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 THE COMMONWEALTH OF VIRGINIA AND 12 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JASON S. MIYARES
Attorney General of Virginia

KEVIN M. GALLAGHER
Deputy Solicitor General

M. JORDAN MINOT
Assistant Solicitor General

ANDREW N. FERGUSON
Solicitor General
Counsel of Record

ERIKA L. MALEY
Principal Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us

Counsel for Amicus Curiae *the Commonwealth of Virginia*

(Additional Counsel listed on Signature Page)

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are the Commonwealth of Virginia, the State of Alaska, the State of Georgia, the State of Iowa, the Commonwealth of Kentucky, the State of Louisiana, the State of Montana, the State of Nebraska, the State of North Dakota, the State of South Carolina, the State of South Dakota, the State of Utah, and the State of West Virginia (collectively, the *Amici* States). All of the *Amici* States have a compelling interest in protecting the legitimacy of jury trials in their jurisdictions. When "justice in a court of law" turns upon "the choice of religion," both the litigants in the case *and* the excluded jurors are harmed, and "the State is the logical and proper party to assert" those excluded jurors' constitutional rights. *Georgia* v. *McCollum*, 505 U.S. 42, 56, 59 (1992).

Amici States also have an interest in protecting jurors from religious discrimination in the jury box, just as in every other aspect of civic life. This case is an excellent vehicle for this Court to ensure that the Fourteenth Amendment's guarantee of equal protection forbids discrimination on the basis of religion during voir dire.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2244 (2019). Yet courts across the country strike jurors from the venire because of stereotypes about those jurors' religious beliefs. That stereotyping violates the jurors' and

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[1] Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel of record of their intent to file this brief at least 10 days prior to the due date for the brief.

parties' rights to equal protection and to the free exercise of their religion, and it undermines the legitimacy of the jury trial system. Just as it is not permissible to discriminate based on race or sex in jury selection, so too is it impermissible to discriminate based on religious affiliation. Eliminating discrimination "means eliminating all of it." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2147 (2023).

Jury service is fundamental to American citizenship. Denial of "the benefits of Trial by Jury" was one of the colonists' complaints in declaring independence. The Declaration of Independence para. 20. In forming the new Republic, the former colonists enshrined the jury right in our founding documents. Indeed, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 139 S. Ct. at 2238. This Court should not permit religious stereotypes to justify denying equal participation in the democratic process to people of faith.

Unjustly denying equal protection to religious adherents in the jury box undercuts the legitimacy of the jury as an institution and permits discriminatory practices. The legitimacy of the jury trial requires that the jury be "indifferently chosen." 4 William Blackstone, Commentaries *350. Drawing the jury from the public, free of prejudice, "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful." 3 William Blackstone, Commentaries *380. Otherwise, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson* v. *Kentucky*,

476 U.S. 79, 87 (1986). To prevent against such evils, this Court has held that "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes." *J.E.B.* v. *Alabama*, 511 U.S. 127, 128 (1994). That principle extends equally to religious classifications as it does to classifications based on race and sex.

This Court should grant the petition and ensure religious Americans are provided the equal protection to which they are entitled.

BACKGROUND

Respondent Jean Finney was an employee of Petitioner Missouri Department of Corrections for almost two decades. App. 66a. In 2018, she filed suit against Petitioner, alleging that "she is a lesbian who presents masculine, and she was improperly stereotyped and discriminated against based on sex" in violation of the Missouri Human Rights Act. App. 67a; see also App. 1a–22a.

During voir dire, Finney's counsel asked the prospective jurors: "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?" App. 29a; see also *ibid.* (equating that type of religious organization with a "conservative Christian church"). Venireperson 4 raised her hand. *Ibid.* Finney's counsel later inquired of Venireperson 4's views on homosexuality given that she was "the wife of a pastor." App. 35a. Venireperson 4 explained that "homosexuality, according to the Bible, is a sin" but "[s]o is gossiping, so is lying, so is – I

mean, we could go on and on." App. 38a. She noted that "a sin is a sin" and "none of us can be perfect." *Ibid.* She concluded: "I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic duty." *Ibid.*

Finney's counsel also 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." App. 30a–31a. Venireperson 13 raised his hand. App. 31a. Venireperson 13 asked to make a comment to explain his position, informing Finney's counsel that "according to [his] belief, homosexuality is a sin" but "you still have to love those people, and you still have to treat them right in society" and "[y]ou don't have the right to judge them." App. 31a–32a. He therefore concluded that he "could be a fair juror." App. 32a; see also *ibid.* ("Everybody sins. All of us here do. So that sin isn't any more or worse than any other."). Petitioner's counsel asked whether Venireperson 13's beliefs would affect his ability to be a fair and impartial juror. *Ibid.* Venireperson 13 replied: "Absolutely not. That has really nothing to do with – in a negative way with whatever this case is going to be about." App. 34a.

Finney's counsel then asked if anybody else had similar views to Venireperson 13. App. 32a. Venireperson 45 raised her hand. *Ibid.* Finney's counsel never questioned Venireperson 45 further on the issue. App. 42a–43a.

After voir dire, Finney's counsel sought to strike Venirepersons 4, 13, and 45 for cause as "the individuals that responded to the religious sin question." App. 42a. He argued that "[t]here's no way to

rehabilitate somebody that looks at a gay person and says you are a [] sinner, and God does not approve of what you do." App. 43a. Counsel for Petitioner 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. App. 70a. Despite agreeing with Petitioner that the venirepersons had made clear that "everybody's a sinner and everyone needs to be treated equally and that they could follow the law," the trial judge excluded Venirepersons 4, 13, and 45 for cause to "err on the side of caution." App. 45a.

The jury returned verdicts in favor of Finney on discrimination and hostile work environment claims and awarded Finney a total of $175,000 in non-economic damages and $100,000 in punitive damages. App. 70a. Petitioner moved for a new trial, arguing that the trial court's exclusion of jurors solely on the basis of religion violated the Fourteenth Amendment. App. 47a–50a. The circuit court denied the motion. App. 51a–52a; App. 56a.

On appeal, the Missouri Court of Appeals acknowledged that the jurors were struck "based on the specific views held"—specifically, their "religiously based beliefs"—but concluded that no constitutional violation occurred "[b]ecause the strikes at issue were not based on the veniremembers' status as Christians." App. 77a, App. 81a. That decision was incorrect.

ARGUMENT

I. Service on a jury is one of the most substantial opportunities citizens have to participate in the democratic process and should be protected

Other than voting, "serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 139 S. Ct. at 2238. Thus, all persons, "when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 511 U.S. at 141–42. When jurors are excluded on such a discriminatory basis, it "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), and "raises serious questions as to the fairness of the proceedings," *J.E.B.*, 511 U.S. at 140. To protect the integrity of jury trials, this Court has built guardrails against invidious discrimination.

1. The jury, and a citizen's participation on it, has been an indispensable element of our system of law since the Founding. Early Americans understood that the jury trial was "the most transcendent privilege" of the common law system. 3 William Blackstone, Commentaries *379. The jury was so important to the Founding generation that "depriving [colonists] in many cases, of the benefits of Trial by Jury" was one of the enumerated grievances in the Declaration of Independence. The Declaration of Independence para. 20. That is because the jury is part of the "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown," given that the jury

required that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 William Blackstone, Commentaries *349–50. The Founders understood that the jury's legitimacy "cannot but subsist so long as this *palladium* remains sacred and inviolate." *Id.* at *350.

Therefore, from the Founding, the concept of trial by a jury of one's peers has been firmly engrained in our jurisprudence. The Founders ensured the primacy of the jury by protecting it both in the original Constitution and the Bill of Rights. See U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by jury."); U.S. Const. amend. VI (guaranteeing the right to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"). In including the right in our foundational documents, the Founding generation transformed the jury trial from "a privilege at common law" into "a right with us," stripping "whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers" and directing that such limitations "do not prevail in this country." *Glasser* v. *United States*, 315 U.S. 60, 85 (1942).

The jury also plays an important democratizing role. "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407; see also *Duncan* v. *Louisiana*, 391 U.S. 145, 187 (1968) (jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law"). "Just as suffrage ensures the people's ultimate control in the legislative

and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004). As Alexis de Tocqueville observed, "[t]he system of the jury, as it is understood in America, appears to me to be as direct and extreme a consequence of the sovereignty of the people, as universal suffrage." Alexis de Tocqueville, Democracy in America 264 (Henry Reeve, ed. 1838) (1835). The institution of the jury "raises the people itself . . . to the bench of judicial authority [and] invests the people . . . with the direction of society." *Ibid*. It is "one of the most efficacious means for the education of the people, which society can employ." *Id*. at 266.

This Court has repeatedly affirmed the jury's special place in a democratic society. See, *e.g.*, *Flowers*, 139 S. Ct. at 2238. The "opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." *Powers*, 499 U.S. at 406. The jury system "postulates a conscious duty of participation in the machinery of justice"; one of its "greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Balzac* v. *Porto Rico*, 258 U.S. 298, 310 (1922). Depriving a citizen of the opportunity to participate in the jury therefore "forecloses a significant opportunity to participate in civic life." *Powers*, 499 U.S. at 409.

2. Given the importance of the jury system, it comes as no surprise that there are robust protections in place for jury selection. The jury's role as a "prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor*

v. *Louisiana*, 419 U.S. 522, 530 (1975). And the jury system will not maintain its legitimacy as a fair arbiter of the rights of the community and the citizen if segments of that community are systematically excluded from participating in that system. See *Smith* v. *Texas*, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."). Thus, this Court has "reaffirmed repeatedly [its] commitment to jury selection procedures that are fair and nondiscriminatory." *J.E.B.*, 511 U.S. at 128. In voir dire, "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes." *Ibid.*; see also *Holland* v. *Illinois*, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring) ("[A] juror's right to equal protection is violated when he is excluded" because of an impermissible classification). That commitment to equal protection in the jury box protects not only the parties in a given case, but also the legitimacy of the trial-by-jury system as a whole.

In *Batson*, this Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case." 476 U.S. at 89. In reaching that decision, this Court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at 87. Maintaining a system that failed to apply equal protection principles to jury selection would "undermine public confidence in the fairness of our system of justice." *Ibid.*; see also *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979) ("[T]here is injury to the jury system, to the

law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (quoting *Ballard* v. *United States*, 329 U.S. 187, 195 (1946))). In *J.E.B.*, this Court recognized that the logic of *Batson* extends beyond race, and held "that gender, like race, is an unconstitutional proxy for juror competence and impartiality." 511 U.S. at 129. This Court observed that "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 140.

A *Batson*-type error infects the trial itself, causing "damage to the fairness, integrity, and public reputation of the judicial proceeding." *United States* v. *McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012). Thus, this Court has regularly "granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury" even if it has not yet "label[ed] those errors structural in express terms." *Weaver* v. *Massachusetts*, 582 U.S. 286, 301 (2017). Indeed, in both *Batson* and *J.E.B.*, this Court granted automatic relief to defendants alleging discrimination in jury selection, see *Batson*, 476 U.S. at 100; *J.E.B.*, 511 U.S. at 145–46, and this Court has described *Batson* as an "automatic reversal precedent," *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009).

The injury from a *Batson*-type violation attaches both to the parties and to the excluded jurors. Jurors subjected to invidious discrimination wear "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . prejudice." *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879). Any "assumption that no stigma or dishonor

attaches contravenes accepted equal protection principles." *Powers*, 499 U.S. at 410.

II. The Fourteenth Amendment forbids striking jurors based on religious stereotypes

The exclusion of jurors on the basis of religion inflicts on the community and on the administration of justice the same sort of harm that race- and sex-based exclusion inflicts. Indeed, "given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Davis* v. *Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from denial of cert.).

Religion, of course, is a suspect classification that warrants heightened scrutiny. In the famous footnote of *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), that laid the foundation for strict scrutiny review under the Equal Protection Clause, this Court suggested that strict scrutiny was warranted when the law was "directed at particular religious or national or racial minorities." *Id.* at 152 n.4. This treatment of religious discrimination transcends the Equal Protection Clause: the Court applies strict scrutiny to *all* classifications between religions, given that the impetus for the Free Exercise and Establishment Clauses of the First Amendment was the Framers' insistence that Congress should not treat one religion differently than another. *Larson* v. *Valente*, 456 U.S. 228, 244–46 (1982). These protections extend to "governmental hostility which is masked, as well as overt." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993). Thus, this Court has directed that, in most contexts, "status-based discrimination is subject to the strictest scrutiny." *Espinoza* v.

Montana Dep't of Rev., 140 S. Ct. 2246, 2257 (2020) (quotation marks omitted). Our Constitution "protects not only the right to harbor religious beliefs inwardly and secretly" but also "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022).

Further, in extending *Batson*'s prohibition to strikes based upon sex, the *J.E.B.* Court held that to allow the exclusion of an otherwise qualified veni-reperson simply on account of that person's sex would amount to permitting jury selection procedures that promote "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.*, 511 U.S. at 128. To establish historical prejudice, this Court analyzed sex discrimination both in the specific context of jury selection and in general. See *id.* at 136. Similarly, there is a specific history of discrimination against religious persons in jury selection, as well as a long and unfortunate history of religious discrimination more generally in this country. As this Court has recognized in other contexts under the Equal Protection Clause, this history of discrimination warrants the most exacting scrutiny of religion-based classifications. See p.11, *supra*.

First, "[j]urors' religious beliefs and practices have long been targeted by trial lawyers as a basis for exclusion from jury service."[2] Antony Barone Kolenc, *A*

[2] Even when private litigants are engaging in discriminatory practices in jury selection, they are engaged in state action: "a private entity becomes a government actor" while using strikes during jury selection because the "selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 627 (1991).

Juror's Religious Freedom Bill of Rights, 48 B.Y.U. L. Rev. 1521, 1550 (2023). Practitioner manuals are replete with guidance on how lawyers can best craft a jury by relying on shameless stereotypes about various religious sects. One implores: "On the matter of religion, attorneys who are defending are advised that Presbyterians are too cold; Baptists are even less desirable; and Lutherans, especially Scandinavians, will convict. Methodists may be acceptable. Keep Jews, Unitarians, Universalists, Congregationalists, and agnostics." Reid Hastie et al., Inside the Jury 123 (3d ed. 2002). Another warns: "Religious fanatics are almost always self-righteous and narrow. Fundamentalists are conservatively oriented. Devout church members tend to be conformists. . . . Jurors with a strong Catholic faith may favor Catholic litigants." Robert A. Wenke, The Art of Selecting a Jury 79 (2d ed. 1989). Clarence Darrow famously avoided religious people on his juries, for the religious adherent "believes in sin and punishment." J. Suzanne Bell Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 Ind. L.J. 569, 572 (1995) (quoting Saul S. Kassin & Lawrence S. Wrightsman, The American Jury On Trial: Psychological Perspectives 24 (1988)). And these views were not left to academic textbooks and practice guides; they were mobilized in the courtroom. Lawyers have exercised peremptory challenges against jurors for being Muslim,[3] Jehovah's

[3] See, *e.g.*, *State* v. *Hodge*, 726 A.2d 531, 553 (Conn. 1999).

Witnesses,[4] Pentecostal,[5] Catholic,[6] Jewish,[7] and Hindu,[8] among other religions, as well as for wearing crosses,[9] being church-goers,[10] and reading[11] or carrying[12] Bibles.

Further, "American history is replete with laws against specific religious groups" including "laws requiring religious oaths for jurors." Christie Stancil Matthews, *Missing Faith in* Batson*: Continued Discrimination Against African-Americans Through Religion-Based Peremptory Challenges*, 23 Temp. Pol. & Civ. Rts. L. Rev. 45, 64–65 (2013). This history traces itself to America's English roots; for centuries, "England had a rule that only Christians could serve as witnesses or jurors." Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 Buff. Crim. L. Rev. 139, 162 (2005). "The debate about whether to allow non-Christians who believed in a God who would punish them for wrongdoing to testify and serve as jurors lasted well into the nineteenth century." *Id.* at 163. Indeed, many early state constitutions contained religious requirements for jurors. *Id.* at 164.

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[4] See, *e.g.*, *State* v. *Davis*, 504 N.W.2d 767, 771 (Minn. 1993).
[5] See, *e.g.*, *Casarez* v. *State*, 913 S.W.2d 468, 470 (Tex. Crim. App. 1995).
[6] See, *e.g.*, *State* v. *Purcell*, 18 P.3d 113, 118 (Ariz. Ct. App. 2001).
[7] See, *e.g.*, *United States* v. *Berger*, 224 F.3d 107, 119–20 (2d Cir. 2000).
[8] See, *e.g.*, *United States* v. *Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989).
[9] See, *e.g.*, *State* v. *Gowdy*, 727 N.E.2d 579, 583–85 (Ohio 2000).
[10] See, *e.g.*, *United States* v. *Stafford*, 136 F.3d 1109, 1113–14 (7th Cir. 1998).
[11] See, *e.g.*, *United States* v. *DeJesus*, 347 F.3d 500, 502 (3d Cir. 2003).
[12] See, *e.g.*, *State* v. *Neal*, 796 So. 2d 649, 656 (La. 2001).

Discrimination in the jury pool goes beyond mere religious "status." Trial advocates have advised practitioners to ascertain jurors' religious views as a key to determining whether they should remain on a jury. One commentator—a former federal judge—recommended "detailed" questionnaires to "discover a prospective juror's beliefs" about issues, including "religion," which could lead to "identifying and excluding potential jurors who are dogmatic." Thomas Marten, *Politics, Religion, and Voir Dire*, 68 Drake L. Rev. 723, 757 (2020). For instance, several trial lawyers have espoused the theory that Catholics are "unreceptive to the insanity defense because Catholicism emphasizes free will and moral responsibility." Hinkle, *supra*, at 140–41 (citing Walter F. Abbot & John Batt, A Handbook of Jury Research § 4.2 (1999)). Another commentator notes that religion can be "critical" in divorce and child custody cases, asserting that prospective jurors who identify with religions that oppose divorce are "judgmental." Chambers, *supra*, at 589 (quoting James J. Gobert & Walter E. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury 393 (2d ed. 1990)).

There has also been, of course, an unfortunate general history of religious discrimination in the United States. Before Independence, colonies often banished religious minorities entirely: Massachusetts banished Baptists in 1644 and hanged Quakers who refused to leave; Virginia expelled Puritans and prevented Presbyterians from worshipping. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1423 (1990). Independence and ratification of the Constitution and Bill of Rights caused many States to adopt religious liberty protections mirroring the federal Constitution's, *id.* at 1455–56, but religious discrimination

nevertheless continued. In the late eighteenth century, several States required religious oaths—some requiring an oath to Jesus Christ—to hold public office. Hinkle, *supra*, at 159. Well into the nineteenth century, some States denied non-Christians a variety of civil rights, including the right to vote. *Id.* at 159–60.

The discrimination was often targeted to particular religious groups. Catholics, for example, were often considered "not as citizens of the United States, but as soldiers of the Church of Rome, who would attempt to subvert representative government." *Espinoza*, 140 S. Ct. at 2269 (Alito, J., concurring) (quotation marks omitted). "Anti-Semitism has plagued America, with particularly intense periods flaring up during the Civil War and Great Depression." Hinkle, *supra*, at 161.

Some States have already confronted religious discrimination in the jury box. See Pet. 13–14. In an era less tolerant than our own, Texas's highest criminal court held that "[i]f the Legislature of the state should pass a law saying that hereafter no man holding to the Baptist religious faith, or the Methodist religious faith, or to the Roman Catholic religious faith, should ever be permitted to serve on a grand jury . . . the validity of such a law could never be sustained." *Juarez* v. *State*, 277 S.W. 1091, 1094 (Ct. Crim. App. Tx. 1925). More recently, New Jersey's highest court reached the same conclusion, holding that "the prosecutor's 'belief' that demonstrably religious persons are all alike in sharing defense-minded sympathies . . . suggests the very stereotypes that have been used to justify a policy of blanket exclusion that the law condemns." *State* v. *Fuller*, 862 A.2d 1130, 1146–47 (N.J. 2004). As these States have recognized, it is contrary to our Constitutional principles that religious observers face

opprobrium "based on 'perceptions.'" *Kennedy*, 142 S. Ct. at 2427.

The issue, however, is too critical to be left to piecemeal protection by individual States. Religious discrimination does not comport with the guarantees of the Fourteenth Amendment. This Court should grant the petition to clarify that the Constitution prohibits religious discrimination in the venire.

* * *

Striking jurors "on the assumption that they hold particular views simply because of their [religion] is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" *J.E.B.*, 511 U.S. at 142 (quoting *Strauder*, 100 U.S. at 308). The message that striking jurors on the basis of their religion sends "to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than [religion] are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Ibid.* This Court should not stand idly by while such religious discrimination occurs. It should grant the petition and guarantee for people of faith the same guarantee of equal treatment in the jury box that this Court has guaranteed in other contexts.

CONCLUSION

This Court should grant the petition.

October 5, 2023

Respectfully submitted,

JASON S. MIYARES
Attorney General of Virginia

KEVIN M. GALLAGHER
Deputy Solicitor General

M. JORDAN MINOT
Assistant Solicitor General

ANDREW N. FERGUSON
Solicitor General
Counsel of Record

ERIKA L. MALEY
Principal Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us

Counsel for Amicus Curiae *the Commonwealth of Virginia*

Counsel for Additional Amici *States*

TREG TAYLOR
Attorney General
State of Alaska

CHRISTOPHER M. CARR
Attorney General
State of Georgia

BRENNA BIRD
Attorney General
State of Iowa

DANIEL CAMERON
Attorney General
Commw. of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW WRIGLEY
Attorney General
State of North Dakota

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia