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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondent never disputes that it is repugnant to the Constitution to remove a black woman from a jury solely because she reads the Bible, or to remove a person who is "probably Hindu" because he "probably" has beliefs "a good bit different from ours about all sorts of things." Pet.31–32. Respondent never denies the clear split on whether courts can strike jurors based solely on religion. And Respondent never disputes that the lower court's application of plain-error review poses no impediment to reviewing the two Questions Presented about religion (only that it might impede the question about structural error).

Unable to dispute any of these things, Finney frontloads the first half of her brief with strange ideas about standing, such as her assertion that a losing party must sue *the court* for improperly striking a juror. This Court has never required that novelty. The losing party can simply appeal.

No stronger is the back half of her brief. Finney starts fine by correctly stating that this Court must defer to the fact-findings of "trial courts." BIO.15. But because the trial court expressly rejected Finney's argument that the three stricken jurors were biased, found instead that the jurors "were very clear in that they could be absolutely fair and impartial," and granted the strike based on religion "to err on the side of caution," Finney asks this Court to defer instead to the *appellate* court's (mis)reading of the transcript. There is no precedent for that, and Finney cites none.

Finally, Finney's attempt to distinguish for-cause strikes from peremptory strikes lacks support and proves too much. If a private party cannot discriminate through a peremptory strike—where

discretion is at its zenith—then certainly a *court* cannot discriminate through a strike *for cause*, when discretion is limited. Nobody thinks a court could strike a juror "for cause" because she is black or a woman simply because *Batson* concerned peremptory strikes.

Finney offers no persuasive reason to deny the petition. This Court should grant it.

ARGUMENT

I. An appellate court's misreading of a transcript does not create an independent and adequate state ground.

Finney correctly states, but then flees from, the principle that this Court defers to fact-findings of "trial courts." BIO.15. Unable to evade (1) the "trial court's" explicit rejection of her argument that the jurors were biased and (2) the trial court's express finding that the jurors instead "were very clear in that they could be absolutely fair and impartial," App.42a–45a, Finney asks this Court to defer *not* to the trial court's findings but instead to the "findings" of the *appellate* court. On this basis alone, Finney argues the judgment is backed by an adequate and independent state ground.

Finney got it right the first time, when stating the standard: This Court defers to *trial* courts—as does the Missouri Supreme Court. "The trial court receives deference on factual issues," not "the appellate court[]." *Pearson* v. *Koster*, 367 S.W.3d 36, 44 (Mo. 2012). That is because the trial court "is in a better position not only to judge the credibility of the witnesses and the persons directly, but also their

sincerity and character." *Ibid.*; *cf. Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984) (deferring to "the trial court's resolution of" juror bias because it is a "determination" of "credibility" and "demeanor").

The only thing the appellate court did was read (or rather, misread) the trial transcript. This Court is perfectly capable of reading a transcript on its own and owes the Missouri Court of Appeals zero deference over its misreading.[1] Indeed, despite citing parts of the transcript at length, the appellate court never cited the part where the trial court rejected Finney's argument about bias. Finney does not dispute this.

Like the appellate court, Finney also misstates the transcript. She insists the jurors stated they believed gay individuals should not have equal rights and stated they could not operate fairly because of their religious beliefs. BIO.4–5. But she made the same argument at trial, and the court expressly rejected it, finding instead that the jurors "were very clear in that they could be absolutely fair and impartial" and that "they could follow the law." App.42a–45a; see *ibid.* ("I don't agree that they said [gay individuals] could never be protected"). Finney also ignores that her counsel's compound questions were so confusing that even her counsel admitted they were "tricky." App.29a. And she ignores that these

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[1] Finney misstates the appellate court's opinion. Citing three decisions at issue in this split, the appellate court acknowledged that the jurors were struck "based on specific views held," namely their "*religious based views*," but concluded that the Constitution only prohibits striking jurors "based on the veniremembers' *status* as Christians." App.77a, 81a (second emphasis added).

jurors spoke up to explain their responses to counsel's "tricky" questions.

Next, Finney suggests that jurors were not struck for their religion because Juror 19 answered the religious questions the same way and was not struck. But Finney never moved to strike Juror 19. Counsel may have liked that juror for other reasons or simply forgot. Regardless, the transcript is unequivocal that Finney asked for—and received—a strike against three jurors because of religion.

Finney is on no stronger ground in noting that Juror 20 was stricken without objection. Unlike the other three jurors, Juror 20 raised his hand in response to some questions but never spoke up to explain that he would treat everyone equally. App.31a–32a. The Department's counsel thus stated, "We don't have an objection" because "I don't believe he was rehabilitated." BIO.App.6.

II. All three questions warrant review.

A. The undisputed splits on the religion questions warrant review.

Finney does not dispute that there is a clear split on whether the Constitution forbids striking jurors because of religion and whether, if so, it forbids both strikes based on religious beliefs and strikes based on religious status. She instead argues only that the Court should not review these undisputed splits because those cases involve peremptory strikes, not strikes for cause. BIO.16–17.

But if a party cannot strike a juror based on a protected characteristic, it follows even more obviously that neither can a court. "If a court allows

jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Georgia* v. *McCollum*, 505 U.S. 42, 49–50 (1992) (brackets and internal quotation marks omitted).

The whole reason peremptory strikes can be challenged under the Fourteenth Amendment is because a party exercising one is "deemed a government actor." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621 (1991). The party making the peremptory strike "invokes the formal authority of the court." *Id.*, at 624.

So in both the peremptory and strike-for-cause contexts, the question is identical: Does the Fourteenth Amendment permit using "the formal authority of the court" to strike a juror solely because of religion? This Court's cases have never suggested that the answer to juror-strike questions differs when courts strike jurors directly (for cause) than when courts strike jurors indirectly (peremptory). Nobody would contend that courts could strike a black woman "for cause" based on race or sex simply because *Batson* involved a peremptory strike. That would be absurd.

Instead, the principle of *Batson* and its progeny plainly applies to any strike. That principle recognizes a "right to jury selection procedures that are free from state-sponsored group stereotypes." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). The Constitution does not protect this right less when the strike is supposedly "for cause."

If anything, discriminatory strikes are worse when done "for cause." Peremptory strikes are generally made "in the party's sole discretion." *Frazier* v.

United States, 335 U.S. 497, 505 (1948). There is far less discretion when strikes are for cause. A party may seek, and a court may grant, a for-cause strike only if the juror has "[d]emonstrated bias in the responses to questions on *voir dire*." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984). So when a court strikes a juror "for cause" solely because she is black or a woman, the court concludes that the juror is *necessarily* biased solely because of a protected characteristic. That is far more offensive than the (still-offensive) conclusion in a similar peremptory strike: that a person's race or sex *might* cause bias.

Finney cites (at 16–17) several cases where lower courts declined to use *Batson* to second-guess for-cause strikes, but in those cases the trial court found *legitimate* cause to strike jurors. Nobody doubts that if a trial court determined that race or sex alone justified striking a juror "for cause," reversal would be warranted. Race and sex are not legitimate reasons to strike for cause. Neither is religion.[2]

Here, Finney's counsel asked the court to strike jurors because of counsel's religious stereotypes. Juror 4, stated that she believed gay plaintiffs deserve

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[2] Unlike the cases Finney cites, here the trial court struck "for cause" despite finding *no* cause. The court twice found the jurors were unbiased but struck them anyway to "err on the side of caution." App.42a (the jurors "were very clear in that they could be absolutely fair and impartial in this case"); App.45a ("I don't agree that they said [gay plaintiffs] could never be protected because they're in this category. 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.").

the same rights as everybody else because all persons are equal. App.37a–38a. Juror 13 stated expressly, "I could be a fair juror" because he thought gay individuals are just like everybody else and, regardless of religious beliefs, "[y]ou don't have the right to judge them." App.32a. Juror 45 raised her hand to signal agreement with Juror 13. App.32a. Yet Finney's counsel moved to strike all these jurors because counsel believed that if a juror holds "conservative Christian" views about sin, "there's no way to rehabilitate." App.29a, 43a. If that is not a religious-based stereotype, nothing is.[3]

B. The split about structural error warrants review.

Finney raises two arguments with respect to structural error: there is no split, and review is unwarranted on this question (but not the religious question) if this Court determines that the Department failed to object at trial. Neither is persuasive.

1. The appellate court created a split on whether *Batson*-type errors are structural.

Contrary to Finney's contention that automatic reversal for *Batson* violations occurs only in criminal cases, courts in civil cases regularly treat *Batson* error

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[3] The appellate court similarly adopted a stereotype, assuming, without evidence, that religious jurors necessarily would have "strongly held views" on the "predominant issue." App.76a.

as structural, even if they sometimes use words like "automatic reversal" instead of "structural error."[4]

This Court did just that when it interpreted the Constitution to prohibit strikes based on sex in civil cases. Over a dissent arguing to affirm because "this is a case of harmless error if there ever was one," this Court instead granted automatic reversal. *J.E.B.*, 511 U.S., at 145–46; *id.*, at 159 (Rehnquist, C.J., dissenting).

Thus, while *failure* to remove a juror is reviewed for harmless error, *Rivera* v. *Illinois*, 556 U.S. 148, 155–56 (2009), discriminatory *removal* of a juror is not. It is structural. That makes sense because a *Batson*-type violation harms both the jurors wrongly excluded and "casts doubt over" the entire proceeding. *Powers* v. *Ohio*, 499 U.S. 400, 412 (1991).

The court below created a split by incorrectly holding that *Batson*-type errors are not structural.

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[4] E.g., *Pellegrino* v. *AMPCO Sys. Parking*, 785 N.W.2d 45, 56 (Mich. 2010) ("[T]he automatic reversal rule of *Batson* should also apply when there has been an unlawful inclusion of a juror as the result of a *Batson* violation by the trial court."); *SmithKline Beecham Corp*. v. *Abbott Lab'ys*, 740 F.3d 471, 488 (CA9 2014) ("[W]e do not subject such violations to harmless error review."); *Avichail ex rel. T.A.* v. *St. John's Mercy Health Sys.*, 686 F.3d 548, 552 (CA8 2012) ("structural defect in a trial that requires automatic reversal").

2. Any preservation issue in no way impedes review.

Although Finney contends that the decision below to apply plain-error review impedes this Court's review, she does so *only* on the structural-error question.[5] She never disputes that plain-error review below in no way impedes review of the two religion questions. BIO.18–20.

Rightly so. This Court granted certiorari to another petition (1) from Missouri, (2) about excluding jurors, (3) after a state court applied plain-error review. *Harlin* v. *Missouri*, 439 U.S. 459, 459 (1979) (per curiam). Although the Missouri Supreme Court there "reviewed the issue under its 'plain error' rule," it also "reached and decided this [federal] issue," so this Court granted certiorari. *Ibid.* Finney does not even cite *Harlin*, much less deny that it is on all fours with this petition.

The state court's plain-error review likewise poses no impediment to reviewing the structural question. Finney does not deny that plain-error review in federal courts is substantively the same as in Missouri courts. Pet.30. Her only argument for why certiorari is unwarranted is that this Court might not be able to reverse. She states that the Department "cannot meet th[e] standard" for reversal "because the

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[5] Contrary to Finney's contention (at 19–20), the Department vigorously disputes that plain-error review below was warranted. The Department plainly objected at trial. App.44a (asserting that Finney's request for "categorical exclusion" would amount to "religious discrimination"). Regardless, this question is academic because even Finney expresses no disagreement that plain-error review below poses no obstacle to this Court reviewing the religious questions.

Missouri Court of Appeals has already made factual[6] determinations that there was no error, plain or otherwise, and the DOC's rights were not affected." BIO.19. This argument fails for two reasons.

First, this Court could reverse. Whether error occurred and whether it affected substantial rights (*i.e.* was structural) are squarely before this Court in the Questions Presented. The appellate court's contrary conclusions on those questions pose no obstacle because it is precisely those conclusions that are on review.

Second, even if the Court concluded that the state court's plain-error review would preclude outright reversal,[7] even Finney does not dispute that this Court could decide the questions, vacate, and direct the state court to apply the correct federal standard on remand. The Court did that in *Harlin*, the Department raised this argument in the opening brief, Pet.29–30, and Finney offers no response.

Given that this Court grants certiorari and summarily vacates decisions dozens of times a year *without* argument when a court applies the wrong standard, the Court certainly can grant and vacate

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[6] As explained in Part I, Finney is wrong to assert that the appellate court's conclusions are "factual determinations" that receive deference.

[7] Note that lower courts, including Missouri state courts, regularly reverse upon finding jury-discrimination errors on plain-error review. *E.g.*, *Adkins* v. *Warden, Holman CF*, 710 F.3d 1241, 1244, 1258 (CA11 2013) (reversing unpreserved *Batson* error in a habeas case without harmless-error analysis); *State* v. *Smith*, 595 S.W.2d 764, 766 (Mo. App. 1980) (automatically reversing unpreserved error about jury discrimination against women).

here with the benefit of oral argument and merits briefing. This Court frequently does so in merits cases. See, e.g., *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1680–81 (2019); *Meacham* v. *Knolls Atomic Power Lab'y*, 554 U.S. 84, 102 (2008); *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 741–42 (2002).

"When 'a state court's interpretation of state law has been influenced by an accompanying [incorrect] interpretation of federal law,' … 'it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.'" *Foster* v. *Chatman*, 578 U.S. 488, 522–23 (2016) (Alito, J. concurring) (quoting *Three Affiliated Tribes of Fort Berthold Rsrv.* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)). The Court can easily do the same here.

III. The Department plainly has standing.

Finney's novel standing arguments lack any precedential support.

1. Injury exists for three straightforward reasons. First, there is a monetary judgment against the Department, and "one injured by the judgment sought to be reviewed can appeal." *Parr* v. *United States*, 351 U.S. 513, 516 (1956). Second, the State has third-party standing to assert the rights of jurors because discriminatory exclusion infringes the "constitutional rights of the excluded jurors," whose rights "the State is the logical and proper party to assert." *McCollum*, 505 U.S., at 56. And third, despite Finney's contention (at 10) that the trial was fair, the "State suffers a[n] injury" when jurors are

improperly struck because it "casts doubt on the integrity of the judicial process, and places the fairness of a [] proceeding in doubt." *Ibid.* Finney's reliance on statements about fair trials in *Rivera* are inapposite because *Rivera* concerned the *failure* to grant a peremptory strike—a question "determined by state law," not federal. *Rivera*, 556 U.S., at 152.

It is thus irrelevant whether Finney is a state actor, the Department lacks Equal Protection rights, or the ultimately empaneled jury was fair. BIO.7–14. The trial court is a state actor, and it granted Finney's request for a discriminatory strike, which harms the stricken jurors and casts doubt on the trial's integrity. "[I]f a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it"—regardless of whether the Department has Equal Protection rights. *McCollum*, 505 U.S., at 49–50 (brackets and internal quotation marks omitted).

2. Stranger still is Finney's argument that traceability and redressability would exist only if the Department sued *the court* and obtained a ruling reinstating the stricken jurors. BIO.12–14. This Court has never required either. *Batson*-type appeals never reinstate the jurors, and parties always raise those challenges simply by appealing, not by suing the court. Finney cites no precedent to support her novel view of standing.

CONCLUSION

There is an undisputed circuit split on the religious discrimination questions, and this petition provides an excellent vehicle. It is highly unlikely this Court will ever again see a transcript where a court strikes jurors expressly because of their religious views *after* twice determining that the jurors' views would not affect their judgment. The petition should be granted.

October 17, 2023

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