD: Could you speak up, like, speak up really loud? Thank you.

(56) VENIREPERSON MONTFORD: Being in HR, I have to -- I mean, I have to differentiate too. I have to follow my policies and procedures and my discrimination policy. I mean, that's what I have to do. No matter what my church says, when I'm out in the world doing what I do for a living, those are the rules I have to follow.

MR. LUNCEFORD: All right, thank you. Now, how many people can set aside whatever type of religious training that they had -- well, let me ask you this. How many people cannot set aside their religious convictions and just say, look, I don't think I'm qualified to sit here in this case if this case involves someone that is gay? I can't treat them

fairly. I just can't set that religious conviction aside. How many people? Thank you, sir. I appreciate you being honest. Go ahead and keep your signs up. 13 and 20, 14.

[107] Anybody else that just says, look, my religion is so important to me, I just -- honestly, I can't do it. Because we all know that, you know, the whole purpose of being here is to see if we're qualified to sit in a case.

Like if this was a child rape case, I wouldn't be qualified. I couldn't sit in a case like that. I would be so mad I wouldn't be able to listen to the evidence. And that's really what we're trying to figure out is, you know, if that's the way that you grew up, then, you know, if it's going to affect you so much that you don't want to sit here, you don't think you could pay attention, it's going to bother you, then that's just what we're trying to find out.

We feel like both sides need to be heard fairly by 12 jurors. So I appreciate that. Anybody else? Okay, thank you.

(13) VENIREPERSON HARRIS: Can I make a comment, sir?

MR. LUNCEFORD: Do you have a question?

(13) VENIREPERSON HARRIS: No, I have a comment.

MR. LUNCEFORD: Go ahead.

(13) VENIREPERSON HARRIS: Okay. The comment is that according to my belief,

homosexuality is a sin.

MR. LUNCEFORD: Okay.

[108] (13) VENIREPERSON HARRIS: But you still have to love those people, and you still have to treat them right in society.

MR. LUNCEFORD: Okay.

(13) VENIREPERSON HARRIS: You don't have the right to judge them. Therefore, I think I could be a fair juror. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.

MR. LUNCEFORD: Okay.

(13) VENIREPERSON HARRIS: Okay?

MR. LUNCEFORD: Okay. Does anybody else feel that way? No. 9, No. 47, No. 32, No. 45. Anybody else? No. 16. Anybody else just feel that way? I don't think I could say it any better than what he did. That's just how I feel and my religion, I hold dear to my heart. No. 6. Okay. Anybody else? All right, thank you.

Does anyone here have a family member or a loved one or themselves that have been treated unfairly by an employer because they're gay? Either you have a family member, you have somebody in your family, or someone in your household who has been treated unfairly by an employer because they're gay. Okay.

Now, does anyone have a problem awarding emotional distress damages? Okay.

Does anyone know what -- raise your hand if you

* * *

[256]

(13) VENIREPERSON HARRIS: Yes.

MS. ROTHERMICH: Okay. So do you think that that has left you, like hearing about their experiences, has that left you with any sort of negative connotation about corrections workers?

(13) VENIREPERSON HARRIS: No, just about the way they behave.

MS. ROTHERMICH: Okay. About how your children behaved? And grandchildren?

(13) VENIREPERSON HARRIS: Yes.

MS. ROTHERMICH: Do you think that you would be able to be a fair and impartial juror in this case?

(13) VENIREPERSON HARRIS: Yes.

MS. ROTHERMICH: Okay, thank you. Earlier I think that you had raised your paddle on the question about growing up in a religion where it was taught that homosexuality was a sin. Do you -- can you -- was that something that you were taught when you were growing up?

(13) VENIREPERSON HARRIS: No, it's in the Bible.

MS. ROTHERMICH: Okay.

(13) VENIREPERSON HARRIS: The Bible talks about it. But as I tried to say, a sin is a sin. And every one of us here sins. And I don't imagine any of

you would deny it. We all do. It's just part of our nature. And it's something we struggle with, hopefully [257] throughout our life. So there isn't -- homosexuality isn't any worse sin than stealing something. It's all -- a sin is a sin. It's all on the same level.

MS. ROTHERMICH: Do you think that that would impact your ability to be a fair and impartial juror in this case?

(13) VENIREPERSON HARRIS: Absolutely not. That has really nothing to do with -- in a negative way with whatever this case is going to be about.

MS. ROTHERMICH: Okay. You truly don't think --

(13) VENIREPERSON HARRIS: No, I truly don't.

MS. ROTHERMICH: Okay. And you're under oath, you know.

(13) VENIREPERSON HARRIS: I know.

MS. ROTHERMICH: Okay. And then -- did it -- so, as you know, as the jury you are the finders of fact in this case. And the Court in this case, Judge Schaefer, will give you instructions on the law with regard to this case. And so there's going to be a lot of evidence in this case about how the Department of Corrections, the employer in this case, handled Ms. Finney's situation. And you may not necessarily agree with employment decisions that were made,

but the Judge is going to instruct you on the law as to whether it's discrimination, harassment or hostile work environment

* * *

[263]

Mr. Lunceford, do you have any individual questions you would like to ask?

MR. LUNCEFORD: Just a few.

THE COURT: Thank you. You may proceed.

PLAINTIFF'S VOIR DIRE EXAMINATION (Continued)

MR. LUNCEFORD: Juror No. 4, we've not heard a lot from you today. And I note from looking at the forms that you filled out, okay, that you are the wife of a pastor. Okay? And we've had some conversations here today from other jurors about what they could do or not do with the idea of homosexuality.

MS. ROTHERMICH: Your Honor, if we could approach?

THE COURT: Yes.

(Counsel approached the bench, and the following proceedings were held:)

THE COURT: Yes, ma'am.

MS. ROTHERMICH: This is not rehabilitation since she didn't start -- she didn't speak up earlier. So I would object.

MS. RUTTER: She raised her hand to the question about whether or not they were taught.

THE COURT: In the very beginning?

MS. RUTTER: Yes.

THE COURT: Did you know that she raised her hand? [264] I didn't have --

MS. ROTHERMICH: Let me just go grab my notes really quick.

MS. RUTTER: I note that she raised her hand.

MR. LUNCEFORD: Do you have her noted that she raised her hand on that question?

THE COURT: No.

MR. LUNCEFORD: Okay.

MS. ROTHERMICH: Your Honor, I really don't have her down. I have 9, 47, 32, 45, 16 and 13.

MR. SULLIVAN: I don't have her down either.

THE COURT: Well, I will note that I have a lot more than just those.

MS. RUTTER: So do I, Judge.

THE COURT: And I don't know if that was because it was kind of asked twice, and then more people answered. And the juror in the back, I think it was No. 20, Mr. Ehlert, after he spoke, more people raised their hands. So I will note that.

So I guess if you will ask her specifically, I have it noted that you raised your hand when that question was asked. If she says no, then I won't let you go any further if there's no rehabilitation at that point and/or individual questions. But I will note that I had a lot more people raise their hands. I'll let you ask [265] her if she -- your notes reflect that she raised her hand up after those questions were asked.

MR. LUNCEFORD: Okay. Thank you.

(Proceedings returned to open court.)

MR. LUNCEFORD: Ma'am, when the question about the religion and homosexuality was raised, did you raise your hand or not?

(4) VENIREPERSON MASON: I'm No. 4.

MR. LUNCEFORD: No. 4. I'm looking at you, but I'm actually talking to her. So I'm sorry about that, okay? With the numbering system, I get -- yeah. Did you raise your hand on that question?

(4) VENIREPERSON MASON: Could you start over? I'm a little confused of what you're asking.

MR. LUNCEFORD: Sure. You're Pamela Mason?

(4) VENIREPERSON MASON: Yes, I am.

MR. LUNCEFORD: And your husband is a pastor?

(4) VENIREPERSON MASON: Yes.

MR. LUNCEFORD: Okay. So earlier today, way earlier -- ma'am, I'm sorry. I was looking at you and I was talking to her, okay? Sorry about that.

(4) VENIREPERSON MASON: Yes.

MR. LUNCEFORD: Way earlier when we asked the question about people that had been raised where [266] homosexuality was a sin. Did you raise your hand on that question?

(4) VENIREPERSON MASON: I don't think I did. That is what I believe. First of all, let me just say, because what my husband does for a living, you know, that's not --

MR. LUNCEFORD: Sure.

(4) VENIREPERSON MASON: I'm a retired schoolteacher, mother of five and grandmother of four. There's more to me. But I firmly stand on the word of God and what the word of God says. And much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic duty. But, yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is – I mean, we could go on and on. So I don't know if that answers your question, but.

MR. LUNCEFORD: It does.

(4) VENIREPERSON MASON: Okay.

MR. LUNCEFORD: Is there some reason why, when you were asked the question and you just didn't respond to that? Is there some reason why you just didn't respond to that question that I think you've now answered it [267] should have been yes?

(4) VENIREPERSON MASON: Yes, it is a sin.

MR. LUNCEFORD: But my question is, is why didn't you respond? Is it you didn't understand the question?

(4) VENIREPERSON MASON: Perhaps, yes. Perhaps.

MR. LUNCEFORD: Okay. Is there anybody else that now feels that same way? They didn't raise their hand earlier, but they now want to -- now that they had kind of a further explanation, they also want to raise their hand? Okay, I think you've already raised

your hand initially.

(9) VENIREPERSON ARNOLD: Well, I had a response to that.

MR. LUNCEFORD: Okay.

(9) VENIREPERSON ARNOLD: The question was asked if you were raised that way. I wasn't raised that way, but in my later life when I became a Christian, I believe that now.

MR. LUNCEFORD: Okay.

(9) VENIREPERSON ARNOLD: So the question -- it was the way the question might have been asked.

MR. LUNCEFORD: And I very well may have asked a poor question. And if I did, I'm sorry about that. Is

there anybody else that feels that way now that they've heard kind of a further explanation that says, yes, I [268] should have raised my hand earlier?

THE COURT: Mr. Lunceford, come on up.

Ms. Rothermich would like to voice an objection.

(Counsel approached the bench, and the following proceedings were held:)

MS. ROTHERMICH: Again, I think this is just asking new questions. It's not rehabilitating people who already spoke up.

THE COURT: It is, but I would note that I think he's trying to clarify those people he wants to ask, because Ms. Koch also wrote down that Ms. Mason did raise her hand.

MS. ROTHERMICH: Okay.

THE COURT: So I just -- I'll let you, just to see if somebody else had that issue in regards to confusion

about the question or things of that nature. So very limited, you know, to those people.

Your objection is noted and overruled at this time.

MS. ROTHERMICH: Thank you.

(Proceedings returned to open court.)

MR. LUNCEFORD: We've now had a couple more minutes to digest this question. Does anybody want to say, hey, I should have raised my hand when we asked that [269] question, or the further clarification that we have now. I just want to let you guys know is, we're trying to figure out who needs to sit on this jury and who doesn't. Anybody else need to raise their hand to that question? Okay. That's all the questions I have, Judge.

THE COURT: Thank you, sir. All right, Ms. Rothermich, any further individual questions?

MS. ROTHERMICH: Nothing further, Your Honor.

THE COURT: All right, ladies and gentlemen, at this point all the questions have been asked. We're going to take a recess so that I can confer with the attorneys in regards to who will remain and who will go. So we're going to take probably 20 minutes -- let's take a half hour because I'll have a conference with them and they'll need some additional time. So I need you all to be back in the courtroom. And you actually can all -- and if you feel comfortable distancing yourselves, you can sit down here or up

there. You don't have to stay in your assigned seats anymore. You can leave your number placards on the seat. Oh, Jennie says to bring them down, please, and Annette can get them from you. So bring them down and give them to Jennie or Annette out front, and be back at a quarter 'til four, please. Thank you. You're released.

* * *

[279]

[MS. RUTTER:] [. . .] If he's not, he didn't seem to be concerned about it in the same way that Juror No. 37 was.

THE COURT: He really didn't seem concerned. He said I thought I should tell you all because I wanted you to know, but it's really not a hardship and I'll figure it out. So while I feel bad for him that he's a teacher missing school, he didn't voice any of the same indications like No. 37 did in regards to having to rewrite lesson plans or have other teachers fill in for him or having third graders in with the seventh graders, which I thought was really unique. So that request for No. 22, Mr. Dice, will be denied.

MS. ROTHERMICH: We said No. 43, that was all specifically hardship.

THE COURT: Hearing, yes.

MS. ROTHERMICH: And then we'll, obviously, have some for cause.

THE COURT: Okay, yes, okay. All right,

Ms. Rutter.

MS. RUTTER: Yeah, Judge, I think it makes the most sense at this point for the first strikes for cause to group all of the individuals that responded to the religious sin question, because there were multiple. And instead of coming back and forth, I think that it might be best to go over who we had down as responding [280] to that question vs. you and --

THE COURT: If that's the way you want to do it, I will note that, obviously I'd love to hear your objection, but those two specifically that you asked were very clear in that they could be absolutely fair and impartial in this case. So we can go through that group of people, and it shouldn't be that many left after all the hardships we've had. Go ahead.

MS. RUTTER: Judge, I have Juror No. 4 -- after strikes, Juror No. 4, No. 13 and No. 45 left.

THE COURT: And Ms. Burton, I have no notes in regards to Ms. Burton, No. 45, on that question.

MS. RUTTER: I have that when Mr. Lunceford asked if anybody agreed with Juror No. 13 who expressed that homosexuality is a sin in the Bible just like everything else, I had that Juror No. 4, 13, 45, 16, 6, 47, 45 and 16, 20 and 14 all raised their hands when Mr. Lunceford asked who agrees with Juror No. 13.

THE COURT: Okay.

MS. RUTTER: Many of those have already been excused.

THE COURT: Sure. But Ms. Burton did not add

to that, correct? She raised her hand, but she did not add any response. She wasn't asked any specific questions or have any responses, correct?

[281]

MS. RUTTER: I don't have that she was asked any specific questions, no, Judge.

THE COURT: I know I skipped over the first two, but in regards to Ms. Burton, No. 45?

MS. ROTHERMICH: Well, I don't -- I don't have that -- I have that she raised her paddle to the question of whether she grew up in a church where homosexuality was a sin. I don't think there was any follow up with her about whether that would affect her ability to be fair and impartial in this particular case. And it didn't -- she didn't say that she still holds that belief, so. But I guess that would be my hang-up, my objection on striking her for cause at this point.

THE COURT: Mr. Lunsford.

MR. LUNCEFORD: Judge, when somebody says that a protected category of your civil rights, and from the get-go just because that person fits in that category, that is a sin, there's no way to rehabilitate somebody that looks at a gay person and says you are a -- you are a sinner, and God does not approve of what you do when, in fact, it is a legally protected category in the state of Missouri. And for us to say that somebody that embraces the idea that they are

less than everybody else from the get-go because of their religious beliefs, [282] flies in the face of being able to ever rehabilitate themselves, especially on a case like this.

THE COURT: Ms. Rothermich.

MS. ROTHERMICH: I think that in this with Juror No. 4 and 13, they did follow up and they said that they would be fair and impartial, that they were raised -- again, I think the question was whether they were raised like that. And my hang-up is that it wasn't: Do you still believe this? And, like, that's where I have an objection to this. Because I think there would be a number of people who still don't hold the beliefs that they held when they were children, you know.

MR. SULLIVAN: And, Your Honor, I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination.

THE COURT: Uh-huh.

MR. SULLIVAN: So if they ask the appropriate things, they ask if they can be impartial.

MR. LUNCEFORD: No, I don't think you can rehabilitate yourself. No. 4 said that's what my husband believes. It's in the Bible. I still believe it. She married herself to the idea that if you're gay, then you are -- you are a sinner.

THE COURT: Just like I'm a sinner because I chew [283] my nails or I gossip or I -- I don't mean me personally, but she said anybody that gossips or

lies.

MR. LUNCEFORD: But those aren't protected categories that is a civil right. What we're talking about here that causes them to be excluded for cause is they are saying I believe that because of what this person -- sorry, because of what this person does, they then are less than anybody else, and they don't get the same protection under the civil rights because you're a sinner based on what I believe. I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that.

THE COURT: All right. I understand what you're saying. I don't agree that they said they could never be protected because they're in this category. They both said -- I'm not talking about Ms. Burton, but they both said that it doesn't really matter whether or not they believe it's a sin because the law says it's not, and everybody's a sinner and everyone needs to be treated equally and that they could follow the law.

However, I believe at this point we have enough jurors. So to err on the side of caution, because specifically Ms. Burton did not answer that question, so we don't know her beliefs. I don't fault you for not rehabilitating her, but I'm not going to. I think we [284] have enough jurors left in the panel that those three, I will sustain your request and overrule the objection. So No. 4, No. 13 and No. 45 will be excluded for cause.

Any further requests to strike for cause?

MS. ROTHERMICH: Can I ask really quick just for clarification? Did we get No. 9 out because he needs a babysitter?

THE COURT: Yes.

MS. ROTHERMICH: I'm sorry.

MS. RUTTER: That's what I have. Judge, we would move to strike Juror No. 56, Michelle Montford. She answered in response to Mr. Lunceford's question about, Have you ever been sued as a representative of an employer? And she answered in the affirmative and referenced multiple lawsuits against her company by employees, and that they usually don't -- her company doesn't usually do that well in lawsuits.

THE COURT: Ms. Rothermich?

MS. ROTHERMICH: I don't have an objection to this person. No. 56, you said?

MS. RUTTER: Correct.

THE COURT: My notes read she also indicated she could be fair and impartial and that that wouldn't affect her ability at all to listen to the evidence and make a decision. But the Department of Corrections does [. . .]

* * *

APPENDIX C

IN THE CIRCUIT COURT OF BUCHANNAN COUNTY, MISSOURI AT KANSAS CITY

JEAN FINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 18BU-CV04465
	)	
MISSOURI	)	
DEPARTMENT	)	
OF CORRECTIONS,	)	
RYAN CREWS, and	)	
CYNDI PRUDDEN,	)	
	)	
Defendants.	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Pursuant to Mo. Sup. Ct. R. 72.01(b) and Mo. Sup. Ct. R. 78.01, Defendant Missouri Department of Corrections hereby moves for judgment notwithstanding the verdict or, in the alternative, for new trial. In support of this Motion, Defendant states as follows:

1. The verdict in favor of Plaintiff on Plaintiff's claim of sex discrimination, Count I, is against the weight of the evidence, and Defendant

is entitled to judgment as a matter of law thereon or, in the alternative a new trial.

2. The verdict in favor of Plaintiff on Plaintiff's claim of hostile work environment, Count II, is against the weight of the evidence, and Defendant is entitled to judgment as a matter of law thereon, or, in the alternative, a new trial.

3. The Court's blanket exclusion of potential jurors during voir dire based on their religious background and beliefs, despite such jurors testifying that they could be fair and impartial, violated the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause of the Missouri Constitution, and Article I section 5 of the Missouri Constitution. *See Strong v. State*, 263 S.W.3d 636 (Mo. 2008); *see also U.S. v. Greer*, 939 F.2d 1076 (5th Cir. 1991). Several potential jurors testified that, while they grew up in a religion that taught that homosexuality was a sin, they did not view it as different from any other sin and could be fair and impartial. The effect of the Court's decision, for example, is that no Catholic in good standing who receives communion could have served on the jury. Defendant is therefore entitled to a new trial on Counts I and II.

4. The Court's blanket exclusion of jurors during voir dire based on their religious background, without further inquiry by the Court

or plaintiff's counsel into whether such jurors could be fair and impartial, violates the Equal Protection Clauses of both the United States and Missouri Constitutions, (*see* authorities cited above), and Missouri law. *See State v. Carter*, 807 S.W.2d 218, (Mo. Ct. App. E.D. 1991) (participation in organization or activities suggesting bias does not indicate juror unable to be fair and impartial); *see also State v. Moore*, 927 S.W.2d 439, 441 (Mo. Ct. App. W.D. 1996) (court has duty to make independent inquiry of a potential juror when potential juror equivocates about ability to be fair and impartial); *State v. Holliman*, 529 S.W.2d 932, 939 (Mo. Ct. App. St. Louis Div. 1975) (same). Here, several jurors were excluded for cause solely because they indicated that they grew up in a religion that taught that homosexuality was a sin. The potential jurors were not asked if they could be fair and impartial or even if they agreed with that teaching. The exclusion of those potential jurors for cause was error, and Defendant is therefore entitled to a new trial on Counts I and II.

For the foregoing reasons, therefore, Defendant respectfully requests that this Court grant its motion for judgment notwithstanding the verdict on Counts I and II or, in the alternative, order a new trial on Counts I and II.

Respectfully submitted,
ERIC S. SCHMITT
Attorney General

/s/ J. Patrick Sullivan
J. Patrick Sullivan, #42968
615 E. 13th Street
Kansas City, MO 64106
Telephone: (816) 889-5019
Email: Patrick.sullivan@ago.mo.gov

CERTIFICATE OF SERVICE

The undersigned certifies that on September 30, 2021, the foregoing was filed electronically with the Clerk of Court and was served upon all counsel of record via the Courts e-filing.

/s/ J. Patrick Sullivan
Assistant Attorney General

APPENDIX D

IN THE CIRCUIT COURT
OF BUCHANAN COUNTY, MISSOURI
DIVISION 1

JEAN FINNEY,	)	
	)	
Plaintiff,	)	
	)	**Case No. 18BU-CV04465**
v.	)	
	)	
MISSOURI	)	
DEPARTMENT OF	)	
CORRECTIONS,	)	

JUDGMENT DENYING DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

On this 8th day of October, 2021, the Court takes up and considers Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial filed September 30, 2021. Being fully advised in the premises, the Court hereby **DENIES** Defendant's Motion for Judgment

Notwithstanding the Verdict or, in the Alternative, for New Trial in its entirety.

IT IS SO ORDERED.

Dated: October 8, 2021

Kate Schaefer, Circuit Judge

COURT SEAL OF

BUCHANAN COUNTY

APPENDIX E

IN THE CIRCUIT COURT
OF BUCHANAN COUNTY, MISSOURI
DIVISION 1

JEAN FINNEY,	)	FILED 11/9/2021 ASHLEY THRASHER CLERK CIRCUIT COURT BUCHANAN COUNTY, MO
	)	
Plaintiff,	)	
	)	**Case No. 18BU-CV04465**
v.	)	
	)	
MISSOURI	)	
DEPARTMENT OF	)	
CORRECTIONS,	)	

FINAL JUDGMENT AND ORDER

This case came on for trial by jury beginning August 23, 2021. Plaintiff, Jean Finney, appeared in person and by counsel Rachel C. Rutter, David A. Lunceford, and Peter Gardner. Defendant, Missouri Department of Corrections, appeared by corporate representative Neil Woolford and by trial counsel Patrick Sullivan, Abbie Rothermich, and Derek Spencer. The case proceeded with voir dire and a jury was selected.

On August 23, 2021, the jury was sworn. On August 24, 2021, jury instructions were read and opening statements were made. Plaintiff presented

evidence. Plaintiff's evidence continued until August 30, 2021. Plaintiff rested. Plaintiff and Defendant both made oral Motions for Directed Verdict, which were overruled. Thereafter, Defendant presented evidence. Defendant rested on August 30, 2021. At the close of all evidence, Defendant made an oral Motion for Directed Verdict and Plaintiff renewed her oral Motion for Directed Verdict, which were both overruled and denied. A final instruction conference occurred on August 30, 2021. Jury instructions and closing statements were made by both sides on August 30, 2021. Trial resumed on August 31, 2021 with jury deliberations. On August 31, 2021, after due deliberation, the jury returned to open court with the following verdicts:

Verdict A: On the claim of Plaintiff Jean Finney for sex discrimination against Defendant Missouri Department of Corrections; as submitted in Instruction No. 8, we the undersigned jurors find in favor of Plaintiff Jean Finney and award, **for non-economic losses: $70,000.00.** We, the undersigned jurors find that Defendant **is** liable for punitive damages.

Verdict B: On the claim of Plaintiff Jean Finney for retaliation against Defendant Missouri Department of Corrections, as submitted in Instruction No. 13, we the undersigned jurors find in favor of Missouri Department of Corrections. We, the undersigned find that Defendant **is not** liable for

punitive damages.

Verdict C: On the claim of Plaintiff Jean Finney for hostile work environment against Defendant Missouri Department of Corrections; as submitted in Instruction No. 18, we the undersigned jurors find in favor of Plaintiff Jean Finney, **for non-economic losses in the amount of $105,000.00**. We, the undersigned jurors find that Defendant is liable for punitive damages.

There was no motion by either party for a bifurcated trial, so the jury simultaneously returned the following punitive damages verdicts:

Verdict D: On the claim of Plaintiff Jean Finney for punitive damages against Defendant Missouri Department of Corrections, on the Plaintiff's claim for: Sex Discrimination, Retaliation and Hostile Work Environment; we the undersigned jurors, assess the punitive damages of Plaintiff Jean Finney as follows:

Sex Discrimination, $25,000.00; Hostile Work Environment, $75,000.00.

On the 8th day of October, 2021, this Court took up Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, filed September 30, 2021 and Plaintiff's Amended Motion for Attorney's Fees, Costs, and Post-Judgment Interest with Supporting Suggestions, filed on October 1, 2021. Defendant did not appear. (The Court later learned this was due to

a calendaring error.) The Court ruled on these motions and the Defendant's Post-Trial Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial is **OVERRULED AND DENIED**.

On the 12th day of October, 2021, Defendant filed its Suggestions in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Post-Judgment Interest. On October 13, 2021 Defendant filed its Motion for Rehearing on Plaintiff's Motion for Attorney's Fees, Costs, and Post-Judgment Interest. Defendant specifically did not ask for a rehearing on the Court's ruling denying its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

On this 8th day of November, 2021, the Court takes up Defendant's Motion for Rehearing on Plaintiff's Motion for Attorney's Fees and, overruling Plaintiff's objection to a rehearing, **SUSTAINS** the Motion for Rehearing. The attorneys proceed with arguments on the Motion for Attorney's Fees, Costs and Post-Judgment Interest. Now, after considering the arguments of counsel, upon careful review, and being fully apprised in the premises:

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiff Jean Finney and against Defendant Missouri Department of Corrections in the amount of **$175,000.00 for non-economic losses and $100,000.00 for punitive**

damages. Pursuant to MO. REV. STAT. § 408.040.3, interest shall accrue on this Judgment at the rate of 5.08%.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney's Fees, Costs and Post-Judgment Interest is **GRANTED**. Pursuant to MO. REV. STAT. §213.111.2, this Court finds that Plaintiff is entitled to reasonable attorneys' fees and costs. *See also Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 523 (Mo. *banc* 2009). This Court has fully considered Plaintiff's Motion, Plaintiff's Suggestions in Support thereof, and Plaintiff's Exhibits in support thereof. This Court has also considered Defendant's Suggestions in Opposition to Plaintiff's Amended Motion for Attorneys' Fees, Costs, and Post-Judgment Interest.

Plaintiff seeks attorney fees totaling $503,858.75 (which include a 1.5 multiplier), statutory costs of $4,015.96, and litigation expenses of $80.00. Plaintiff also requests post- judgment interest at a rate of 5.08% per annum until the judgment is paid. In support of their claim for attorney fees, Plaintiff's counsel provides time logs and affidavits of David Lunceford, Rachel Rutter, and Christina Nielsen; time logs of Peter Gardner; affidavits of Gene P. Graham Jr., Dennis E. Egan, and Martin M. Meyers; and a copy of Volume 33, Number 31 of the *Missouri Lawyers Weekly* published August 3, 2019. Defendant argues that

Plaintiff is only entitled to $229,675.00 in attorneys' fees. Defendant seeks a reduction in Plaintiff's attorney fees because Plaintiff's fee application is based on *Missouri Lawyers Weekly* survey of the highest rates charged in the state and no attempt was made to compare those rates to those of practitioners in Buchanan County, Missouri. Defendant also argues the 1.5 multiplier is improper.

The evidence reflects Plaintiff's attorneys expended 725 hours working on this case, which this Court finds reasonable. Even though Defendant prevailed on Plaintiff's retaliation claim (Verdict B), Plaintiff is still the "prevailing party" in the litigation as a whole. *See Alhalabi v. Mo. Dept. of Natural Resources*, 300 S.W.3d 518 (Mo. App. E.D. 2009). The legal work required to substantiate the claims on which Plaintiff prevailed are interrelated and overlapping with the claim on which Plaintiff did not prevail.

After review of billing records and affidavits submitted by Plaintiff, the Court finds that the hourly rates of attorneys, David Lunceford, Christina Nielsen, Rachel Rutter, and Peter Gardner of:

- $600 per hour for attorney David Lunceford;
- $600 per hour for attorney Christina Nielsen;
- $475 per hour for attorney Rachel Rutter; and

- $250 per hour for attorney Peter Gardner.

are reasonable and customary for attorneys in this area for attorneys of comparable experience.

This Court also finds that litigation expenses sought by Plaintiff ($80.00 for meals during trial) are of the kind of litigation expenses normally paid by fee-paying clients and are hereby included in the total award of attorneys' fees. *See Harrison v. Harris-Stowe State Univ., ED109012, *27-28* (Mo. App. E.D. May 04, 2021). This Court also finds that Plaintiff has incurred a total of $4,095.96 in costs.

Plaintiff seeks a multiplier of 1.5%. Defendant argues that this multiplier is unreasonable and improper under the law and, further, that Plaintiff's attorneys have not shown that they were precluded from taking less risky employment cases or that they missed out on work. Defendant reminds the Court that Mr. Lunceford was not present on August 30 or August 31 because he was otherwise engaged in another civil trial in Jackson County. However, the Court notes Ms. Rutter was lead counsel on this case and proceeded with Plaintiff's case in Mr. Lunceford's absence.

As evidenced by the billing records attached to Plaintiff's Motion for Attorney's Fees, the Court finds a 1.5% multiplier is reasonable for Plaintiff's attorneys' billable hours, and it will be applied here. This Court has fully considered the factors set forth in *Gilliland* to determine the appropriate lodestar

award in this case. This Court finds the reasonable lodestar is $335,932.50 (hours multiplied by the hourly rates plus litigation expenses which are included in the total award of attorneys' fees). This Court has fully considered whether to award a multiplier based on the factors set forth in *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 432 (Mo. *banc* 2013), factors which are not included in this Court's initial lodestar analysis. Based on these separate factors, this Court finds that a multiplier of 1.5 is reasonable.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that attorney's fees and costs shall be awarded to Plaintiff in the following amounts (attorneys' fees include a 1.5 multiplier, but statutory costs do not):

a. $209,363.46 to David A. Lunceford ($205,267.50 attorneys' fees + $4,015.96 (costs));
b. $273,751.25 to Rachel C. Rutter ($273,671.25 attorneys' fees + $80.00 (costs)); and
c. $24,840.00 to Christina J. Nielsen (attorneys' fees).

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to MO. REV. STAT. § 408.040.3, interest shall accrue on the total attorneys' fees and costs awarded herein at the rate of 5.08%.

IT IS ORDERED.

Date: November 9, 2021

Kate Schaefer, Circuit Judge

COURT SEAL OF

BUCHANAN COUNTY

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	WD84902
	)	(Consolidated with
MISSOURI	)	WD84949)
DEPARTMENT	)	Order filed: December
OF CORRECTIONS,	)	27, 2022
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI THE HONORABLE KATE H. SCHAEFER, JUDGE

Division One: W. Douglas Thomson, Presiding Judge, Alok Ahuja, Judge and Edward R. Ardini, Jr., Judge

O R D E R

PER CURIAM:

The Missouri Department of Corrections appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney on her discrimination claims brought under the Missouri Human Rights Act alleging the trial court committed constitutional error when it struck certain members of the venire for cause. We affirm. Because a published opinion would have no precedential value, we have provided the parties an unpublished memorandum setting forth the reasons for the order. Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	WD84902
	)	(Consolidated with
MISSOURI	)	WD84949)
DEPARTMENT	)	Order filed: December
OF CORRECTIONS,	)	27, 2022
	)	
Appellant.	)	

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

The Missouri Department of Corrections ("DOC") appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney ("Finney") on her discrimination claims brought under the Missouri Human Rights Act ("MHRA") alleging the trial court committed constitutional error when it struck certain members of the venire for cause.

We affirm.

Factual and Procedural Background

Since 2002, Finney has been an employee of the DOC, spending her entire career as a corrections officer at the Western Reception, Diagnostic, and Correctional Center ("WRDCC") in St. Joseph, Missouri. Finney worked with Gaye Colborn ("Gaye") and Jon Colborn ("Jon")[1] at WRDCC from 2002 until Gaye was transferred to another DOC institution in 2010. Gaye and Jon had been married but divorced in 2003.

In 2010, after Gaye had been transferred, Finney and Gaye began a romantic relationship. After learning of Finney's relationship with Gaye, Jon repeatedly sent Gaye text messages about Finney, calling her names including "lesbo, lessie, just derogatory statements like that." Gaye did not initially report the text messages to her superiors because she wanted to maintain a peaceful relationship with Jon out of respect for their children.

However, beginning in 2015, when Finney was chosen for a promotion over Jon, Jon's actions intensified. Jon kept information from Finney that she needed to safely perform her duties, he spread rumors that Finney was romantically involved with a

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[1] To avoid confusion, we refer to certain individuals by their first names; no disrespect or familiarity is intended.

female subordinate, and he submitted multiple complaints to supervisors about Finney and threatened to lodge additional complaints about employees he believed were friends of Finney. Finney complained to her supervisor about these incidents in 2016. Also, in 2016, Gaye reported the text messages Jon had sent indicating that Finney was attempting to sleep with a subordinate at WRDCC. No investigations came from either of these reports, so Finney again reported the conduct in 2017.

After Finney's second complaint, the warden of WRDCC sent a memo to his supervisors and human resources personnel detailing an "increasing level of hostility and aggression from [Jon,]" including "erratic, aggressive [behavior], inciting and retaliatory in nature." The warden expressed concern that Jon would bring a gun to work to shoot Finney and others. Based on Jon's conduct, the warden determined that Jon was creating a harassing, discriminatory, and retaliatory work environment for Finney based on her sexual orientation.

Finney filed suit against DOC, alleging that DOC had violated the MHRA by discriminating against her, creating a hostile work environment, and by retaliating against her. Finney alleged that she is a lesbian who presents masculine, and she was improperly stereotyped and discriminated against based on sex.

During *voir dire*, Finney's counsel sought information about the venire's views on homosexuality:

> How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did?

A number of people raised their hands, including venirepersons 4 and 45. Counsel for Finney continued, asking how many people could not set aside these views. Several more people raised their hands, including Venireperson 13. Venireperson 13 then made the following comment:

> The comment is that according to my belief, homosexuality is a sin. But you still have to love those people, and you still have to treat them right in society. . . . You don't have the right to judge them. Therefore, I think I could be a fair juror. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.

Finney's counsel asked if anyone else shared those views. Several veniremembers raised their hands, including venireperson 45. Counsel for DOC followed up with venireperson 13:

> [Counsel for DOC:] Okay. Thank you. Earlier I think that you had raised your paddle on the question about growing up in a religion

where it was taught that homosexuality was a sin. Do you – can you – was that something that you were taught when you were growing up?

[Venireperson 13:] No, it's in the Bible The Bible talks about it. But as I tried to say, a sin is a sin. And every one of us here sins. And I don't imagine any of you would deny it. We all do. It's just part of our nature. And it's something we struggle with, hopefully, throughout our life. So there isn't – homosexuality isn't any worse sin than stealing something. It's all – a sin is a sin. It's all on the same level.

[Counsel for DOC:] Do you think that would impact your ability to be a fair and impartial juror in this case?

[Venireperson 13:] Absolutely not. That has really nothing to do with – in a negative way with whatever this case is going to be about.

Finney's counsel later inquired of venireperson 4's views on homosexuality:

. . . I firmly stand on the word of God and what the word of God says. And much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic

> duty. But, yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is – I mean, we could go on and on.

After *voir dire*, Finney's counsel sought to strike venirepersons 4, 13, and 45 for cause. Counsel for DOC objected, arguing that venirepersons 4 and 13 indicated they could be fair and impartial despite their views on homosexuality and that venireperson 45 did not state that she continued to hold negative views concerning homosexuality. DOC's counsel further stated that, "I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination." The trial court sustained Finney's request to strike all three venirepersons for cause.

The jury returned verdicts in favor of Finney on the discrimination and hostile work environment claims and for DOC on the retaliation claim and awarded Finney a total of $175,000.00 in non-economic damages and $100,000.00 in punitive damages.

In its motion for new trial, DOC argued that "[t]he Court's blanket exclusion of potential jurors during voir dire based on their religious background and beliefs, despite such jurors testifying that they could be fair and impartial, violated the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause of the Missouri Constitution, and Article I section 5 of the Missouri

Constitution." The trial court denied DOC's motion for new trial. DOC appeals.

Discussion

DOC raises three points on appeal, all arguing that the trial court's decision to strike veniremembers 4, 13, and 45 for cause violated provisions of the United States and Missouri constitutions. Specifically, in Point I, DOC claims that the trial court's actions violated article I, section 5 of the Missouri Constitution, which prohibits the disqualification of jurors based on their religious beliefs or persuasion. In Points II and III, DOC asserts that the trial court violated the Equal Protection Clauses contained in the United States and Missouri constitutions, arguing again that the jurors were improperly struck based on their religion.

Standard of Review

When properly preserved, "[a] strike for cause is reviewed for abuse of discretion." *State v. Johnson*, 284 S.W.3d 561, 580 (Mo. banc 2009) (citation omitted). However, "'[f]or an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the [circuit] court in a motion for new trial.'" *State v. Minor*, 648 S.W.3d 721, 729 (Mo. banc 2022) (quoting *State v. Loper*, 609 S.W.3d 725, 732 (Mo. banc 2020) (additional citation omitted). Moreover, "[a] claim of constitutional error must be

raised at the first opportunity and with citation to specific constitutional objections." *Id.* (citing *State v. Driskill*, 459 S.W.3d 412, 426 (Mo. banc 2015)). Here, although DOC objected to the strikes at issue during jury selection, it did not cite to specific constitutional provisions or in any manner put forth an argument founded on constitutional principles, relying instead on the claim that the strikes could "get[ ] into the bounds of religious discrimination." Counsel never stated an *objection* on the basis of religious discrimination, claimed that exclusion of veniremembers 4, 13 and 45 would actually *constitute* religious discrimination, or identified the legal authority which would prohibit such discrimination. Counsel's ambiguous and ambivalent statement falls well short of the specificity required to preserve a constitutional objection. *See G.B. v. Crossroads Acad.-Central St.*, 618 S.W.3d 581, 593 (Mo. App. W.D. 2020) (stating that the assertion that a form violated "the Missouri Constitution regarding freedom of religion, separation of religion, as well as the Missouri RFRA" was insufficient to preserve an Equal Protection claim); *State v. Steidley*, 533 S.W.3d 762, 777 (Mo. App. W.D. 2017) (stating that a general argument that evidence "would violate [the defendant's] rights 'under the Missouri Constitution and the Constitution of the United States'" was insufficient to preserve a Sixth Amendment confrontation clause claim).

DOC also argues that, despite any deficiencies in its statement of an objection, opposing counsel and the circuit court *understood* that DOC was invoking constitutional principles, and the issues should accordingly be treated as preserved. We disagree. The single, ambiguous statement to which DOC refers occurred in the middle of a lengthier discussion concerning whether veniremembers 4, 13 and 45 had exhibited a disqualifying bias and whether they had been successfully rehabilitated. This broader discussion involved typical, "run-of-the-mill" questions presented to a trial court whenever a litigant seeks to strike a veniremember for cause. Nothing in the broader discussion would have alerted the trial court that DOC was raising some sort of religion-specific, constitutional objection requiring a different legal analysis and a heightened level of scrutiny. Confirming that the trial court did not view this as a constitutional issue, following DOC counsel's "objection," the court stated that it would "err on the side of caution" by striking the challenged veniremembers – a statement which invokes general, *non-constitutional* caselaw concerning for-cause strikes. *See*, *e.g. Brown v. Collins*, 46 S.W.3d 650, 652 (Mo. App. W.D. 2001) ("It is better for the trial court to err on the side of caution by sustaining a challenge for cause than to create the potential for retrial . . . by retaining the questionable juror.")

Because DOC's claims are not preserved, we can review them only for plain error. *See* Rule 84.13(c). [2] "Appellate courts 'will review an unpreserved point for plain error only if there are substantial grounds for believing that the trial court committed error that is evident, obvious and clear and when the error resulted in manifest injustice or miscarriage of justice.'" *Veal v. Kelam*, 624 S.W.3d 172, 178 (Mo. App. E.D. 2020) (quoting *Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019)) (additional citation omitted). "Reversal for plain error in a civil case further requires the injustice to be 'so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.'" *Id.* (quoting *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 176 (Mo. App. W.D. 2012)) (additional citation omitted).

Point I

In its first point, DOC asserts that the trial court erred in granting Finney's request to strike for cause veniremembers 4, 13, and 45, arguing that they were excluded "on the grounds that they were Christians who believed homosexual acts are sinful[.]" DOC further argues that the strikes were improper because veniremembers 4 and 13 stated that they "believed that everyone was a sinner and

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[2] Rule references are to the Missouri Supreme Court Rules (2017).

would follow the law;" and there was no evidence that venireperson 45 was unwilling to follow the law.

Article I, section 5 of the Missouri Constitution states, in relevant part, that "no person shall, on account of his or her religious persuasion or belief, . . . be disqualified from . . . serving as a juror[.]" This safeguard enshrined in our constitution serves as an invaluable tool to prohibit the exclusion from jury service of individuals based on their chosen religion. DOC attempts to trigger the protections of article I, section 5 by arguing that the removal of the prospective jurors at issue in this appeal was based on their status as Christians. This effort mischaracterizes the nature of the inquiry pursued during *voir dire* and ignores the broader proposition that article I, section 5 does not render an individual's views on issues relevant to the pending case immune from scrutiny during the jury selection process when those views are grounded in or evolve from religious sources or teachings. Indeed, "no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person[ ] . . . shall be sworn as a juror in the same cause." § 494.470.1, RSMo.[3] While *voir dire* unquestionably touched upon religion, contrary to DOC's assertion, it did not serve to

[3] Statutory citations are to the Missouri Revised Statutes (2016).

identify and exclude prospective jurors of certain religious persuasions. Rather, the questioning was appropriately focused on identifying those members of the venire who possessed strong feelings on the subject of homosexuality – a central issue in the case. DOC's efforts to narrowly cast the challenged strikes for cause as being based on the prospective jurors being Christians – as opposed to an issue-based determination founded on their views on homosexuality – is further undermined by the fact that several other prospective jurors who identified as religious or Christian but did not express strong views on homosexuality were not struck for cause.[4] Based on this record, we are simply not persuaded that the relevant venirepersons were "disqualified" from jury service "on account of [their] religious persuasion or belief" in violation of article I, section 5 of the Missouri Constitution; rather we conclude those individuals were disqualified as jurors based on strongly held views relevant to the predominant issue in the case. *See Thomas by and through Thomas v. Mercy Hosps. E. Cmtys.*, 525 S.W.3d 114, 118 (Mo. banc 2017) (citing Mo. Const. art. I, § 22(a)) (additional citation omitted) (stating that civil litigants have a constitutional right to a fair and

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[4] For example, veniremembers 8, 12, 19, 52, and 56, each indicated that they were raised in or went to conservative Christian churches. Juror 19 served on the jury. Juror 56 was struck for cause on other grounds.

impartial jury); *Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351, 353 (Mo. banc 1990) ("Even in a civil trial, where a jury decision need be made by only a three- fourths majority, the civil litigant is still entitled to a jury of twelve impartial persons").

Finney's sexual orientation and her same-sex relationship with Gaye were at the heart of her claim of discrimination against DOC and it was not a clear, evident and obvious violation of article I, section 5 of the Missouri Constitution for the trial court to strike for cause those prospective jurors who expressed strong feelings on the topic of homosexuality during the *voir dire* process.

At least two additional considerations persuade us that there was no plain error injustice here. As reflected in our description of the relevant facts, Finney's counsel asked extensive questions during voir dire, explicitly asking veniremembers whether they harbored *religious-based views* concerning homosexuality. Despite this extensive questioning, DOC's counsel never lodged an objection that it was inappropriate to examine veniremembers about their religiously based beliefs. In addition, it is not at all clear that either the State or federal constitutions prohibit exclusion from jury service based on an individual's *beliefs* – even *religiously based* beliefs – which prevent the juror from serving impartially in a particular case. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003)

(drawing a distinction between an arguably improper strike based on a venire member's "religious *identity*," versus a permissible strike based on a venire member being a "'religious *activist*'" (emphasis added)); *United States v. DeJesus*, 347 F.3d 500, 511 (3d Cir. 2003) ("The distinction drawn by the District Court between a strike motivated by religious beliefs and one motivated by religious affiliation is valid and proper."); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) ("It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, [or] a Muslim," but it would be "proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing").

As we have explained above, this case involved claims by Finney that she was mistreated, harassed, disparaged, and vilified by Jon *based on her homosexuality*. Given that the stricken veniremembers believed that Finney's conduct was sinful (meaning immoral and wrong), it is not "evident, obvious and clear" that the circuit court erred in concluding that they could not impartially and fairly decide her claim that she was unlawfully harassed due to her homosexuality – even if those veniremembers claimed that their religious beliefs would not prevent them from serving. *Henderson v. Fields*, 68 S.W.3d 455, 475 (Mo. App. W.D. 2001)

("The trial court is not required to accept as credible a venireperson's testimony that he or she will be able to overcome previously disclosed biases, prejudices and affiliations in rendering a verdict").

Finally, even if we were to find the trial court committed plain error when it excluded the three veniremembers for cause (a finding we do not make), DOC's claim on appeal would still fail as manifest injustice is not shown where, as here, there is no allegation that any of the twelve jurors who decided the case were unqualified. *See Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 203 (Mo. App. W.D. 2012) (quoting *State v. Robinson*, 26 S.W.3d 414, 418 (Mo. App. E.D. 2000) ("A party 'do[es] not have a right to a specific juror or to representation on the jury of a particular point of view'"). No manifest injustice exists "where there is no claim or suggestion from the record that any of the jurors selected to deliberate on the case was biased and should have been removed." *Id*; *see also State v. Reynolds*, 502 S.W.3d 18, 28 (Mo. App. E.D. 2016) (finding no manifest injustice from the dismissal of two female jurors when there was no indication that the jurors who served were not impartial).

Point denied.

Points II and III

In Points II and III, DOC alleges that the trial court's striking of veniremembers 4, 13, and 45 for cause violated the Equal Protection Clauses of the

United States and Missouri constitutions.

The Equal Protection Clause, found in the United States Constitution, states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Similarly, the equivalent provision contained in the Missouri Constitution states, in relevant part, that "all persons are created equal and are entitled to equal rights and opportunity under the law[.]" Mo. Const. art. I, § 2. The Equal Protection Clause prohibits striking a juror on the basis of race, gender, or another legally protected class. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-42 (1994).

DOC argues that because religion is a legally protected classification, the trial court's granting of the for-cause strikes must comply with strict scrutiny. However, consistent with our finding in Point I, the premise of DOC's arguments in Points II and III is incorrect as the strikes at issue in this appeal were not based on the veniremembers' religion; instead the strikes were founded on the veniremembers' views regarding an issue central to

Finney's case. As a result, DOC's claims in Points II and III must fail.

Because the strikes at issue were not based on the veniremembers' status as Christians and instead were based on specific views held by the prospective jurors directly related to the case, as we reasoned in Point I, the trial court did not commit plain error by granting Finney's for-cause strikes.
Points II and III denied.

Conclusion

The judgment of the trial court is affirmed, and the case is remanded to the trial court for a determination of attorney fees.[5]

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[5] Finney filed a motion for attorney's fees and motion to deem the motion for attorney's fees timely filed. Both motions were taken with the case. Finney had attempted to electronically file her motion for attorney's fees on November 15, 2022 – a day prior to the case being submitted. However, due to an issue with two supporting exhibits, and not the motion itself, the clerk's office rejected the filing of both the motion and the exhibits. This rejection was electronically communicated to Finney's counsel. Finney subsequently filed – after the case was submitted – an Amended Motion for Attorneys' Fees Incurred on Post-Trial Motions and on Appeal with Suggestions in Support Thereof that rectified the issues related to the two exhibits that "did not scan correctly."

Our Local Rule 29 requires that a party must file "a separate written motion [for attorney's fees] before submission of the cause." In this instance, there was no deficiency identified in the motion for attorney's fees that was timely submitted for

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filing by Finney on November 15, 2022. Nevertheless, the motion was "returned to filer" due to issues related only to the exhibits. Under these circumstances, we will deem that Finney's motion for attorney's fees was timely filed under Local Rule 29. As the prevailing party, Finney's motion for attorney's fees is granted and we remand to the trial court for determination of the appropriate award. *Gray v. Mo. Dep't of Corr.*, 635 S.W.3d 99, 108 (Mo. App. W.D. 2021) ("[W]hile appellate courts have the authority to award attorney fees on appeal, because the trial court is better equipped to hear evidence and determine the reasonableness of the fee requested, we remand to the trial court to determine a reasonable award of attorney['s] fees on appeal.").

Finney's motion to dismiss this appeal or, in the alternative, to strike DOC's brief, which was also taken with the case, is denied.

APPENDIX G

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Appeal No. WD84321

JEAN FINNEY,
Respondent,
v.
MISSOURI DEPARTMENT OF CORRECTIONS,
Appellant.

RESPONDENT'S BRIEF

APPEAL FROM THE
CIRCUIT COURT OF BUCHANAN
COUNTY, MISSOURI HONORABLE KATE H.
SCHAEFER
CASE NO. 18BU-CV04465

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STATEMENT OF FACTS

Plaintiff/Respondent Jean Finney ("Finney") has worked for the Missouri Department of Corrections ("DOC) since 2002 (Tr. 964, 967). She spent her entire career at Western Missouri Correctional Center ("WRDCC"). She began as a Corrections Officer I and, at the time of trial, held the rank of captain as a Corrections Supervisor I (Tr. 965). In approximately 2010, Finney began a relationship with another DOC employee, Gaye Colborn ("Gaye") (Tr. 481, 488). Gaye and Finney worked at different institutions, so it was not against DOC policy for the two women to be in a relationship (Tr. 488, 509). Gaye had been married to Jon Colborn ("Jon"), also a DOC employee, but Gaye and Jon divorced in 2003 (Tr. 480). John worked at WRDCC where Finney worked (Tr. 885).

Even before Gaye and Finney began their relationship, Jon sent text messages to Gaye in which he called Finney names such as "tardo boy," "lesbo," "lessie," "butch dyke," and other derogatory names (Tr. 490, 491). On just one day, Jon sent five pages of text messages to Gaye in which he ranted about Finney, her sexual orientation, and his sexual stereotyping of Finney (Tr. 491, 492). Jon's behavior became erratic and the name-calling escalated after Gaye and Finney began their relationship. Jon filed multiple complaints against Finney and (complaints that were investigated and determined to be unfounded) and actively tried to get Finney's subordinate staff to

make allegations of harassment against her (Tr. 569, 631). Jon also threatened to make complaints against DOC employees he thought were friends with Finney (Tr. 597-598, 647). There were instances where Jon did not pass along vital information to Finney during shift changes that could have put the lives of Finney and other DOC employees at risk (Tr. 648)

Gaye reported Jon's conduct to Cyndi Prudden who was the deputy division director of the DOC (Tr. 497-500, 527, 546-547, 556). In September 2016, when the DOC had still not investigated Jon's misconduct, Christopher Brewer, the warden of WRDCC (where both Finney and Jon worked), authored a memo to his superiors and to Human Resources in which he reported that, since Finney was promoted to Corrections Supervisor I at WRDCC in October 2015, "there has been an increasing level of hostility and aggression from . . . Colborn" (Tr. 565, 570, 574, 587, 608). Brewer characterized Jon's behavior as "erratic, aggressive, inciting and retaliatory in nature" (Tr. 565, 570, 574, 587, 608). Brewer expressed concerned that Jon was "out of control" (Tr. 587). Brewer wrote to his chain of command that he was concerned that Jon would show up at work with a gun and shoot Finney and possibly others (Tr. 623-624).

Brewer concluded Jon was creating a harassing, discriminatory, and retaliatory work environment for CSI Finney (Tr. 569, 629). Brewer concluded that Jon's name- calling, accusations, and other conduct

was directed at Finney based on negative stereotype in relation to Finney's protected class under sexual orientation (Tr. 579, 615).

On October 22, 2018, Finney filed suit against the DOC in which she alleged the DOC violated the Missouri Human Rights' Act ("MHRA"), MO. REV. STAT. § 213.010, *et seq.* by (1) discrimination against her on the basis of sex and creating a hostile work environment (LF 2, 30). Finney is a lesbian and her claims were brought based on the DOC's improper sexual stereotyping (Tr. 979; LF 30, p. 3, ¶¶ 21, 23, 24). She also brought a claim of retaliation in violation of the MHRA (LF 30).

Trial commenced on August 23, 2021 (LF 125, p. 1). During voir dire, Finney's counsel asked the venire panel following question:

> How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did?

(Tr. 105:10-21).

Juror 4, whose husband is a pastor, elaborated:

> I firmly stand on the word of God and what the word of God says. And much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know,

> none of us can be perfect. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic duty. But, yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is – I mean, we could go on and on. So I don't know if that answers your question, but.
>
> ***
>
> Yes, it is a sin.

(Tr. 266:10-19, 265:17-19, 267:2).

Juror 13 also responded affirmatively to the question from Finney's counsel (Tr. 106:19-23). The following colloquy then occurred between Juror 13 and Finney's counsel:

> [JUROR NO. 13]: Can I make a comment, sir?
>
> [FINNEY'S COUNSEL]: Do you have a question?
>
> [JUROR NO. 13]: No, I have a comment. [FINNEY'S COUNSEL]: Go ahead.
>
> [JUROR NO. 13]: Okay. The comment is that according to my belief, homosexuality is a sin.
>
> [FINNEY'S COUNSEL]: Okay.
>
> [JUROR NO. 13]: But you still have to love those people, and you still have to treat them

> right in society.
>
> [FINNEY'S COUNSEL]: Okay.
>
> [JUROR NO. 13]: You don't have the right to judge them. Therefore, I think I could be a fair juror. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.
>
> [FINNEY'S COUNSEL]: Okay.
>
> [JUROR NO. 13]: Okay?
>
> [FINNEY'S COUNSEL]: Okay. Does anybody else feel that way? No. 9, No. 47, No. 32, No. 45.

(Tr. 107:18-108:12) (emphasis added).

Although Juror 45 agreed with Juror 13, no specific questions were asked of Juror 45 (Tr. 280-281).

Finney's counsel moved to strike Jurors 4, 13, and 45 for cause based on their anti- homosexual beliefs (Tr. 280-283). The DOC made the following argument as to why these Jurors should not be struck for cause:

> MS. ROTHERMICH [for the DOC]: I think that in this with Juror No. 4 and 13, they did follow up and they said that they would be fair and impartial, that they were raised -- again, I think the question was whether they were

> raised like that. And my hang-up is that it wasn't: Do you still believe this? And, like, that's where I have an objection to this. Because I think there would be a number of people who still don't hold the beliefs that they held when they were children, you know.
>
> MR. SULLIVAN [for the DOC]: And, Your Honor, I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination.

(Tr. 282:4-16)

After hearing the arguments of the parties, the trial court made the following findings and ruling:

> All right. I understand what you're saying. I don't agree that they said they could never be protected because they're in this category. They both said – I'm not talking about Ms. Burton, but they both said that it doesn't really matter whether or not they believe it's a sin because the law says it's not, and everybody's a sinner and everyone needs to be treated equally and that they could follow the law. However, I believe at this point we have enough jurors. So to err on the side of caution, because specifically Ms. Burton did not answer that question, so we don't know her beliefs. I don't fault you for not rehabilitating

> her, but I'm not going to. I think we have enough jurors left in the panel that those three, I will sustain your request and overrule the objection. So No. 4, No. 13 and No. 45 will be excluded for cause.

(Tr. 283-284).

The jury returned verdicts in favor of Finney on her sexual discrimination and hostile work environment claims and in favor of the DOC on her retaliation claim (LF 84- 86). On the sexual discrimination claim, the jury awarded Finney $70,000 in non-economic damages and $25,000 in punitive damages (LF 84, 87). On the hostile work environment claim, the jury awarded Finney $105,000 in non-economic damages and $75,000 in punitive damages (LF 86, 86).

On September 30, 2021, the DOC filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial (LF 88). In its three-page motion, the DOC generally argued the alleged "blanket exclusion" of potential jurors based on religious background and beliefs violated art. I, § 5 of the Missouri Constitution which provides for religious freedom, the Equal Protection Clause of the U.S. Constitution (U.S. Const. amend XIV, § 1), and the Equal Protection Clause of the Missouri Constitution (art. I, § 2), (LF 88 pp. 2-3). On October 08, 2021, the trial Court denied the DOC's Motion for Judgment

Notwithstanding the Verdict or, in the Alternative, for New Trial (LF 115).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF ARTICLE I, § 5 OF THE MISSOURI CONSTITUTION BECAUSE THE TRIAL COURT'S DECISION TO STRIKE FOR CAUSE JURORS 4, 13, AND 45 WERE NOT BASED ON THEIR RELIGION BUT, INSTEAD, BECAUSE THE VENIREPERSONS HELD BELIEFS WHICH THE TRIAL COURT CONCLUDED AFFECTED THEIR ABILITY TO BE FAIR AND IMPARTIAL.

State v. Storey, 901 S.W.2d 886, 892 (Mo. *banc* 1995).
Thomas ex rel. Thomas v. Mercy Hospitals East Communities, 525 S.W.3d 114 (Mo. *banc* 2017)
State v. Stewart, 692 S.W.2d 295 (Mo. *banc* 1985); Missouri Constitution, art. I, § 5;
MO. R. CIV. P. 84.13(c).

II. THE TRIAL COURT DID NOT ERR WHEN IT

DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE (A) THE DOC, AS A POLITICAL SUBDIVISION OF THE STATE, DOES NOT HAVE STANDING TO ASSERT EQUAL PROTECTION CHALLENGES; (B) THE DOC DID NOT PRESERVE ITS CLAIMED CONSTITUTIONAL ERROR; AND (C) THE TRIAL COURT STRUCK JURORS 4, 13, AND 45 BECAUSE THEY HELD BELIEFS WHICH AFFECTED THEIR ABILITY TO FAIR AND IMPARTIAL, NOT BECAUSE OF THEIR RELIGION.

City of Harrisonville v. McCall Service Stations, 495 S.W.3d 738 (Mo. *banc* 2016)
State v. Minor, SC99469 (Mo. *banc* June 14, 2022).
State v. Mathenia, 702 S.W.2d 840 (Mo. *banc* 1986)
U.S. Const. amend XIV, § 1 MO. R. CIV. P. 84.13(c).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE (A) THE DOC, AS A POLITICAL SUBDIVISION OF THE STATE, DOES NOT HAVE STANDING TO ASSERT EQUAL PROTECTION CHALLENGES; (B) THE DOC DID NOT PRESERVE ITS CLAIMED CONSTITUTIONAL ERROR; AND (C) THE TRIAL COURT STRUCK JURORS 4, 13, AND 45 BECAUSE THEY HELD BELIEFS WHICH AFFECTED THEIR ABILITY TO FAIR AND IMPARTIAL, NOT BECAUSE OF THEIR RELIGION.

City of Harrisonville v. McCall Service Stations, 495 S.W.3d 738 (Mo. *banc* 2016)
State v. Minor, SC99469 (Mo. *banc* June 14, 2022).
Khoury v. Conagra Foods, Inc., 368 S.W.3d 189 (Mo. App. W.D. 2012) Missouri Const. art. I, § 2
MO. R. CIV. P. 84.13(c).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF ARTICLE I, § 5 OF THE MISSOURI CONSTITUTION BECAUSE THE TRIAL COURT'S DECISION TO STRIKE FOR CAUSE JURORS 4, 13, AND 45 WERE NOT BASED ON THEIR RELIGION BUT, INSTEAD, BECAUSE THE VENIREPERSONS HELD BELIEFS WHICH THE TRIAL COURT CONCLUDED AFFECTED THEIR ABILITY TO BE FAIR AND IMPARTIAL.

Standard of Review

As discussed, *infra,* under *Preservation of Error*, because the DOC did not preserve its constitutional challenges to the striking of Jurors 4, 13, or 45, this Court is limited to discretionary review for plain error. MO. R. CIV. P. 84.13(c). *See also State v. Oates*, 540 S.W.3d 858, 863 (Mo. *banc* 2018) (an "unpreserved constitutional claim is subject to discretionary review only for plain error"). "Plain error review, however, rarely is granted in civil cases." *Mayes v. St. Luke's Hospital of Kansas City*, 430 S.W.3d 260, 269 (Mo. *banc* 2014).

Even if the DOC had preserved its error, its requested *de novo* standard of review would not be

appropriate. The DOC argues the trial court erred in not granting its Motion for New Trial (App. Br., p. 19). "The standard of review for a trial court's order denying a motion for a new trial is abuse of discretion." *Stewart v. Partamian*, 465 S.W.3d 51, 56 (Mo. *banc* 2015). Moreover, the DOC contends Jurors 4, 13, and 45 should not have been struck for cause. "Appellate courts review for-cause rulings only for abuse of discretion." *State v. Storey,* 901 S.W.2d 886, 892 (Mo. *banc* 1995). In *Storey,* the appellant argued that the trial court excused a venireperson based on religious beliefs in violation of Missouri Const., art. I, § 5, *id.,* which is the same argument made by the DOC herein. The *Storey* Court evaluated the case using an abuse of discretion standard. *Id.* at 892-893.

Preservation of Error

The DOC's "preservation of error" in its Point I fails to comply with MO. R. CIV. P. 84.04(e) which requires the DOC to "include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved." The entirety of the DOC's alleged preservation of error is: "Preservation: Tr. Trans. 282, A0032; D88, pp 2-3." (App. Br., p. 20) (emphasis in original). As discussed more fully in § II(A) of Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Appellant's Brief, Appellant's purported preservation of error is fatally defective and its appeal should be dismissed or Appellant's Brief stricken.

In any event, the DOC did not preserve its claimed constitutional violation because it did not voice constitutional objections during the trial. The DOC argues on appeal the trial court erred in denying its Motion for New Trial because, when the trial court struck for cause Jurors 4, 13, and 45, the trial court violated art. I, § 5 of the Missouri Constitution. "A claim of constitutional error must be raised at the first opportunity and with citation to specific constitutional objections." *State v. Minor*, SC99469, *6 (Mo. *banc* June 14, 2022). *See also State v. Driskill*, 459 S.W.3d 412, 426 (Mo. *banc* 2015) ("To preserve a constitutional claim of error, the claim must be raised at the first opportunity with citation to specific constitutional sections.").

The DOC's "preservation of error" section of its brief cites to transcript page 282 wherein the DOC's attorneys stated:

> MS. ROTHERMICH [for the DOC]: I think that in this with Juror No. 4 and 13, they did follow up and they said that they would be fair and impartial, that they were raised -- again, I think the question was whether they were raised like that. And my hang-up is that it wasn't: Do you still believe this? And, like, that's where I have an objection to this. Because I think there would be a number of people who still don't hold the beliefs that they held when they were

> children, you know.
>
> MR. SULLIVAN [for the DOC]: And, Your Honor, I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination.

(Tr. 282:4-16) Note the DOC did not include Juror 45 in its objection, yet it now claims error for the exclusion of Juror 45.

The DOC's objection that "[i]t starts getting into the bounds of religious discrimination" is not a citation to specific constitutional objections as required to preserve its constitutional claims. *Minor*, SC99469, *6. Although the DOC raised constitutional challenges in its Motion for New Trial (LF 88), that was not the first opportunity to raise its constitutional claim. In *Mayes*, the appellant raised a constitutional argument in the motion for new trial, but did not raise the issue during the trial. 430 S.W.3d 260. The Court held "the trial court did not have the opportunity to consider these constitutional claims" which resulted in a waiver of the objection. *Id.* at 267. *See also State v. Conner,* 583 S.W.3d 102, 113 (Mo. App. E.D. 2019) (raising the constitutional claim for the first time in the motion for new trial was not the first opportunity). The DOC's failure to preserve its constitutional challenge to the striking of Jurors limits this Court to discretionary review for plain error. *Oates*, 540 S.W.3d at 863.

Arguably, the DOC's objection to striking

Jurors 4 and 13[1] while not rising to the level of preserving a constitutional claim preserved some objection. However, the DOC did not request a new trial based on the trial court's alleged abuse of discretion in striking Jurors 4, 13, or 45 (LF88). "A point raised on appeal must be based upon the same theory . . . as preserved in the motion for new trial." *State v. Lewis*, 243 S.W.3d 523, 525 (Mo. App. W.D. 2008). "An issue that is not preserved for appellate review is subject to only plain error review." *Id.*

The DOC did not raise constitutional objections at trial, but did raise them in its Motion for New Trial. The DOC made a general objection at trial, but its Motion for New Trial was not based on the trial court's alleged abuse of discretion. The different theories advanced at different times results in plain error review to be applied in the discretion of this Court to either possible claim of error. *See State v. Walter*, 479 S.W.3d 118, 123 (Mo. *banc* 2020) ("For an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial *and* presented to the trial court in a motion for new trial.") (emphasis in original).

Argument

A. Only plain error review is available in

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[1] Again, the DOC's citation to the record where it allegedly preserved its claim of error makes no mention of Juror 45.

> the discretion of this Court, but the DOC has not asked for plain error review nor shown that plain error review is warranted.

The DOC has framed this appeal as a religious discrimination issue. It is not. The jurors were not struck because of their religion – they were struck because Finney is homosexual, there was substantial evidence at trial concerning her homosexuality, and Jurors 4, 13, and 45 expressed negative beliefs about homosexuality which the trial court believed might affect their ability to be impartial. At trial, even the DOC recognized this as a question of beliefs, not religion, when it noted to the trial court the basis of its objection:

> I think that in this with Juror No. 4 and 13, they did follow up and they said that they would be fair and impartial, that they were raised -- again, **I think the question was whether they were raised like that**. And my hang-up is that it wasn't: **Do you still believe this? And, like, that's where I have an objection to this. Because I think there would be a number of people who still don't hold the beliefs that they held when they were children**, you know.

(Tr. 282:4-13) (emphasis added).

Even if the Jurors' beliefs stem from their religious convictions, that is not the same as striking

the Jurors on the basis of their religion. "Excusing a venireperson who cannot follow the law does not violate § 5, even if the reason for the inability is a religious belief." *Storey*, 901 S.W.2d at 892-893 (citing *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. *Banc* 1987), *cert. denied,* 485 U.S. 993 (1988)).

As discussed, *supra*, the correct standard of review is plain error. "Review for plain error involves a two-step process." *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. *banc* 2009). During this first step, the court "facially" reviews the matter to determine if the error 1) is "evident, obvious, and clear" and 2) one from which this Court can conclude there is "substantial ground for believing that manifest injustice or miscarriage of justice has resulted." *In re Estate of Werner,* 133 S.W.3d 108, 111 (Mo. App. W.D. 2004). "If we find that the claim of plain error does not facially establish substantial grounds for believing that manifest injustice or miscarriage of justice has occurred, we should decline to exercise our discretion to review a claim of error under Rule 84.13(c)." *Id.*

The DOC notes that art. I, § 22 of the Missouri Constitution guarantees litigants the right "to trial by a fair and impartial jury of twelve qualified jurors" (App. Br. p. 20). The DOC makes no effort to show this Court that there is substantial ground for believing that manifest injustice or miscarriage of justice has resulted from the exclusion of Jurors 4 or 13 (or 45) because it never claims it was denied the right to trial

by a fair and impartial jury. In fact, the DOC could not show there was substantial ground for believing manifest injustice or miscarriage of justice occurred where the trial court did exactly what it has been instructed to do -- err on the side of caution when ruling on challenges for cause "where a replacement can easily be obtained for a prospective juror of doubtful qualifications." *State v. Stewart,* 692 S.W.2d 295, 299 (Mo. *banc* 1985). *See also Brown v. Collins*, 46 S.W.3d 650, 652 (Mo. App. W.D. 2001) (trial court should "err on the side of caution by sustaining a challenge for cause than to create the potential for retrial -- an illogical expenditure of the citizenry's time and money -- by retaining the questionable juror."). Therefore, this Court should decline to exercise its discretion to review a claim of error under Rule 84.13(c). *Estate of Werner,* 133 S.W.3d at 111.

Even if the DOC could somehow show the error was "evident, obvious, and clear" the Court must determine "whether the error actually did result in manifest injustice or a miscarriage of justice." *State v. Hunt*, 451 S.W.3d 251, 260 (Mo. *banc* 2014). "In other words, the appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice will occur if the error is left uncorrected." *State v. Winfield*, 5 S.W.3d 505, 511 (Mo. *banc* 1999). The DOC bears the burden of establishing manifest injustice. *Hunt*, 451 S.W.3d at 260. This requires the DOC to show "the error was outcome

determinative." *Minor*, SC99469, *10.

Again, the DOC does not contend the striking of Jurors 4 or 13 (or 45) resulted in "manifest injustice," was a "miscarriage of justice," or was "outcome determinative." Nor can it. If, as the DOC contends, Jurors 4 and 13 (and 45) were unaffected by their anti-homosexual beliefs (i.e., they were fair and impartial) and they were seated, the end result is a fair and impartial jury – just as the one that was actually seated.

B. The trial court did not abuse its discretion when it the DOC's Motion for New Trial based on the striking of Jurors 4, 13, and 45.

In its Motion for New Trial, the DOC argued only the alleged constitutional violations but never argued the trial court abused its discretion in excluding Jurors 4, 13, and 45 (LF 88). Its failure to raise abuse of discretion in its Motion for New Trial leaves this Court with only the ability to conduct plain error review. *Lewis*, 243 S.W.3d at 525.

Even if the DOC had preserved an error, "[t]he standard of review for a trial court's order denying a motion for a new trial is abuse of discretion." *Partamian,* 465 S.W.3d at 56. Moreover, "[a]ppellate courts review for-cause rulings only for abuse of discretion." *Storey,* 901 S.W.2d at 892. If it had been preserved, abuse of discretion would be standard of

review even where the appellant argues the trial court erred in excusing a venireperson based on religious beliefs in violation of Missouri Const., art. I, § 5. *Id.* at 892-893.

"[T]he determination of the juror's qualifications is a matter for the trial court in the exercise of sound judicial discretion, and an appellate court will reject the trial court's determination only upon a clear showing of abuse of discretion." *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. *banc* 2008). Rulings on qualification of jurors "will not be disturbed on appeal unless [they constitute] a clear abuse of discretion and a real probability of injury to the complaining party." *State v. Feltrop,* 803 S.W.2d 1, 7 (Mo. *banc*), *cert. denied*, 501 U.S. 1262 (1991). "An appellate court will find reversible error only where an abuse of discretion is found and the defendant can demonstrate prejudice." *State v. Howell*, 626 S.W.3d 758, 764 (Mo. App. W.D. 2021). "Generally, the trial court has wide discretion in determining the qualifications of prospective jurors, and its decision will not be disturbed absent deprivation of a fair trial." *Thomas ex rel. Thomas v. Mercy Hospitals East Communities*, 525 S.W.3d 114, 117-118 (Mo. *banc* 2017) (internal quotations omitted). Here, the DOC makes no claim of prejudice, no claim that there was a real probability of injury, and no claim that it was deprived of a fair trial.

In *State v. Gray*, the defendant argued the trial

court abused its discretion in striking a venireperson for cause because the venireperson gave unequivocal answers that he could be fair and impartial. 812 S.W.2d 935, 938 (Mo. App. S.D. 1991). In *Gray*, like the DOC here, the defendant did not claim he was not provided a full panel of qualified jurors. 812 S.W.2d at 938. The *Gray* Court denied the defendant's claim of error and repeated the rule that "error may not be predicated on the sustaining of a challenge for cause if a full panel of qualified jurors is tendered for peremptory challenge. . . . The fact that the full panel of qualified jurors from which defendant expended his peremptory challenges did not include [the stricken venireperson] did not prejudice defendant." *Id.* (internal quotations omitted). Here, there was a full panel of qualified jurors from which to make peremptory challenges and the DOC implicitly concedes the jury that was sworn in was fair and impartial. There could be no prejudice, no possibility of injury to the DOC, and no deprivation of a fair trial. Accordingly, the trial court did not abuse its discretion when it denied the DOC's Motion for New Trial.

Because the DOC addresses each juror individually, Finney will briefly address each juror's response and demonstrate why the trial court did not abuse its discretion in striking each juror.

Juror No. 4.

Juror 4 answered affirmatively to the question: "How many of you went to a religious organization

growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did?" (Tr. 105:10-21). Juror 4, whose husband is a pastor, elaborated:

> I firmly stand on the word of God and what the word of God says. And much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic duty. But, yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is – I mean, we could go on and on. So I don't know if that answers your question, but.
>
> ***
>
> Yes, it is a sin.

(Tr. 266:10-19, 265:17-19, 267:2).

Later, Finney's counsel asked the venire panel the following question:

> How many people cannot set aside their religious convictions and just say, look, I don't think I'm qualified to sit here in this case if this case involves someone that is gay? I can't

> treat them fairly. I just can't set that religious conviction aside.

(Tr. 106:16-25).

The DOC is correct that Juror 4 did not raise her hand (Tr. 106) (App. Br., p. 23). Even if the failure to answer this question indicated Juror 4 could be fair and impartial, that did not remove the possibility of bias. "Even if a juror reaffirms his ability to be impartial . . . a venireperson should not be allowed to judge his own qualification to serve as a juror.'" *Khoury v. Conagra Foods, Inc.,* 368 S.W.3d 189, 201 (Mo. App. W.D. 2012) (internal quotations omitted). *See also Ray v. Gream,* 860 S.W.2d 325, 333-334 (Mo. *banc* 1993) ("It is proper to examine a juror as to the nature, character, and cause of his prejudice or bias, but it is not proper to permit the juror, who admits the existence in his mind of such prejudice or bias, to determine whether or not he can or cannot, under his oath, render an impartial verdict. Such a course permits the juror to be the judge of his qualifications, instead of requiring the court to pass upon them as questions of fact.").

The DOC incorrectly claims the trial court found no cause to strike Juror 4 (App. Br. p. 23). The trial court *did not* find no cause. The trial court simply recapped what they jurors said – "they both [referring to Jurors 4 and 13] said that it doesn't really matter whether or not they believe it's a sin because the law

says it's not, and everybody's a sinner and everyone needs to be treated equally and that they could follow the law" (Tr. 283:17-20). Restating what the jurors said during voir dire does not mean the trial judge believed the jurors were unbiased.

In *Milam v. Vestal*, a motor vehicle accident case, a juror was overheard conversing with two other jurors and saying he did not know how a person could sustain a back injury from a rear-end collision. 671 S.W.2d 448, 452 (Mo. App. S.D. 1984). The trial court questioned the juror, who indicated he had an open mind, would listen to the evidence, and make a decision strictly based on the evidence. *Id.* at 453. The juror was later excused before the jury began its deliberation. *Id.* On appeal, the Court held the trial court did not abuse its discretion in excluding the juror because "the record showed that the juror was removed because his reported remarks suggested a possible bias." *Id.* at 453.

In *Gray*, the defendant was convicted of selling methamphetamine. 812 S.W.2d at 937-938. The juror in question said he had done almost every type of drug except heroin and believed decriminalizing marijuana possession of less than one ounce would be a good idea. *Id.* at 937. The Court concluded the juror in question gave answers from which the trial court could have concluded he had beliefs that would affect his ability to follow the law as declared in the instructions. *Id.* at 938.

In *State v. Plaster,* the potential juror was asked whether she or any member of her family or a close friend had ever experienced harassment, to which the potential juror responded she had several close friends undergo that. 813 S.W.2d 349, 352 (Mo. App. E.D. 1991). The potential juror said she was not sure if it would affect her one way or the other, but later stated she thought she would not have any problems waiting until the end of all the evidence before making a decision. *Id.* On appeal the Court held the trial court properly exercised its discretion in striking the potential juror for cause believing her experience may have affected her ability to render a fair and impartial verdict. "The trial court determined to err on the side of caution in selecting fair and impartial jurors and we will not discourage such practice." *Id.*

Juror 4 entered the courtroom believing Finney was a sinner. The trial court could reasonably infer that Juror 4 could not be fair and impartial. As with *Milam, Gray*, and *Plaster,* it was not error to err on the side of caution and exclude Juror 4.

Juror No. 13.

Juror 13 responded affirmatively to the following question from Finney's counsel:

> How many people cannot set aside their religious convictions and just say, look, I don't think I'm qualified to sit here in this case if

> this case involves someone that is gay? I can't treat them fairly. I just can't set that religious conviction aside.

(Tr. 106:19-23).

The following colloquy then occurred:

> [JUROR NO. 13]: Can I make a comment, sir?
>
> [FINNEY'S COUNSEL]: Do you have a question?
>
> [JUROR NO. 13]: No, I have a comment.
> [FINNEY'S COUNSEL]: Go ahead.
> [JUROR NO. 13]: Okay. The comment is that according to my belief, homosexuality is a sin.
>
> [FINNEY'S COUNSEL]: Okay.
> [JUROR NO. 13]: But you still have to love those people, and you still have to treat them right in society.
> [FINNEY'S COUNSEL]: Okay.
>
> [JUROR NO. 13]: You don't have the right to judge them. Therefore, I *think* I could be a fair juror. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.
> [FINNEY'S COUNSEL]: Okay.
> [JUROR NO. 13]: Okay?
> [FINNEY'S COUNSEL]: Okay. Does anybody

> else feel that way? No. 9, No. 47, No. 32, No. 45.

(Tr. 107:18-108:12) (emphasis added).

The DOC again incorrectly claims the trial court expressly found Juror 13's beliefs would not keep him from following the law (App. Br. p. 25). The trial court did not make this finding; it merely recapped what Juror 13 had said during questioning (Tr. 283:15-20) ("they both [referring to Jurors 4 and 13] said that it doesn't really matter whether or not they believe it's a sin because the law says it's not, and everybody's a sinner and everyone needs to be treated equally and that they could follow the law."). The trial court was not bound by Juror 13's statement that he "thinks" he could follow the law because a venireperson is not allowed to judge his own qualifications to serve as a juror." *Khoury,* 368 S.W.3d at 201; *Ray,* 860 S.W.2d at 333-334.

Juror No. 45.

The DOC cites to page 282 of the transcript as the location where it allegedly preserved its claim of error. At page 282 of the transcript, the DOC only referred to Jurors 4 and 13 (Tr. 282:4-13). It is not this Court's duty to "comb the record in search of facts to support [appellants'] claim of error or demonstrate it is properly preserved for appellate review." *State ex rel. Schmitt v. Schier Co.,* 594 S.W.3d 245, 254 (Mo. App. S.D. 2020).

Gratuitously reviewing the trial court's striking of Juror 45 shows no error. The DOC rests its claim of error solely on Juror 45's agreement with Juror 13's comment that he homosexuality is a sin, but the juror "thinks" he could be fair (App. Br. p. 27). The trial court was not bound by the statements Juror 45 that he could follow the law, particularly where the anti-homosexual sentiment hints at a possibility of bias. *Khoury,* 368 S.W.3d at 201; *Ray,* 860 S.W.2d at 333-334.

> [A] determination by the trial judge of the qualifications of a prospective juror necessarily involves a judgment based on observation of his demeanor and, considering that observation, an evaluation and interpretation of the answers as they relate to whatever the venireman would be fair and impartial if chosen as a juror. . . . Because the trial judge is better positioned to make that determination than are we from the cold record, doubts as to the trial court's findings will be resolved in its favor.

State v. Mathenia, 702 S.W.2d 840, 844 (Mo. *banc* 1986) (internal quotations omitted). *See also Lester v. Sayles*, 850 S.W.2d 858, 870 (Mo. *banc* 1993) ("The trial court is in the best position to determine whether a juror will be able to effectively discharge his

duties.").[2] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Johnson,* 207 S.W.3d 24, 40 (Mo. *banc* 2006) (internal quotations omitted). Here, Finney is homosexual and there was substantial evidence at trial regarding her homosexuality. It does not shock the sense of justice nor does it indicate a lack of careful consideration for the trial court to strike Juror 4 who expressed strong anti-homosexuality beliefs.

Moreover, even Juror 4, 13 and 45 had indicated they could follow the law, that is insufficient to overcome the trial court's discretion to strike the juror for cause where the trial court believed the juror's answers suggested a possible bias. The trial court did exactly what the law requires – erred on the side of caution when ruling on challenges for cause "where a replacement can easily be obtained for a prospective juror of doubtful qualifications." *Stewart,*

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[2] The DOC may argue the trial court had a duty to independently examine Juror 4 to determine her ability to be fair and impartial. While there are cases suggesting the trial court has such a duty, that duty exists where the juror is actually seated. That is not the trial court's duty when the juror is struck for cause. *See Thomas,* 525 S.W.3d at 120 ("If counsel had not asked further and established an unequivocal response that prospective juror 24 could set aside any bias and judge the case fairly and impartially, the trial court would have been obligated to do so before seating the juror.") (emphasis added).

692 S.W.2d at 299. *See also Khoury,* 368 S.W.3d at 201 ("Replacement of a juror with an alternate is an appropriate remedy when there is a *possibility* of bias.") (internal quotations omitted) (emphasis in original); *Brown,* 46 S.W.3d at 652 (Trial court should "err on the side of caution by sustaining a challenge for cause than to create the potential for retrial -- an illogical expenditure of the citizenry's time and money -- by retaining the questionable juror.").

"Given this mandate a trial court's discretion to exclude a venireperson in order to avoid leaving a potentially prejudiced venireperson on the jury panel will not be disturbed by us. . . . The trial court determined to err on the side of caution in selecting fair and impartial jurors and we will not discourage such practice." *Plaster,* 813 S.W.2d at 352.

Finally, even if it is determined that he trial court should not have excluded Jurors 4, 13, or 45, that decision will not be disturbed absent deprivation of a fair trial. *Thomas*, 525 S.W.3d at 117-118. The DOC does not contend it was deprived of a fair trial. Thus, there is no basis on which to grant a new trial.

II. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE (A) THE DOC, AS A POLITICAL SUBDIVISION OF THE STATE, DOES NOT

HAVE STANDING TO ASSERT EQUAL PROTECTION CHALLENGES; (B) THE DOC DID NOT PRESERVE ITS CLAIMED CONSTITUTIONAL ERROR; AND (C) THE TRIAL COURT STRUCK JURORS 4, 13, AND 45 BECAUSE THEY HELD BELIEFS WHICH AFFECTED THEIR ABILITY TO FAIR AND IMPARTIAL, NOT BECAUSE OF THEIR RELIGION.

Standard of Review

As an initial matter, there is no standard of review because the DOC does not have standing to assert a Fourteenth Amendment Equal Protection challenge the trial court's striking of jurors. *See* Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Appellant's Brief at § I and discussion, *infra,* at Point II(A).

Even if the DOC had standing review, if at all, is for plain error, not the DOC's proposed *de novo* and strict scrutiny standards of review. The DOC failed to object at trial based on constitutional grounds. Therefore, it failed to preserve its constitutional challenges to the striking of jurors. *See* discussion *supra*, at Point I (preservation of error). *See also Minor*, SC99469, *6 and *Driskill*, 459 S.W.3d at 426. Raising its Equal Protection challenges in its Motion for New Trial (D88) was not the first opportunity to do so; the first opportunity was at trial, which the DOC

did not do. *See State v. Loper*, 609 S.W.3d 725, 732 (Mo. *banc* 2020); *Mayes*, 430 S.W.3d at 267; *Conner,* 583 S.W.3d at 113.

Abuse of discretion review would normally be the appropriate standard when a trial court denies a motion for new trial or when the challenged ruling is striking jurors for cause. *Partamian,* 465 S.W.3d at 56 (abuse of discretion review for denial of motion for new trial); *Storey,* 901 S.W.2d at 892 (abuse of discretion review of for-cause rulings). Abuse of discretion review in for-cause strikes is the appropriate standard even where the defendant claims the trial court excused a venireperson based on religious beliefs. *Id.* at 892-893. However, the DOC's Motion for New Trial did not raise alleged abuse of discretion in the striking of Jurors (LF 88). *See* discussion *supra*, at Point I (preservation of error). *See also Lewis*, 243 S.W.3d at 525; *Partamian,* 465 S.W.3d at 56; *Storey,* 901 S.W.2d at 892.

Therefore, even if the DOC had standing, it is entitled, if at all, to plain error review which is rarely granted in civil cases. Rule 84.13(c); *Oates*, 540 S.W.3d at 863. *See also Loper,* 609 S.W.3d at 733; *Mayes*, 430 S.W.3d at 269.

Preservation of Error

The DOC's "preservation of error" in its Point II fails to comply with Rule 84.04(e) in that it fails to explain how its claimed error was preserved. The

entirety of the DOC's alleged preservation of error is: "**Preservation**: Tr. Trans. 282, A0032; D88, pp 2-3." (App. Br., p. 20) (emphasis in original). As discussed in Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Appellant's Brief (at § II(A)), Appellant's purported preservation of error is fatally defective and its appeal should be dismissed or Appellant's Brief stricken.

In any event, the DOC did not preserve its Equal Protection challenge. It did not object at trial based on constitutional grounds to the striking of Jurors 4 or 13 (its cited transcript does not show it objected to Juror 45). *See* discussion *supra*, at Point I (preservation of error). *See also Minor*, SC99469, *6; *Driskill*, 459 S.W.3d at 426. Although the DOC raised Equal Protection challenges in its Motion for New Trial (D88), to preserve its claimed error, it was required to raise the challenge at the first opportunity (i.e., trial). *See Loper,* 609 S.W.3d at 733; *Mayes*, 430 S.W.3d at 267; *Conner,* 583 S.W.3d at 113.

The DOC also did not preserve any challenge to the trial court's discretionary authority to strike jurors for cause because its Motion for New Trial did not raise this issue (LF 88). Therefore, the DOC's has not preserved any challenge the trial court's exercise of discretion in the striking Jurors 4, 13, and 45 for cause. abuse of discretion appeal which relegates its appeal back to discretionary plain error review.

Because the DOC did not preserve either Equal

Protection or abuse of discretion challenges, only plain error review is available, in the discretion of this Court, which is rarely granted in civil cases. *Lewis*, 243 S.W.3d at 525; *Mayes*, 430 S.W.3d at 269.

Argument

A. The DOC, as a political subdivision of the State, does not have standing to assert equal protection challenges to the striking of Jurors 4, 13, or 45.

As noted by the DOC, the Equal Protection Clause found in the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, § 1 (emphasis added).

"[I]t has been consistently recognized by this Court that the state and political subdivisions of the state . . . are not entitled to the same constitutional protections as citizens." *City of Harrisonville v. McCall Service Stations*, 495 S.W.3d 738, 760 (Mo. *banc* 2016) (no due process analysis necessary because the political subdivision is not a citizen and does not

have due process rights). "Political subdivisions established by the State are not 'persons' within the protection of the due process and equal protection clauses." *Committee for Educational Equality v. State,* 294 S.W.3d 477, 485 (Mo. *banc* 2009). *See also City of Chesterfield v. Director. of Revenue*, 811 S.W.2d 375, 377 (Mo. *banc* 1991) ("Both state and federal courts have repeatedly held that municipalities and other political subdivisions established by the state are not 'persons' within the protection of the due process and equal protection clauses of the United States Constitution.") (citing *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) and *City of Trenton v. State of New Jersey*, 262 U.S. 182, 192 (1923)).

B. Even if the DOC had standing, only plain error review is available in the discretion of this Court, but the DOC has not asked for plain error review nor shown that plain error review is warranted.

As with the DOC's Point I, this is not a religious discrimination issue nor is it an issue of equal protection. It does not violate Equal Protection to disqualify a juror who holds certain beliefs when those beliefs may affect the juror's ability to be impartial. The source of those beliefs is ancillary. There are likely members of all religions who believe homosexuality is a sin just as there are members of all religions who

believe homosexuality is not a sin. [3] Finney is homosexual and her homosexuality was discussed during trial. Here, Jurors 4, 13, and 45 were excluded based on their beliefs about homosexuality because those beliefs may lead to the possibility that the juror could not be unbiased. That is not religious discrimination. At trial, the DOC understood that jurors were not being excluded "on the basis of" their religion but, as the DOC stated, whether they "hold the beliefs" because "they were raised like that" regardless of religious affiliations (Tr. 282:4-16).

Consider, for example, one who has no religious beliefs (for example, an anti- theist) but who finds homosexuality repugnant or morally reprehensible. Such person would have also fit into the category of holding beliefs from which the trial court could have determined that there was the "possibility of bias" or

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[3] It is axiomatic for the DOC to argue that those who believe homosexuality is a sin constitutes a categorical religious exclusion when studies show that "[a]mong religious LGBT adults, there are an estimated 1.5 million Protestants, 1.3 million Roman Catholics, 1.3 million who report belonging to another Christian religion, 425,000 who identify with another non-Christian religion, as well as 131,000 Jews, 107,000 Mormons, and 106,000 who are Muslim." Conron, K., Goldberg, S., O'Neill, K., *Religiosity Among LGBT Adults in the U.S.,* p. 2. UCLA School of Law, Williams Institute (Oct. 2020) (https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Religiosity-Oct-2020.pdf). *See also Most U.S. Christian Groups Grow More Accepting of Homosexuality,* Pew Research Center (Dec. 18, 2015) (https://www.pewresearch.org/fact-tank/2015/12/18/most-u-s-christian-groups-grow-more- accepting-of-homosexuality/).

"the slightest hint of bias or prejudice" and excluded the juror. *See State v. Brusatti*, 745 S.W.2d 210, 213 (Mo. App. E.D. 1987); *Khoury,* 368 S.W.3d at 201. The trial court did not violate anyone's Equal Protection rights. It did exactly what it has been instructed to do – "err on the side of caution by sustaining a challenge for cause than to create the potential for retrial -- an illogical expenditure of the citizenry's time and money -- by retaining the questionable juror." *Brown*, 46 S.W.3d at 652.

There is no plain error in striking jurors who hold anti-homosexuality beliefs from which a trial court could conclude there was a possibility bias. *See* discussion, *supra,* at Point I(A). Doing so does not demonstrate "evident, obvious, and clear" error so as to warrant plain error review. *Estate of Werner,* 133 S.W.3d at 111. Nor can the DOC meet its burden of showing the error was "outcome determinative." *Minor*, SC99469, *10. If, as the DOC contends, the anti-homosexual beliefs held by Jurors 4, 13, and 45 would not have affected their views on this case then the end result is a fair and impartial jury – just as the one that was actually seated.

C. The trial court did not abuse its discretion when it denied the DOC's Motion for New Trial based on the striking of Jurors 4, 13, and 45.

Even if the DOC had preserved an argument that the trial court abused its discretion when it

struck jurors for cause, (which it did not, *see* discussion, *supra*, Points I and II (preservation of error)), the DOC has not shown a "clear" abuse of discretion nor has it even argued it was denied a fair trial, both of which must exist before the trial court's broad discretion will be second guessed. *See Joy*, 254 S.W.3d at 888; *Thomas*, 525 S.W.3d at 117-118 (internal quotations omitted). Moreover, even if this Court might have reach a different conclusion about the ability of Jurors 4, 13, and 45 to be fair and impartial, that is not sufficient to find the trial court abused its discretion. *Mathenia,* 702 S.W.2d at 844.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DOC'S MOTION FOR NEW TRIAL BASED ON ALLEGED VIOLATIONS OF THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE (A) THE DOC, AS A POLITICAL SUBDIVISION OF THE STATE, DOES NOT HAVE STANDING TO ASSERT EQUAL PROTECTION CHALLENGES; (B) THE DOC DID NOT PRESERVE ITS CLAIMED CONSTITUTIONAL ERROR; AND (C) THE TRIAL COURT STRUCK JURORS 4, 13, AND 45 BECAUSE THEY HELD BELIEFS WHICH AFFECTED THEIR ABILITY TO FAIR AND IMPARTIAL, NOT BECAUSE OF THEIR RELIGION.

Standard of Review

There is no standard of review because, as with the DOC's Equal Protection challenge based on the United States Constitution, the DOC does not have standing to assert Equal Protection challenges to trial court's striking of jurors based on the Missouri Constitution. *See* Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Appellant's Brief at § I and discussion, *supra,* at Point II(A).

Even if the DOC had standing, it is did not preserve its claimed errors and is, therefore, entitled to only discretionary plain error review. *See* discussion *supra*, at Points I and II (preservations of error) and Points I(A) and II(B) (plain error standard of review). Plain error review which is rarely granted in civil cases. Rule 84.13(c); *Oates*, 540 S.W.3d at 863. *See also Loper,* 609 S.W.3d at 733; *Mayes*, 430 S.W.3d at 269.

Preservation of Error

The DOC's "preservation of error" in its Point III fails to comply with Rule 84.04(e) which requires Appellants to "include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved." The entirety of the DOC's alleged preservation of error is: "Preservation: Tr. Trans. 282, A0032; D88, pp 2-3." (App. Br., p. 20) (emphasis in original). As discussed more fully in

Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Appellant's Brief (at § II(A)), Appellant's purported preservation of error is fatally defective and its appeal should be dismissed or Appellant's Brief stricken.

Assuming the DOC has standing to assert Equal Protection violations, the DOC did not object at trial based on constitutional grounds and, therefore, failed to preserve its constitutional challenge to the striking of jurors. *See* discussion *supra*, at Points I and II (preservation of error). *See also Minor*, SC99469, *6; *Driskill*, 459 S.W.3d at 426. Although the DOC raised equal protection challenges in its Motion for New Trial (D88, pp. 2-3, that was not the first opportunity to raise its contention that striking the jurors for cause violated the Fourteenth Amendment's Equal Protection Clause. *See Loper,* 609 S.W.3d at 733; *Mayes*, 430 S.W.3d at 267; *Conner,* 583 S.W.3d at 113. The DOC's failure to preserve its constitutional challenge to the striking of Jurors 4, 13, and 45 limits this Court to discretionary review for plain error. *Oates*, 540 S.W.3d at 863.

The DOC also did not preserve any challenge to the trial court's discretionary authority to strike jurors for cause because its Motion for New Trial did not raise this issue (LF 88). The DOC's raising of one issue during trial and a different issue in its Motion for New Trial, results in plain error review of either issue. "For an allegation of error to be considered

preserved and to receive more than plain error review, it must be objected to during the trial *and* presented to the trial court in a motion for new trial." *Walter*, 479 S.W.3d at 123.

Argument

A. The DOC, as a political subdivision of the state, does not have standing to assert Equal Protection challenges to the striking of Jurors 4, 13, or 45.

As noted by the DOC, the Equal Protection Clause found in the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." Missouri Const. art. I, § 2. "[I]t has been consistently recognized by this Court that the state and political subdivisions of the state . . . are not entitled to the same constitutional protections as citizens." *City of Harrisonville*, 495 S.W.3d at 760 (no due process analysis necessary because the political subdivision is not a citizen and does not have due process rights). "Political subdivisions established by the State are not 'persons' within the protection of the due process and equal protection clauses." *Committee for Educational Equality,* 294 S.W.3d at 485. *See also City of Chesterfield*, 811 S.W.2d at 377 ("Both state and federal courts have repeatedly held that municipalities and other political subdivisions established by the state are not 'persons' within the

protection of the due process and equal protection clauses of the United States Constitution.") (citing *Williams*, 289 U.S. at 40 and *City of Trenton,* 262 U.S. at 192).

Therefore, the DOC lacks standing to assert equal protection violations.

B. Even if the DOC had standing, only plain error review is available in the discretion of this Court, but the DOC has not asked for plain error review nor shown that plain error review is warranted.

As with the DOC's Points I and II, this is not a religious discrimination issue nor is it an issue of equal protection. It does not violate Equal Protection to disqualify a juror who holds certain beliefs that may affect his or her ability to be impartial. Finney is homosexual and there was significant evidence developed during trial about her homosexuality. Jurors 4, 13, and 45 were struck for cause because their anti- homosexuality beliefs could lead the trial court to determine that there was the "possibility of bias" or a "hint of bias or prejudice." *See Brusatti*, 745 S.W.2d at 213; *Khoury,* 368 S.W.3d at 201. The DOC recognized this distinction at trial and noted that Jurors 4, 13, and 45 were not being excluded "on the basis of" their religion but, because they "hold the beliefs" that homosexuality is a sin because "they were raised like that" (Tr. 282:4- 16).

The trial court did exactly what it has been instructed to do – "err on the side of caution by sustaining a challenge for cause than to create the potential for retrial -- an illogical expenditure of the citizenry's time and money -- by retaining the questionable juror." *Brown*, 46 S.W.3d at 652. *See also Stewart,* 692 S.W.2d at 299 (trial court should err on the side of caution when ruling on challenges for cause because "a replacement can easily be obtained for a prospective juror of doubtful qualifications."); *Brown,* 46 S.W.3d at 652 (Trial court should "err on the side of caution by sustaining a challenge for cause than to create the potential for retrial -- an illogical expenditure of the citizenry's time and money -- by retaining the questionable juror.").

There is no plain error in striking jurors who hold anti-homosexuality beliefs that could lead one to conclude there was a possibility bias. Doing so does not demonstrate "evident, obvious, and clear" error so as to warrant plain error review. *Estate of Werner,* 133 S.W.3d at 111. Nor can the DOC meet its burden of showing the error was "outcome determinative." *Minor*, SC99469, *10. If, as the DOC contends, the anti-homosexual beliefs held by Jurors 4, 13, and 45 would not have affected their views on this case then the end result is a fair and impartial jury – just as the one that was actually seated.

C. The trial court did not abuse its discretion the DOC's Motion for New

> Trial based on the striking of Jurors 4, 13, and 45.

In its Motion for New Trial, the DOC argued only the alleged constitutional violations, including equal protection, but never argued the trial court abused its discretion in excluding Jurors 4, 13, and 45 (LF 88). In its Motion for New Trial, the DOC did not contend the trial court abused its discretion in striking for cause Jurors 4, 13, and 45 (LF 88). Its failure to raise this argument in its Motion for New Trial leaves this Court with only the ability to conduct plain error review. *Lewis*, 243 S.W.3d at 525. *See also* discussion *supra*, at Points I and II (preservations of error) and Points I(A) and II(B) (plain error standard of review).

Even if the DOC had preserved an abuse of discretion review, as discussed *supra,* at Points I(A) and II(A), the DOC has not shown a "clear" abuse of discretion nor has it even argued it was denied a fair trial, both of which must exist before the trial court's broad discretion will be second guessed. *See Joy*, 254 S.W.3d at 888; *Thomas*, 525 S.W.3d at 117-118 (internal quotations omitted). Moreover, even if this Court might have reach a different conclusion about the ability of Jurors 4, 13, and 45 5 to be fair and impartial, that is not sufficient to find the trial court abused its discretion. *Mathenia,* 702 S.W.2d at 844.

CONCLUSION

Based on the foregoing, Respondent, Jean Finney, respectfully requests this Court affirm the trial court's Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to MO. R. CIV. P. 84.06, I hereby certify that:

- This brief complies with the requirements of MO. R. CIV. P. 55.03;
- This brief complies with the length limitations of MO. R. CIV. P. 84.06(b) and Local Rule 41(A)(2);
- According to the word count function of Microsoft Word, this brief contains 9,683 words,

excluding those portions of the brief identified in MO. R. CIV. P. 84.06(b) and Local Rule 41(A)(2) of the Missouri Court of Appeals for the Western District of Missouri.

- Counsel further certifies that the electronic copies of this brief have been scanned for viruses and are virus free.

/s/ David Lunceford
David Lunceford
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 15th day of August 2022, true and accurate copy of the foregoing was filed using the Missouri Court's ECF which provided notice to all counsel of record.

/s/ David Lunceford
David Lunceford
Attorney for Respondent

APPENDIX H

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	Case No. WD84902
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
Appellant.	)	

APPELLANT'S MOTION FOR REHEARING OR APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

Appellant Missouri Department of Corrections respectfully moves this Court to vacate its December 27, 2022 Order and grant rehearing under Rule 84.17(a)(1) or, alternatively, transfer the case to the Missouri Supreme Court under Rule 83.02.

I. Questions of General Interest and Importance

1. Whether "religious belief," as opposed to just "religious status," is a protected classification under the U.S. and Missouri Equal Protection clauses for purposes of a *Batson*-type challenge.

2. Whether striking for cause jurors solely because they held traditional Christian beliefs on sexuality, despite the circuit court finding that those jurors could apply the law fairly, violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.
3. Whether trial counsel preserves for ordinary review a *Batson*-type challenge by objecting in court and noting that a strike would amount to "religious discrimination," even if trial counsel does not specifically cite a constitutional clause as the basis for the objection.
4. Whether a *Batson*-type violation causes a miscarriage of justice, or whether instead a *Batson* violation can be cured by empaneling a fair jury.

II. Appellate Authority Contrary to the District's Opinion

- *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)
- *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–42 (1994)
- *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987)
- *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992)

- *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016)

REASONS FOR GRANTING REHEARING OR TRANSFER

I. Statement of Facts

This appeal arises from a suit against the Missouri Department of Corrections alleging that an employee in the Department was unlawfully harassed because of her relationship with another female employee. The appeal, however, concerns not the underlying merits, but the exclusion of prospective jurors because of their religious views. Counsel for the plaintiff asked the trial court to strike—categorically—all prospective jurors who held traditional Christian views on sexuality. Tr. 281–82. The trial court, "to err on the side of caution," granted that request. Tr. 283:21–284:3.

Counsel for the plaintiff began the relevant part of voir dire by asking what he admitted was "a tricky question." Tr. 105:10. He asked, "How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin what they did?" Tr. 105:10–16. Juror 4 raised a hand. *Id.* Counsel then asked, "How many people cannot set aside their religious convictions and just say, look, I don't think I'm qualified to sit here in this case if this

case involves someone that is gay? I can't treat them fairly. I just can't set that religious conviction aside." Tr. 106:19–24. Juror 13 raised a hand. *Id.*

When allowed to explain, both Juror 4 and Juror 13 revealed that they were confused about counsel's compound questions and uses of double negatives. They *did* believe that all people, including those who identify as gay, have sinned as a religious matter. But they did *not* believe that "homosexuals shouldn't have the same rights as everyone else."

Just the opposite. Juror 13 explained, "Everybody sins. All of us here do. So that sin isn't any more or worse than any other." Tr. 108:7–8. Because of the belief that everybody sins and that all sins are equal, Juror 13 believed "you still have to treat them right in society" and, "[t]herefore, I think I could be a fair juror." Tr. 108:1–7. When counsel for the plaintiff asked prospective jurors to raise their hands if they agreed with Juror 13, Juror 45 did so. Tr. 108:11–12. Similarly, Juror 4 explained that, "much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. . . . But yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is—I mean, we could go on and on." Tr. 266:10–18.

Counsel for the plaintiff then moved to strike for cause the jurors who held traditional

Christian views on sexuality. Counsel argued that a person with traditional Christian beliefs necessarily "embraces the idea that [gay individuals] are less than everybody else" and that such Christians should thus never sit on a jury when a plaintiff is gay because when a prospective juror believes "that is a sin, there's no way to rehabilitate." Tr. 281:19, 24–25. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." Tr. 283:10–12.

The Department's counsel objected to the strike motion and protested the request for "a categorical exclusion like that," saying that it would be "getting into the bounds of religious discrimination." Tr. 282:14–16. Jurors 4 and 13 could not be struck on the basis of their religious beliefs, the Department's counsel said, because they testified they would be fair and impartial. Tr. 282:4-6. (Juror 45 was not given the opportunity to clarify.)

In response to the argument by plaintiff's counsel that the prospective jurors could not be fair, the trial court expressly disagreed. Those jurors, the trial court said, "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. "I don't agree that they said [gay plaintiffs] could never be protected because they're in this category." Tr. 283:13–15. Rather, the jurors

"both said that it doesn't really matter whether or not they believe it's a sin because the law says it's not, and everybody's a sinner and everyone needs to be treated equally." Tr. 283:13–20.

But despite finding that the jurors "were very clear in that they could be absolutely fair and impartial," the trial court decided that "we have enough jurors. So to err on the side of caution," the trial court granted the request to strike the three jurors—Jurors 4, 13, and 45—who held traditional Christian beliefs. Tr. 283:21–22.

After the later-empaneled jury returned a verdict against the Department, the Department moved for a new trial, arguing that excluding potential jurors based solely on their traditional religious beliefs about sexuality violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution. D88, pp.1–3. The circuit court denied this motion. D122. The Department timely appealed.

D126.

On appeal, the Department argued that the circuit court violated Equal Protection as

well as article I, section 5 of the Missouri Constitution by striking for cause veniremembers on the basis of their traditional religious beliefs about sexuality without finding that they could not

be fair and impartial. On December 27, 2022, this Court affirmed the circuit court.

This Court readily agreed that the jurors were struck "based on specific *views* held"—namely, their traditional Christian views on sexuality—but the Court concluded that no violation occurred "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians." Op. at 11 (emphasis added).

II. Argument

This Court should reconsider its decision or transfer this case to the Missouri Supreme Court. The jurors were struck solely because they held traditional religious beliefs, not because of any court finding that they would be biased. Indeed, the trial court expressly determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. And the distinction this Court drew between these persons' "status as Christians" and their "specific views" has been rejected by the U.S. Supreme Court. These strikes violate the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.

A. A new trial is necessary because striking jurors on the basis of their traditional religious beliefs violates Equal Protection.

Under both the Missouri Constitution and the Fourteenth Amendment to the U.S. Constitution, striking a juror on the basis of protected characteristics like race or sex triggers the applicable level of heightened scrutiny. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *see also Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 805 (Mo. banc 2013) ("[T]he Missouri Constitution's equal protection clause is coextensive with the Fourteenth Amendment."). This rule applies in cases both criminal and civil. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

Religion also is a protected characteristic, so a trial court cannot exclude jurors because of their religion without satisfying strict scrutiny. As the U.S. Supreme Court has held, when a trial court strikes a juror based on a classification that triggers "heightened scrutiny," the "*only* question is whether discrimination ... in jury selection" satisfies that scrutiny. *J.E.B.*, 511 U.S. at 136 (emphasis added). Religious discrimination triggers heightened scrutiny—strict scrutiny. *E.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). So to strike these jurors on the basis of their religious beliefs, the trial court needed to satisfy strict scrutiny.

The trial court did not. It did not even try to. It found that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. But then, "to err on the side of caution" because "we have enough jurors," the trial court struck these potential jurors solely because they held traditional religious beliefs. Tr. 283:21–22.[1] The trial court made no attempt to establish that it was pursuing a "compelling interest" and that striking the jurors was the least restrictive means to achieve that interest.

Nor could the court have made that showing. Striking jurors on behalf of their religious beliefs, without finding that they are biased, fails to satisfy strict scrutiny for the same reasons the strikes did in *Batson* and *J.E.B.* In *Batson*, counsel struck a juror based on a stereotype: he "assum[ed] that black jurors as a group" could not "impartially [ ] consider the State's case against a black defendant." 476 U.S. at 89. *J.E.B.* similarly warned against using "state-sponsored group stereotypes" and "unconstitutional prox[ies] for . . .

[1] In determining that the trial court had found that the jurors "could not impartially and fairly decide [plaintiff's] claim," Op. at 10, this Court overlooked this critical part of the transcript. The trial court accepted the prospective jurors' statements that they could be fair and impartial, and it never identified any evidence to the contrary. It simply assumed, because "we have enough jurors," that it could avoid claims of bias (by the plaintiff) later by excluding jurors on the basis of religious belief earlier.

impartiality." 511 U.S. at 128–29. Here, the trial court acknowledged that the jurors' testimony showed they could be fair. And the trial court never identified any evidence against their impartiality. But then, "to err on the side of caution"—presumably out of a concern that the plaintiff would move for a mistrial if she lost—the trial court simply assumed that individuals who hold traditional religious views might not be impartial. That unconstitutional stereotyping placed "a brand upon them, affixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142.

In affirming the judgment below, this Court did not dispute—and could not reasonably dispute—that Equal Protection prohibits striking potential jurors because of their religion (absent satisfying strict scrutiny). Instead, this Court upheld the strikes "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians and instead were based on specific *views* held by the prospective jurors directly related to the case." Op. at 11 (emphasis added).

But the U.S. Supreme Court has repeatedly rejected attempts to distinguish between religious status, religious conduct, and religious belief. Just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), so too a strike against jurors

because they hold traditional Christian beliefs is a strike against traditional Christians. Just last term, the U.S. Supreme Court unequivocally declared that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022); *see also Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022) (protecting voluntary religious conduct, such as praying, not just religious status). Nobody doubts that a trial court can strike a juror if his religious beliefs or status would cause him to be biased. But where a trial court—as here—has no evidence that a juror would be biased because of his beliefs, those beliefs cannot serve as the basis to strike that juror.

This Court's opinion also has no limiting principle. If admittedly fair jurors can be struck from a case about sexual orientation discrimination simply because of their religious views about sexuality, then so too can many others. To "err on the side of caution," a court could categorically strike all Mormons from a contract dispute involving a bar and grill because of their religious views on alcohol. It could automatically strike Jews in a tort case involving a party operating a motor vehicle on a Saturday. And it could automatically

strike Muslims from a case involving allegations of food poisoning at a pork barbecue restaurant.

In short, under the rule adopted by this Court, whenever a plaintiff or defendant does something that members of one religion disagree with, members of that religion can be categorically excluded from any jury even absent a finding that those members are biased.

B. Striking all identified jurors who held traditional religious views violated article I, section 5 of the Missouri Constitution.

Because the Missouri Supreme Court evaluates article I, section 5 violations like it does *Batson* challenges, *see Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008), the Equal Protection analysis in Part II.A applies the same here. The circuit court struck the jurors expressly because of their religious beliefs but did not even try to satisfy strict scrutiny. Rather than determine whether each juror was actually biased, the circuit court considered the jurors' religious beliefs as a "proxy" for bias, which is unconstitutional group stereotyping. *See J.E.B.*, 511 U.S. at 128–29. To avoid creating an underclass of citizens, this Court should rehear this case or transfer it to the Missouri Supreme Court.

The distinction drawn in the opinion by this Court between religious "status" and religious

"views" fails here as well. Article I, section 5 of the Missouri Constitution expressly protects religious belief, not just status: "[N]o person shall, on account of his or her religious persuasion *or belief* . . . be disqualified from . . . serving as a juror[.]" (Emphasis added.) This Court's contrary holding erases the term "belief" from the Constitution and conflicts with Missouri Supreme Court precedent. For example, after a trial court excused a potential juror who did not believe in the death penalty, the Missouri Supreme Court determined that the trial court excused the potential juror "not for his religious beliefs, but because he indicated that he would not follow the laws of this State." *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987).

C. This Court should review the claims under ordinary appellate standards, not plain-error review.

To preserve appellate review of *Batson*-type strikes, counsel need only (1) object and (2) "identify the discriminatory criterion." *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016). The Department met this standard. It expressly objected to the plaintiff's request to categorically strike all persons who held traditional religious beliefs. Counsel for the Department noted that the plaintiff was seeking "a categorical exclusion" and that striking these jurors "starts getting into the bounds of religious

discrimination." Tr. 282:4–16. In doing so, the Department notified the trial court of the Department's objection and the discriminatory criterion—religion—on which the objection was made. *See Singletary*, 497 S.W.3d at 809.

A party can also preserve a *Batson*-type challenge for review even without expressly identifying the discriminatory criterion so long as "[i]t appears from the transcript . . . that the [opposing party] and the trial court understood" the basis for the challenge. *Id*. Here, again, the Department met this standard. Right after the Department opposed a "categorical exclusion" of jurors for their religious beliefs, counsel for the plaintiff argued that jurors who hold these beliefs necessarily must be excluded. Tr. 283:10–12 ("I don't think that you can ever rehabilitate yourself.") The parties and the court all understood that counsel for the plaintiff was seeking a categorical exclusion on the basis of religious viewpoint and that the Department was opposing this request.

Instead of applying either of these standards, the Court applied a third: to preserve a challenge to a strike, counsel must "cite to specific constitutional provisions." Op. at 5. But none of the cases this Court cited were *Batson*-type cases. In the *Batson* context, Missouri courts have not required counsel during voir dire to cite specific

constitutional provisions. *See, e.g.*, *Singletary*, 497 S.W.3d at 809. This Court's opinion is thus contrary to *Singletary*. Under the standard established in *Singletary*, the Department preserved the issue for review, and this Court should not have reviewed under plain error.

D. Even under plain-error review, the trial court unlawfully struck the jurors.

This Court determined that the Department failed to meet both plain-error requirements: (1) that manifest injustice or miscarriage of justice resulted; and (2) that the error was evident, obvious, and clear. *See* Mem. at 8–10 & n.4; *see also Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019). This Court erred on both counts.

1. When a court removes a prospective juror in a way that unlawfully discriminates on the basis of a protected characteristic, that act causes structural error. It necessarily creates manifest injustice. The reason is simple: This kind of discrimination occurs under the imprimatur of the court itself. As the U.S. Supreme Court has explained, "wrongful exclusion of a juror" for protected characteristics "is a constitutional violation committed in open court… [that]

> casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). A *Batson*-type violation "in the courtroom 'raises serious questions as to the fairness of the proceedings.'" *J.E.B.*, 511 U.S. at 140.

It is thus beside the point whether the panel of jurors ultimately seated is fair. Citing decisions unrelated to the *Batson* context, this Court determined here that there was no manifest injustice because "there is no allegation that any of the twelve jurors who decided the case were unqualified." Op. at 10. But the U.S. Supreme Court has rejected harmless- error analysis in *Batson*-type cases. *Batson*, 476 U.S. at 100 (structural error); *compare J.E.B.*, 511 U.S. at 146 (structural error), *with id.* at 159 (Scalia, J. dissenting) (arguing that any error was harmless); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (permitting a defendant who experienced no identifiable harm to "raise the third-party equal protection claims of jurors"); *Vasquez v. Hillery*, 474 U.S. 254, 261–62 (1986) (structural error when a grand jury is chosen through race discrimination). So lower courts regularly hold that *Batson*-type claims are structural and treat them accordingly. *See, e.g.*, *Winston v. Boatright*,

649 F.3d 618, 628 (7th Cir. 2011) ("[I]ntentional discrimination on the basis of race in jury selection is a structural error" that "def[ies] analysis by 'harmless-error' standards" because the "entire conduct of the trial from beginning to end is . . . affected by the error" (internal quotation marks omitted)); *United States v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014) ("Because *Batson* error is structural and is not subject to harmless error review, only reversal of the conviction and a new trial could remedy any *Batson* error found."); *United States v. Blake*, 819 F.2d 71, 73 (4th Cir. 1987) ("If the Government's reasons fail to satisfy the *Batson* standards, appellants must be granted a new trial.").

The reason error is structural in the *Batson* context is simple: a defendant who makes a *Batson* claim is in fact asserting "the equal protection rights of the excluded venirepersons." *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992). Asking whether the empaneled jury was fair is the wrong approach because then "the discrimination endured by the excluded venirepersons goes completely unredressed." *See id.* at 936; *see also State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009) (reviewing unconstitutional discrimination in jury selection for plain error); *State v. Smith*, 595 S.W.2d 764, 766 (Mo. App. W.D. 1980) (holding that

discrimination against women in jury selection satisfied the plain-error standard); *State v. Hudson*, 815 S.W.2d 430, 432, 434 (Mo. App. E.D. 1991) (indicating that it would review an unpreserved *Batson* claim under the plain-error standard after remanding to the trial court for additional findings).

2. As argued in more detail above, the error here was plain. The trial court determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. There was no evidence that the jurors would fail to be impartial— indeed, they took pains to say that they had religious beliefs that gay individuals are no better or worse than anybody else and that they should absolutely be treated equally. Tr. 108:1–8, 266:10–18. Yet the trial court, "to err on the side of caution" and because "we have enough jurors," merely assumed that the jurors could potentially be biased because they held traditional religious views.

None of this Court's reasons for declining to find plain error is correct. The trial court never identified any evidence that the jurors would be biased. There is no legal distinction between discrimination based on religious "status" and discrimination based on religious "views." And contrary to this Court's determination (Op. at 8 n.4), the trial court's empaneling of people who might

hold views different from those of the prospective jurors does not save the trial court's actions from scrutiny. The trial court struck these jurors solely on the basis of their religious views. That the trial court did not make it worse by also incorrectly striking *other* jurors means nothing. The circuit court's error was plain.

III. Conclusion

It is paramount that this Court clarify that trial courts cannot simply "err on the side of caution" and strike jurors who have religious views about sexuality. After the U.S. Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), and the Missouri Supreme Court's decision in *Lampley v. Missouri Comm'n on Hum. Rts.*, 570 S.W.3d 16 (Mo. banc 2019), cases involving allegations of sexual orientation discrimination are bound to increase. Without a clear holding from this Court or the Missouri Supreme Court, trial courts will be stuck on the horns of a dilemma: either empanel jurors who have declared their religious beliefs (and thus invite arguments by a losing plaintiff that the jury was biased) or discriminate against prospective jurors who hold traditional beliefs. The trial court here chose the latter. This Court should make clear that striking a prospective juror because of her religious beliefs—without making any

determination that the juror would be biased—is unconstitutional.

Because this Court's decision contradicts controlling U.S. Supreme Court, Missouri Supreme Court, and Missouri Court of Appeals precedent, this Court should grant this motion for rehearing or transfer the case to the Missouri Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2023, the foregoing was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record.

/s/ Maria A. Lanahan

Maria A. Lanahan

APPENDIX I

Missouri Court of Appeals
WESTERN DISTRICT
1300 OAK STREET

KIMBERLY K. BOEDING
CLERK

KANSAS CITY, MO 64106–2970

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January 31, 2023

IMPORTANT NOTICE

To All Attorneys/Parties of Record

JEAN FINNEY, RESPONDENT,

vs. WD84902

MISSOURI DEPARTMENT OF CORRECTIONS, APPELLANT.

Please be advised that Appellant's motion for rehearing is **OVERRULED** and application for transfer to Supreme Court pursuant to Rule 83.02 is **DENIED.**

Kimberly K. Boeding
Clerk

ecc: All Attorneys of Record Notified Through E-filing System
cc:

APPENDIX J

SC99974

APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

Applicant Missouri Department of Corrections respectfully moves this Court grant this Application for Transfer to the Missouri Supreme Court under Rule 83.04.

I. Questions of General Interest and Importance

1. Whether "religious belief," as opposed to just "religious status," is a protected classification under the U.S. and Missouri Equal Protection clauses for purposes of a *Batson*-type challenge.
2. Whether striking for cause jurors solely because they held traditional Christian beliefs on sexuality, despite the circuit court finding that those jurors could apply the law fairly, violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.
3. Whether trial counsel preserves for ordinary review a *Batson*-type challenge by objecting in court and noting that a strike would amount to "religious discrimination," even if trial counsel does not specifically cite a constitutional clause as the basis for the objection.

4. Whether a *Batson*-type violation causes a miscarriage of justice, or whether instead a *Batson* violation can be cured by empaneling a fair jury.

II. Appellate Authority Contrary to the District's Opinion

- *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)
- *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–42 (1994)
- *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987)
- *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992)
- *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016)

REASONS FOR GRANTING REHEARING OR TRANSFER

When the trial court excluded jurors for cause solely because of their Christian beliefs, that order violated both the federal and state constitutions. The U.S. Supreme Court has repeatedly held that courts cannot exclude jurors on the basis of sex or race. Religion is no different: The Constitution does not permit religious Americans to be treated as second-class citizens. This Court should grant transfer, reverse, and remand.

I. Statement of Facts

This appeal arises from a suit against the Missouri Department of Corrections alleging that an employee in the Department was unlawfully harassed because of her relationship with another female employee. The appeal, however, concerns not the underlying merits, but the trial court's exclusion of prospective jurors because of their religious views. Counsel for the plaintiff asked the trial court to strike—categorically—all prospective jurors who held traditional Christian views on sexuality. Tr. 281–82. The trial court, "to err on the side of caution," granted that request. Tr. 283:21–284:3.

Counsel for the plaintiff began the relevant part of voir dire by trying to determine who on the jury held traditional Christian beliefs. He began by

asking what he admitted was "a tricky question"—in fact a series of compound questions that used double negatives. Tr. 105:10. He asked, among other things, "How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin what they did?" Tr. 105:10–16. Juror 4 raised a hand. *Id.* Counsel then asked, "How many people cannot set aside their religious convictions and just say, look, I don't think I'm qualified to sit here in this case if this case involves someone that is gay? I can't treat them fairly. I just can't set that religious conviction aside." Tr. 106:19–24. Juror 13 raised a hand. *Id.*

When allowed to explain, both Juror 4 and Juror 13 clarified that, although they raised their hands, they could not agree with counsel's compound questions. They *did* believe that all people, including those who identify as gay, have sinned as a religious matter. (And they did not think one could simply stop believing in their religion. *E.g.*, Tr. 266:10–11.) But they did *not* believe that "homosexuals shouldn't have the same rights as everyone else."

Just the opposite. Juror 13 explained why he believed gay plaintiffs should be treated the same as any other plaintiff: "Everybody sins. All of us here do. So that sin isn't any more or worse than any other." Tr. 108:7–8. Because he believed that everybody sins and that all sins are equal, Juror 13 maintained that

"you still have to treat them right in society" and, "[t]herefore, I think I could be a fair juror." Tr. 108:1–7. When asked whether his religion would "impact your ability to be a fair and impartial juror," Juror 13 was emphatic and unequivocal: "Absolutely not." Tr. 257:4–7. When counsel for the plaintiff asked prospective jurors to raise their hands if they agreed with Juror 13, Juror 45 did so. Tr. 108:11–12.

Similarly, Juror 4 explained why she believed gay plaintiffs should be treated the same as everybody else: "much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. . . . But yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is—I mean, we could go on and on." Tr. 266:10–18.

Counsel for the plaintiff then moved to strike for cause the jurors who held traditional Christian views on sexuality. Counsel argued that a person with traditional Christian beliefs should never sit on a jury when a plaintiff is gay because when a prospective juror believes "that is a sin, there's no way to rehabilitate." Tr. 281:19, 24–25. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." Tr. 283:10–12. Counsel also argued that Juror 4 should be struck because she was married to a pastor. Tr. 265:18-19, 282:21–24 ("She married herself to the

idea that if you're gay, then you are—you are a sinner.").

The Department's counsel objected to the strike motion, arguing that the request for "a categorical exclusion like that" would be "getting into the bounds of religious discrimination." Tr. 282:14–16. Jurors 4 and 13 could not be struck on the basis of their religious beliefs, the Department's counsel said, because they testified they would be fair and impartial. Tr. 282:4-6. (Juror 45 was not given the opportunity to clarify.)

The trial court expressly agreed that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. "I don't agree that they said [gay plaintiffs] could never be protected because they're in this category." Tr. 283:13–15. Rather, the jurors "both said that it doesn't really matter whether or not they believe it's a sin because the law says it's not, and everybody's a sinner and everyone needs to be treated equally." Tr. 283:13–20.

But despite finding that the jurors "were very clear in that they could be absolutely fair and impartial," the trial court decided that "we have enough jurors. So to err on the side of caution," the trial court granted the request to strike for cause the three jurors— Jurors 4, 13, and 45—who held traditional Christian beliefs. Tr. 283:21–22.

After the later-empaneled jury returned a verdict against the Department, the Department

moved for a new trial, arguing that excluding potential jurors based solely on their traditional religious beliefs about sexuality violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution. D88, pp.1–3. The circuit court denied this motion. D122. The Department timely appealed. D126.

On appeal, the Department argued that the circuit court violated Equal Protection as well as article I, section 5 of the Missouri Constitution by striking for cause veniremembers on the basis of their traditional religious beliefs without finding that they could not be fair and impartial. On December 27, 2022, the Court of Appeals affirmed the circuit court.

The Court of Appeals readily acknowledged that the jurors were struck "based on specific *views* held"—namely, their traditional Christian views on sexuality—but the Court of Appeals concluded that no violation occurred "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians." Op. at 11 (emphasis added).

The Department filed a motion for rehearing and application for transfer with the Court of Appeals on January 11, 2023, which was denied on January 31, 2023.

II. Argument

This Court should grant this application for transfer. The jurors were struck solely because they held traditional religious beliefs, not because of any court finding that they would be biased. Indeed, the trial court expressly determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. And the distinction the Court of Appeals drew between these persons' "status as Christians" and their "specific views" has been rejected by the U.S. Supreme Court. These strikes violate the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.

A. A new trial is necessary because striking jurors on the basis of their traditional religious beliefs violates Equal Protection.

Under both the Missouri Constitution and the Fourteenth Amendment to the U.S. Constitution, striking a juror on the basis of protected characteristics like race or sex triggers heightened scrutiny. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *see also Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 805 (Mo. banc 2013) ("[T]he Missouri Constitution's equal protection clause is coextensive

with the Fourteenth Amendment."). This rule applies in cases both criminal and civil. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

Religion also is a protected characteristic, so a trial court cannot strike a juror based on religion without satisfying strict scrutiny. As the U.S. Supreme Court has held, when a trial court strikes a juror based on a classification that triggers "heightened scrutiny," the "*only* question is whether discrimination … in jury selection" satisfies that scrutiny. *J.E.B.*, 511 U.S. at 136 (emphasis added). Religious discrimination triggers heightened scrutiny— strict scrutiny. *E.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). So to strike these jurors on the basis of their religious beliefs, the trial court needed to satisfy strict scrutiny.

The trial court did not. It did not even try to. It found that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. But then, "to err on the side of caution" because "we have enough jurors," the trial court struck these potential jurors solely because they held traditional religious beliefs. Tr. 283:21–22.[1] The trial court made

[1] In construing the transcript to say that the trial court had found that the jurors "could not impartially and fairly decide [plaintiff's] claim," Op. at 10, the Court of Appeals entirely overlooked this critical passage. Reading the full transcript, the trial court accepted the prospective jurors' statements that they could be fair and impartial, and it never identified any evidence

no attempt to establish that it was pursuing a "compelling interest" and that striking the jurors was the least restrictive means to achieve that interest.

Nor could the court have made that showing. No doubt, a trial court can strike a juror whom the court finds to be biased, but under *Batson* and *J.E.B.*, a court cannot assume a juror will be biased simply because of her religious beliefs. In *Batson*, counsel struck a juror based on a stereotype: he "assum[ed] that black jurors as a group" could not "impartially [ ] consider the State's case against a black defendant." 476 U.S. at 89. *J.E.B.* similarly warned against using "state-sponsored group stereotypes" and "unconstitutional prox[ies] for . . . impartiality." 511 U.S. at 128–29. Here, the trial court acknowledged that the jurors' testimony showed they could be fair. And the trial court never identified any evidence against their impartiality. But then, "to err on the side of caution"—presumably out of a concern that the plaintiff would move for a mistrial if she lost—the trial court simply assumed that individuals who hold traditional religious views might not be

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to the contrary. It simply assumed, because "we have enough jurors," that it could avoid claims of bias (by the plaintiff) later by excluding jurors on the basis of religious belief earlier.

impartial. That unconstitutional stereotyping placed "a brand upon them, affixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142.

In affirming the judgment below, the Court of Appeals did not dispute—and could not reasonably dispute—that Equal Protection prohibits striking potential jurors because of their religion (absent satisfying strict scrutiny). Instead, the Court of Appeals upheld the strikes "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians and instead were based on specific *views* held by the prospective jurors directly related to the case." Op. at 11 (emphasis added).

But the U.S. Supreme Court has repeatedly rejected attempts to distinguish between religious status, religious conduct, and religious belief. Just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), so too a strike against jurors because they hold traditional Christian beliefs is a strike against traditional Christians. Just last term, the U.S. Supreme Court unequivocally declared that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022); *see also Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022) (protecting voluntary religious conduct, such as praying, not just religious status). Nobody doubts

that a trial court can strike a juror if his religious beliefs or status would cause him to be biased. But where a trial court—as here—has no evidence that a juror would be biased because of his beliefs, the trial court cannot engage in unconstitutional stereotyping to strike that juror.

The Court of Appeals opinion also has no limiting principle. If fair jurors can be struck from a case about sexual orientation discrimination simply because of their religious views about sexuality, then so too can many others. To "err on the side of caution," a court could categorically strike all Mormons from a contract dispute involving a sports bar because of their religious views on alcohol. It could automatically strike Jews in a tort case involving a party operating a motor vehicle on a Saturday. And it could automatically strike Muslims from a case involving allegations of food poisoning at a restaurant that serves pork. In short, under the rule adopted by the Court of Appeals, whenever a plaintiff or defendant does something that members of one religion disagree with, members of that religion can be categorically excluded from any jury even absent a finding that those members are biased.

B. Striking all identified jurors who held traditional religious views violated article I, section 5 of the Missouri Constitution.

Because this Court evaluates article I, section 5 violations like it does *Batson* challenges, *see Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008), the Equal Protection analysis in Part II.A applies the same here. The circuit court struck the jurors expressly because of their religious beliefs but did not even try to satisfy strict scrutiny. Rather than determine whether each juror was actually biased, the circuit court considered the jurors' religious beliefs as a "proxy" for bias, which is unconstitutional group stereotyping. *See J.E.B.*, 511 U.S. at 128–29. To avoid creating an underclass of citizens, this Court should grant this application for transfer.

The distinction drawn in the Court of Appeals opinion between religious "status" and religious "views" fails here as well. Article I, section 5 of the Missouri Constitution expressly protects religious belief, not just status: "[N]o person shall, on account of his or her religious persuasion *or belief* . . . be disqualified from . . . serving as a juror[.]" (Emphasis added.) The Court of Appeals opinion's contrary holding erases the term "belief" from the Missouri Constitution and conflicts with this Court's precedent. For example, in a case where a trial court excused a potential juror who did not believe in the death penalty, this Court determined that the trial court excused the potential juror "not for his religious beliefs, but because he indicated that he would not

follow the laws of this State." *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987).

C. This Court should review the claims under ordinary appellate standards, not plain-error review.

To preserve appellate review of *Batson*-type strikes, counsel need only (1) object and (2) "identify the discriminatory criterion." *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016). The Department met this standard. It expressly objected to the plaintiff's request to categorically strike all persons who held traditional religious beliefs. The Department's Counsel noted that the plaintiff was seeking "a categorical exclusion" and that striking these jurors "starts getting into the bounds of religious discrimination." Tr. 282:4–16. In doing so, the Department notified the trial court of the Department's objection and the discriminatory criterion—religion—on which the objection was made. *See Singletary*, 497 S.W.3d at 809.

A party may also preserve a *Batson*-type challenge for review without expressly identifying the discriminatory criterion so long as "[i]t appears from the transcript . . . that the [opposing party] and the trial court understood" the basis for the challenge. *Id.* Here, again, the Department met this standard. Right after the Department opposed a "categorical exclusion" of jurors for their religious beliefs, counsel for the plaintiff argued that jurors

who hold these beliefs necessarily must be excluded. Tr. 283:10–12 ("I don't think that you can ever rehabilitate yourself."). The parties and the court all understood that plaintiff's counsel was seeking a categorical exclusion on the basis of religious viewpoint and that the Department was opposing this request.

Instead of applying either of these standards, the Court of Appeals applied a third: to preserve a challenge to a strike, counsel must "cite to specific constitutional provisions." Op. at 5. But the Court of Appeals cited no *Batson*-type cases to support this contention. In the *Batson* context, Missouri courts have not required counsel cite specific constitutional provisions when objecting to motions to strike jurors. *See, e.g.*, *Singletary*, 497 S.W.3d at 809. The Court of Appeals opinion is thus contrary to *Singletary*. Under the standard established in *Singletary*, the Department preserved the issue for review, and the Court of Appeals should not have reviewed under plain error.

D. Even under plain-error review, the trial court unlawfully struck the jurors.

The Court of Appeals also wrongly determined that the Department failed to meet both plain-error requirements: (1) that manifest injustice or miscarriage of justice resulted; and (2) that the error was evident, obvious, and clear. *See* Mem. at 8–10 &

n.4; *see also Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019).

1. When a court removes a prospective juror in a way that unlawfully discriminates on the basis of a protected characteristic, that act causes structural error. It necessarily creates manifest injustice. The reason is simple: This kind of discrimination occurs under the imprimatur of the court itself. As the U.S. Supreme Court has explained, "wrongful exclusion of a juror" for protected characteristics "is a constitutional violation committed in open court… [that] casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). A *Batson*-type violation "in the courtroom 'raises serious questions as to the fairness of the proceedings.'" *J.E.B.*, 511 U.S. at 140.

It is thus beside the point whether the panel of jurors ultimately seated is fair. Citing decisions unrelated to the *Batson* context, the Court of Appeals determined here that there was no manifest injustice because "there is no allegation that any of the twelve jurors who decided the case were unqualified." Op. at 10. But the U.S. Supreme Court has rejected harmless-error analysis in *Batson*-type cases. *Batson*, 476 U.S. at 100 (structural error); *compare J.E.B.*, 511 U.S. at 146 (structural error), *with id.* at 159 (Scalia, J. dissenting) (arguing that any error

was harmless); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (permitting a defendant who experienced no identifiable harm to "raise the third-party equal protection claims of jurors"); *Vasquez v. Hillery*, 474 U.S. 254, 261–62 (1986) (structural error when a grand jury is chosen through race discrimination). So lower courts regularly hold that *Batson*-type claims are structural and treat them accordingly. *See, e.g.*, *Winston v. Boatright*, 649 F.3d 618, 628 (7th Cir. 2011) ("[I]ntentional discrimination on the basis of race in jury selection is a structural error" that "def[ies] analysis by 'harmless- error' standards" because the "entire conduct of the trial from beginning to end is . . . affected by the error" (internal quotation marks omitted)); *United States v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014) ("Because *Batson* error is structural and is not subject to harmless error review, only reversal of the conviction and a new trial could remedy any *Batson* error found."); *United States v. Blake*, 819 F.2d 71, 73 (4th Cir. 1987) ("If the Government's reasons fail to satisfy the *Batson* standards, appellants must be granted a new trial.").

The reason error is structural in the *Batson* context is simple: a defendant who makes a *Batson* claim is in fact asserting "the equal protection rights of the excluded venirepersons." *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992). Asking whether the empaneled jury was fair is the wrong approach

because then "the discrimination endured by the excluded venirepersons goes completely unredressed." *See id.* at 936; *see also State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009) (reviewing unconstitutional discrimination in jury selection for plain error); *State v. Smith*, 595 S.W.2d 764, 766 (Mo. App. W.D. 1980) (holding that discrimination against women in jury selection satisfied the plain-error standard); *State v. Hudson*, 815 S.W.2d 430, 432, 434 (Mo. App. E.D. 1991) (indicating that it would review an unpreserved *Batson* claim under the plain-error standard after remanding to the trial court for additional findings).

2. As argued in more detail above, the error here was plain. The trial court determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. There was no evidence that the jurors would fail to be impartial— indeed, they took pains to say that they had religious beliefs that gay individuals are no better or worse than anybody else and that they should absolutely be treated equally. Tr. 108:1–8, 266:10–18. Yet the trial court, "to err on the side of caution" and because "we have enough jurors," merely assumed that the jurors could potentially be biased because they held traditional religious views.

None of the reasons cited by the Court of Appeals for declining to find plain error is correct. The trial court never identified any evidence that the

jurors would be biased. There is no legal distinction between discrimination based on religious "status" and discrimination based on religious "views." And contrary to the Court of Appeals determination (Op. at 8 n.4), the trial court's empaneling of people who might hold views different from those of the prospective jurors does not save the trial court's actions from scrutiny. The trial court struck these jurors solely on the basis of their religious views. That the trial court did not make it worse by also incorrectly striking *other* jurors means nothing. The circuit court's error was plain.

III. Conclusion

It is paramount that this Court clarify that trial courts cannot simply "err on the side of caution" and strike jurors who have religious views about sexuality. After the U.S. Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), and the Missouri Supreme Court's decision in *Lampley v. Missouri Comm'n on Hum. Rts.*, 570 S.W.3d 16 (Mo. banc 2019), cases involving allegations of sexual orientation discrimination are bound to increase. Without a clear holding from this Court, trial courts will be stuck on the horns of a dilemma: either empanel jurors who have declared their religious beliefs (and thus invite arguments by a losing plaintiff that the jury was biased) or discriminate against prospective jurors who hold traditional beliefs. The trial court here chose the latter. This

Court should make clear that striking a prospective juror because of her religious beliefs—without making any determination that the juror would be biased— is unconstitutional.

Because the Court of Appeals decision contradicts controlling U.S. Supreme Court, Missouri Supreme Court, and Missouri Court of Appeals precedent, this Court should grant this application for transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2023, the foregoing Application for Transfer and all required attachments was filed through the Missouri CaseNet e-filing system with the Missouri Supreme Court was served on counsel of record via email:

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/s/ Maria A. Lanahan
Maria A. Lanahan

APPENDIX K

Supreme Court of Missouri
en banc

SC99974
WD84902 consolidated with WD84949
January Session, 2023

Jean Finney,
Respondent,

vs. (TRANSFER)

Missouri Department of Corrections,
Appellant.

Now at this day, on consideration of Appellant's application to transfer the above- entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a

full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2023, and on the 4th day of April, 2023, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 4th day of April, 2023.

_____, Clerk

_____, Deputy Clerk

APPENDIX L

Search

	Search documents in this case:
No. 22A1112	
Title:	Missouri Department of Corrections, Applicant v. Jean Finney
Docketed:	June 23, 2023
Lower Ct:	Court of Appeals of Missouri, Western District
Case Numbers:	(WD84902)

Date	Proceedings and Orders
Jun 21 2023	Application (22A1112) to extend the time to file a petition for a writ of certiorari from July 3, 2023 to September 1, 2023, submitted to Justice Kavanaugh.
	Main DocumentLower Court Orders/Opinions
Jun 26 2023	Application (22A1112) granted by Justice Kavanaugh extending the time to file until September 1, 2023.

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Party name: Missouri Department of Corrections		