NO. 23-203

IN THE

Supreme Court of the United States

MISSOURI DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JEAN FINNEY,
Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

Alliance Defending Freedom (ADF) is a non-profit, public-interest legal organization providing strategic planning, training, funding, and litigation services to protect Americans' constitutional rights—including the First Amendment right to the free exercise of religion and the Fourteenth Amendment right to the equal protection of the law.

Since its founding in 1994, ADF has played a key role in numerous cases before this Court, including *303 Creative* v. *Elenis*, 600 U.S. 570 (2023), *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373 (2021), *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), *Trinity Lutheran Church of Columbia, Inc.,* v. *Comer*, 582 U.S. 449 (2017), *Zubik* v. *Burwell*, 578 U.S. 403 (2016), *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), *McCullen* v. *Coakley*, 573 U.S. 464 (2014), *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014), and *Arizona Christian School Tuition Organization* v. *Winn*, 563 U.S. 125 (2011), and hundreds more cases in lower federal and state courts.

In *Trinity Lutheran*, ADF brought free-exercise and equal-protection claims on behalf of Trinity Lutheran Church of Columbia after the State of Missouri excluded the church's preschool from a playground-resurfacing program. 582 U.S. at 455–56.

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* No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties were timely notified of this brief as required by Supreme Court Rule 37.2.

This Court held that excluding Trinity Lutheran from a public benefit for which it was otherwise eligible based on its religious affiliation violated the Free Exercise Clause, thus obviating the need to address the church's equal-protection claim. *Id.* at 466 & n.5.

Now the State of Missouri has found itself on the *receiving* end of invidious discrimination against its citizens—prospective jurors who were excluded from a jury based on their religious beliefs despite the trial court's finding that they "were very clear in that they could be absolutely fair and impartial." App.42a, 45a.

The State has highlighted how the Missouri Court of Appeals' decision affirming that exclusion has deepened a split in authority. Pet.10–18. ADF submits this brief to further highlight how flagrantly wrong that decision is in light of close to a century's worth of this Court's precedent, including multiple recent free-exercise and Establishment Clause cases.

Given the egregious nature of the discrimination here, the State's petition would warrant this Court's review even if the Missouri Court of Appeals were the sole outlier among the lower courts. But it is not. Pet.15–18. As the petition highlights, two of the worst offenders are the Texas Criminal Court of Appeals' decision in *Casarez* v. *State*, 913 S.W.2d 468 (Tex. Crim. App. 1994) (en banc), and the Minnesota Supreme Court's decision in *State* v. *Davis*, 504 N.W.2d 767 (Minn. 1993). Both courts affirmed striking prospective black jurors based on the prosecutor's claim they were struck not because of their race—but because of their religious affiliation. Like the decision below, those decisions are egregiously wrong. The Court should grant this petition and relegate them to the dustbin of history.

SUMMARY OF THE ARGUMENT

The Equal Protection Clause requires our judicial system to treat citizens—including prospective jury members—as individuals and not deny them access to public life based on stereotypical assumptions about their race, religion, sex, or national origin. That has been an empty promise in this case.

During voir dire for a civil jury trial, Respondent's counsel asked prospective jurors to out themselves if they had attended a "hell, fire and brimstone church," meaning a "conservative Christian church" where they had been taught that homosexuality is a sin. App.29a–30a. Relevant here, three prospective jurors confessed that they still believe homosexuality is a sin. App.31a–34a, 37a–39a. But all three agreed that "[e]verybody sins," no sin is "worse than any other," and "you still have to love those people, and you still have to treat them right in society," and all three indicated they could be fair and impartial. App.32a–34a, 38a, 42a (noting that Jurors 4 and 45 had both agreed with Juror 13's earlier statements), App.45a.

Respondent's counsel moved to strike all three for cause, arguing "there's no way to rehabilitate somebody" who believes homosexuality is a sin, "especially on a case like this" involving allegations of discrimination based on sexual orientation. App.43a–45a. The trial court rejected Respondent's counsel's misreading of the prospective jurors' statements, noting that two of them had been "very clear" that "they could be absolutely fair and impartial," and that they realized it did not matter what they believed about homosexuality "because the law says it's not [a sin]" and "everyone needs to be treated equally." App.42a, 45a. And thus "they could follow the law." App.45a.

And yet the trial court still agreed to strike all three jurors for cause "to err on the side of caution." App.45a. And the Missouri Court of Appeals affirmed that decision on appeal. App.81a.

Those decisions were egregiously wrong. Litigants would never be allowed to strike prospective jurors based on *racial* stereotypes just "to err on the side of caution," and rightly so. Allowing litigants to strike prospective jurors based on *religious* stereotypes is equally offensive to the Constitution, and this Court should say so and put a decisive end to the practice. To do otherwise would condone a practice that conflicts with decades of precedent and multiple cases the Court has recently decided. A practice that, unfortunately, is not at all limited to a single state or jurisdiction.

The Missouri Court of Appeals tried to escape all of that by rebranding the prospective jurors' statements as admissions that they had "strongly held views" on "an issue central to Finney's case." App. 76a, 80a–81a. That's wrong. What "the word of God says" about homosexuality was *not* a central issue in the case, as all three prospective jurors recognized. App.32a–34a, 38a, 42a, 45a. As one of those jurors, a "retired schoolteacher, mother of five, and grandmother of four" tried to explain, the fact that she was married to a pastor and "firmly stand[s] on the word of God" did not prevent her from serving as an impartial juror. App.37a–38a.

"There's more to me," she insisted. App.38. And she was right. But unless the Court grants the State's petition and reverses, she and millions of Americans like her will be left to wonder if—at least in the eyes of our judicial system—she was wrong.

ARGUMENT

I. The Missouri Court of Appeals' decision is badly out of step with 80 years of precedent recognizing that religious discrimination is presumptively invidious.

Religion is American law's first suspect classification. Article VI, Clause 3 of the U.S. Constitution bans religious tests for any federal office or position of public trust, and the First Amendment to the U.S. Constitution protects the free exercise of religion. Indeed, ratification of the U.S. Constitution depended on the promise of the Free Exercise Clause and the other provisions contained in the Bill of Rights. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 636–37 (1943). The notion that citizens' religious affiliation or beliefs should have no effect on their legal standing is part of the groundwork on which American democracy was built.

As a result, this Court has recognized for at least 80 years that religious classifications are constitutionally suspect. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (a decision not to prosecute may not be based on race or religion); *Wade* v. *United States*, 504 U.S. 181, 186 (1992) (the government cannot refuse to file a substantial-assistance motion based on race or religion); *Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992) (recognizing that race and religion are suspect classifications under the Fourteenth Amendment); *Friedman* v. *Rogers*, 440 U.S. 1, 17 (1979) (listing race, religion, or alienage as suspect distinctions under the Equal Protection Clause); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining that religious classifications require a more searching inquiry).

Because they disadvantage members of a suspect class and intrude on the exercise of a fundamental right, religious classifications—like those the Court of Appeals approved—are presumptively invalid. *E.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (strict scrutiny applies to laws that impinge on personal rights); *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 457 (1988) (strict scrutiny applies to laws that interfere with a fundamental right or discriminate against a suspect class); *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) (classifications that disadvantage a suspect class or impinge on a fundamental right are presumptively invidious). The general rule under the First and Fourteenth Amendments is that religious choices should not impact citizens' rights, duties, benefits, or participation in public life. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring). When the state deems it necessary to directly intrude on free exercise or other First Amendment liberties, it must do so on individualized bases, *not* on broad classifications and invidious stereotypes. Cf. *Police Dep't of City of Chi.* v. *Mosley*, 408 U.S. 92, 101 (1972).

That's especially true in the jury-selection process. More than 70 years ago, this Court reaffirmed that the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *S. Pac. Co.*, 328 U.S. 217, 220 (1946). "This does not mean, of course, that every jury must contain representatives of all the economic, social, *religious*, racial, political and geographical groups of the community" because "such complete representation" will often be

impossible. *Ibid.* (emphasis added). "But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." *Ibid.* "Jury competence is an individual rather than a group or class matter." *Ibid.* "That fact lies at the very heart of the jury system." *Ibid.* To disregard it "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Ibid.*

And that is what happened here. Respondent's counsel moved to exclude three prospective jurors whose religious beliefs and affiliations—in counsel's view—made it impossible to "ever rehabilitate" them. App.43a–45a. Those beliefs, counsel claimed, meant those prospective jurors viewed others as "less than anybody else," and thus that they necessarily believed someone like Respondent should not "get the same protection under the civil rights [laws] because [she's] a sinner based on what [they] believe." App.45a.

That mischaracterization of the prospective jurors' statements and beliefs is abhorrent. App.32a–34a, 38a, 42a, 45a. And the trial court rightly rejected counsel's claim that the jurors said individuals "could never be protected because they're in this category." App.45a. The two jurors who spoke up "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." App.45a. And yet the trial court still excluded these jurors for cause "to err on the side of caution." App.45a. And the Missouri Court of Appeals affirmed, wrongly assuming that the jurors' "strongly held views" on homosexuality made them incapable of "serving impartially in [this] particular case." App.76a–78a.

That was error. "[T]his Court's precedents make clear that courts cannot assume, based on stereotypes about race or sex, that a person will be biased" and thus incapable of serving on a jury. Pet.3; *accord* Pet.22 (citing *Batson* v. *Kentucky*, 476 U.S. 79 (1986) (race); *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (sex)). And for all the reasons discussed above, the "same ought to be true with religion." Pet.3.

If allowed to stand, the decisions below risk slamming the jury box closed to prospective jurors based not on any actual inability to faithfully apply the law, but based on the unfounded assumption that people who hold certain religious beliefs can't possibly fairly serve on a jury. Such broadscale discrimination against people of faith is biased, prejudicial, and approximates a religious test for jury service. The very point of suspect-classification status under the Constitution is to protect against reliance on such overbroad stereotypes. Yet the Missouri Court of Appeals approved excluding religious people from jury service based on just such stereotypes without applying strict scrutiny or the presumption that such classifications are constitutionally forbidden. The Court should grant the petition and reverse.

II. The decision below also flouts the Court's recent opinions in *Town of Greece*, *Trinity Lutheran,* and *Masterpiece Cakeshop*.

Almost 30 years ago, two members of this Court dissented from denial of certiorari in a case like this, "addressing whether juror strikes because of religion are subject to *Batson* and its progeny." Pet.11 (citing *Davis* v. *Minnesota*, 511 U.S. 1115 (1994) (Thomas, J., and Scalia, J., dissenting from denial of certiorari)). In the years since then, multiple decisions of this

Court have confirmed that continuing to turn a blind eye to religious discrimination in the jury-selection process would mean subjecting citizens to state-sanctioned religious discrimination that the Court would not tolerate in any other context.

For example, in *Town of Greece* v. *Galloway*, this Court rejected an argument that prayers offered at the start of government meetings violate the Establishment Clause unless they are nonsectarian and devoid of any references to "any one religion." 572 U.S. at 578. In so doing, the Court observed that "requir[ing] chaplains to redact the religious content from their message in order to make it acceptable for the public sphere" would be "but a few steps removed from" allowing the government to "prescrib[e] prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral character." *Id.* at 581. "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Ibid.*

That principle applies equally here. As the Missouri Court of Appeals observed below, the three prospective jurors who were excluded might have been allowed to serve if they had limited their admissions to confessing that "they were raised in or went to conservative Christian churches." App.76a n.4. But so limiting access to the jury box would mean "mandat[ing] a civic religion that stifles any but the most generic reference to the sacred." *Town of Greece*, 572 U.S. at 581. The Court should reject that unconstitutional invitation.

Three years after *Town of Greece*, this Court in *Trinity Lutheran* invalidated Missouri's ban on allowing preschools affiliated with religious organizations to compete for government funds to install rubber playground surfaces made from recycled tires. *Trinity Lutheran*, 582 U.S. at 455–56, 466. The Court reached that result because the "Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* at 458 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533, 542 (1993)).

The challenged "policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 462. And this Court's survey of its past cases made "one thing clear," namely "that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Ibid.*

That's true here, too. Indeed, the disqualified jurors were not even trying to exercise their religion. They simply stated their beliefs in response to specific questions. And for that they were penalized. The Constitution "protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id.* at 463 (cleaned up). No less than for race or sex, striking jurors based on religious views that would not have prevented them from serving fairly and impartially "is practically a brand upon them, affixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142 (cleaned up). And no less than for race or sex, a brand like that should have no place in our judicial system.

Finally, this Court's 2018 decision in *Masterpiece Cakeshop* confirmed that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534). And the departure here was stark. Respondent's counsel repeatedly exaggerated and denigrated the prospective jurors' religious views, accusing them of "embrac[ing] the idea" that people like Respondent "are less than everybody else from the get-go," which "flies in the face of being able to ever rehabilitate themselves." App.43a–44a. According to counsel, Juror 4, who was married to a pastor, had "married herself to the idea that if you're gay, then you are … a sinner." App.44a. And counsel added that all three had wedded themselves to the idea that "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" laws because they're "a sinner based on what [the jurors] believe." App.45a.

The trial court rightly rejected that flagrant mischaracterization of the jurors' views. App.42a, 45a. But the court then allowed those views to control, ostensibly "to err on the side of caution." App.45a. That is not the type of caution the First Amendment allows. See *Trinity Lutheran*, 582 U.S. at 466 (rejecting a similar "policy preference" proffered in defense of a free-exercise violation). Quite the opposite, "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop,* 138 S. Ct. at 1731 (cleaned up). The trial court failed that duty here, as did the Missouri Court of Appeals. And unless the Court intervenes, more such failings will follow.

III. Even under plain-error review, this is an ideal vehicle because the violation is structural and the error could not be plainer.

Aside from voting, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991). The potential jurors here understood that. As Juror 4 put it, it was "an honor" to be in court to "perhaps be a part of … a civic duty." App.38a. And she and the other "jurors themselves [had] a right to nondiscriminatory jury selection procedures." *J.E.B.*, 511 U.S. at 140–41.

The State objected to Respondent's motion to strike the prospective jurors based on their religious beliefs because "a categorical exclusion like that … starts getting into the bounds of religious discrimination." App.44a. But the State did not expressly invoke the Equal Protection Clause, so the Court of Appeals applied plain-error review. App.71a–74a.

As the petition explains, the Court of Appeals' application of plain-error review does not prevent this Court from resolving the important constitutional issues and the deep circuit split this case implicates. Pet.29 (discussing *Harlin* v. *Missouri*, 439 U.S. 459 (1979)). Given Respondent's counsel's open admissions that he moved to strike based on the prospective jurors' religious beliefs—and given the trial court's rejection of counsel's mischaracterization of those beliefs—the error here could not be plainer. See *United States* v. *Brown*, 352 F.3d 654, 665 (2d Cir. 2003) (explaining that courts are "more inclined to deem an error 'plain'" on such a developed record). And because that error is a structural one, Pet.25–26, it follows that a manifest injustice occurred.

"In the *Batson* context, it is normally the case that the only complicated question" under plain-error review is "whether the error at issue is 'plain.'" *Brown*, 352 F.3d at 664. That's because once the reviewing court has decided that the "district court's approval of a challenge based on religion [was] error," the dual requirements that the error "affects substantial rights" and "seriously affects the fairness, integrity, or public reputation of judicial proceedings … are also generally met." *Ibid.* (cleaned up). "The asserted right in question is that to equal protection of the laws, and the remedy for a violation is reversal." *Ibid.* "There is therefore usually little question that any *Batson* error" the reviewing court identifies would affect the losing party's "substantial rights the violation of which would result in manifest injustice." *Ibid.* (cleaned up).

The Missouri Court of Appeals reached the opposite conclusion on the manifest-injustice prong, but not because it applied a different test. App.74a. Indeed, "in Missouri, plain-error review is substantively the same as federal plain-error review." Pet.30. Instead, the Missouri Court of Appeals held that "even if … the trial court [had] committed plain error," any such error would not have caused a manifest injustice because there was "no allegation that any of the twelve jurors who decided the case were unqualified." App.79a.

That reasoning badly misunderstands the nature of a *Batson* violation. "The asserted right in question is that to equal protection of the laws," not merely the right to an impartial jury. *Brown*, 352 F.3d at 664. "[A]nd the remedy for a violation is reversal." *Ibid.* So being denied that remedy substantially affects the losing party's rights. *Ibid.*

More fundamentally, the Missouri Court of Appeals erred by focusing its manifest-injustice analysis solely on the extent of the harm to the State rather than the constitutional harm to the excluded jurors and the resulting harm to the community.

"Discrimination in jury selection … causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B.*, 511 U.S. at 140. "The community is harmed by … the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *Ibid.* And the excluded jurors are harmed by the denial of their "right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.* at 141–42.

Jurors 4, 13, and 45 were denied that right. And the message that sent to "those in the courtroom, and [to] all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than their [religious beliefs], are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.* at 142. Not surprisingly, "any such error … seriously affect[s] the fairness, integrity, [and] public reputation of judicial proceedings." *Brown*, 352 F.3d at 664 (cleaned up). And thus there is "little question" that, if this Court allows the decisions below to stand, a manifest injustice will have occurred. *Ibid.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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