No. _____

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

PETITION FOR WRIT OF CERTIORARI

ANDREW BAILEY
Missouri Attorney General
JOSHUA M. DIVINE
Solicitor General
Counsel of Record
MARIA A. LANAHAN
Deputy Solicitor General
PATRICK SULLIVAN
Chief Counsel - Litigation

OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(573) 751-8870
Joshua.Divine@ago.mo.gov

Counsel for Petitioner

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QUESTIONS PRESENTED

During *voir dire* in an employment-discrimination suit involving a lesbian plaintiff, plaintiff's attorney asked several questions about whether jurors held "conservative Christian" beliefs. When some said yes, counsel asked the court to strike them for cause, arguing, "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." The court disagreed, explicitly finding that the jurors "were very clear in that they could be absolutely fair and impartial" and that they believed "everyone needs to be treated equally." But the court struck them anyway for their religious beliefs "to err on the side of caution." On appeal, the court agreed the jurors were struck because of their religious "views," but held that the strike was not unlawful because it was not based on religious "status."

1. This Court has interpreted the Fourteenth Amendment to forbid relying on stereotypes about race and sex to strike jurors. Does the Fourteenth Amendment also prohibit relying on stereotypes about religious views to strike jurors, as 5 courts have held, or not, as 5 other courts (including below) have held?

2. Is a *Batson*-type violation structural, as at least 18 courts have held, or is it subject to harmless-error review, as the court below held?

3. In the context of jury selection, does the Fourteenth Amendment protect both religious status and religious belief, as 4 courts have held; religious status only, as 3 courts have held (including the court below); or neither, as 2 courts have held?

PARTIES TO THE PROCEEDING

Petitioner Missouri Department of Corrections was the defendant in the trial court and the appellant in the Missouri appellate courts.

Respondent Jean Finney was the plaintiff in the trial court and the respondent in the Missouri appellate courts.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Finney* v. *Missouri Dep't of Corrs.*, 18BU-CV04465 (Mo. Cir. Ct. Nov. 9, 2021) (trial court judgment).

- *Finney* v. *Missouri Dep't of Corrs.*, WD84902 and WD84949 (Mo. Ct. App. Dec. 27, 2022) (appellate court decision).

- *Finney* v. *Missouri Dep't of Corrs.*, SC99974 (Mo. Apr. 4, 2023) (denial of application for transfer to the Supreme Court of Missouri).

- *Missouri Dep't of Corrs.* v. *Finney*, No. 22A1112 (filed June 21, 2023) (application to extend the time to file a petition for writ of certiorari) (granted June 26, 2023).

There are no other proceedings in state or federal court or this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The trial court's opinion is not published and is reproduced at App.53a. The opinion of the Court of Appeals is not published and is reproduced at App.62a–82a. The orders denying transfer to the Missouri Supreme Court are not published and are reproduced at App.155a, App.177a.

JURISDICTION

The Missouri Court of Appeals entered its order affirming the trial court's judgment on December 27, 2022. App.62a–63a. The Missouri Court of Appeals denied rehearing on January 31, 2023. App.155a. The Missouri Supreme Court denied hearing on April 4, 2023. App.177a. The Court extended the time to file this petition up to and including September 1, 2023. App.179a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1 says, in relevant part:

> No State shall…deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

"Beware of the Lutherans," warned famed attorney Clarence Darrow in a 1936 article giving advice on striking potential jurors. Unlike "Jews and other agnostics" whom attorneys should try to "keep," and "Methodists [who] are worth considering," a Lutheran is "unsafe" because he has been taught "from the preacher" specific views "about sinning." C. Darrow, *Attorney for the Defense*, Esquire Magazine (May 1936) (reprinted in 7 Litig. 41, 43 (1981)). For that reason, Darrow said, Lutherans were as bad as "the women" who, "all puffed up with the importance of the part they feel they play," have "invaded the jury box." *Id.*, at 43–44.

Whether he read Darrow or not, plaintiff's counsel followed this advice. After several jurors disclosed in response to his questioning that they hold traditional religious views, plaintiff's counsel—whose client identifies as lesbian—moved to exclude them for cause, arguing that if a person holds those religious beliefs, "I don't think that you can ever rehabilitate yourself, no matter what." The trial court expressly disagreed with plaintiff's counsel. The court made an explicit fact finding that the jurors "were very clear in that they could be absolutely fair and impartial," that they believed "everyone needs to be treated equally and that they could follow the law." Yet the trial court still granted the strike for their

religious beliefs "to err on the side of caution" because "we have enough jurors" already.

The Constitution does not tolerate excluding jurors on the basis of race or sex. It ought not to tolerate exclusion on the basis of religion, the very first freedom protected by the Bill of Rights. "[N]o 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, 1115 (1994) (Thomas, J. and Scalia, J., dissenting from denial of certiorari)).

Jurors can be excluded, of course, if their religious views *in fact* make them biased—just like jurors can be excluded if their race or sex in fact makes them biased. But this Court's precedents make clear that courts cannot assume, based on stereotypes about race or sex, that a person will be biased. The same ought to be true with religion.

In fact, the absence of clear precedent on this issue may be enabling trial attorneys to evade *Batson*. In nearly every case involving a strike based on religion, the juror struck is a racial minority, raising the question whether jurors in some cases are being struck for religion as a pretext for race.

STATEMENT OF THE CASE

I. The employment dispute at the Missouri Department of Corrections.

Jean Finney alleges that after she began a same-sex relationship with a coworker's former spouse, the coworker retaliated against Finney by spreading rumors, sending demeaning messages about Finney to

the coworker's former spouse, and depriving Finney of information she needed to complete her duties as an employee of the Missouri Department of Corrections. She sued the Department, alleging that the Department was responsible for the coworker's actions under the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010. App.1a–22a.

II. The trial court grants counsel's request to strike jurors solely for their religious views without any finding of bias.

During *voir dire*, Finney's counsel asked several questions to determine who on the jury held traditional religious beliefs about sexuality. He began by asking what he admitted was a "tricky question"—in fact a series of compound questions that used double negatives and shifting definitions. App.29a. 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 with what they did?" *Ibid.* He then clarified that he was asking jurors if they went to "a conservative Christian church and that's what they taught." App.29a–30a. Juror 4 raised a hand. *Ibid.* 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." App.30a–31a. Juror 13 raised a hand. *Ibid.* (Thirteen others also raised their hands to these compound questions, but they were excused for other reasons

and thus were not the target of counsel's strike motion.)

Both Juror 4 and Juror 13 then clarified that in fact they did not agree with counsel's compound questions. They *did* believe as a religious matter that all people, including gay individuals and in fact the jurors themselves, have sinned. App.30a–32a, 38a. But they did *not* agree with counsel's statement that "homosexuals shouldn't have the same rights as everyone else." *Compare* App.29a *with* App.45a.

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." App.32a. Because he believed that everybody sins (including himself) and that all sins are equal, Juror 13 maintained that "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." App.32a. When asked whether his religion would "impact [his] ability to be a fair and impartial juror," Juror 13 was emphatic and unequivocal: "Absolutely not." App.34a. When Finney's counsel asked prospective jurors to raise their hands if they agreed with Juror 13, Juror 45 did so. App.32a.

Similarly, Juror 4 explained that she believed gay plaintiffs deserve the same rights as everybody else because no person is any worse or better than any other: "[M]uch 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." App.38a.

Finney's counsel then moved to strike for cause the jurors who held traditional religious views on sexuality: Jurors 4, 13, and 45. Counsel argued that a person with traditional religious beliefs should never sit on a jury when a party has been in a same-sex relationship because when a prospective juror believes as a religious matter "that is a sin, there's no way to rehabilitate." App.43a. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." App.45a. Finney's counsel urged the court to assume that religious jurors would treat gay individuals as "less than everybody else from the get-go because of [the jurors'] religious beliefs." App.44a.

The Department's counsel objected to the strike motion, arguing that the request for "a categorical exclusion like that" was "getting into the bounds of religious discrimination." App.44a. The jurors could not be struck solely on the basis of their religious beliefs, the Department's counsel said, because they testified they would be fair and impartial. App.44a. (Juror 45 was not given the opportunity to clarify verbally but raised a hand when Finney's counsel asked whether anybody agreed with Juror 13. App.32a.

The trial court expressly rejected Finney's counsel's characterization of the testimony. The court instead made an explicit fact finding that the jurors "were very clear in that they could be absolutely fair and impartial." App.42a. The trial court rejected the assertion by Finney's counsel that these individuals would be biased because of their religious beliefs: "I don't agree that they said [gay plaintiffs] could never be protected." App.45a. Rather, the court explained that 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 and that they could follow the law." App.45a.

Nevertheless, despite determining that the jurors "were very clear in that they could be absolutely fair and impartial," the court *granted* the motion to strike Jurors 4, 13, and 45 for cause based on their religion "to err on the side of caution." App.42a, App.45a.

The later-empaneled jury returned a verdict against the Department, and the Department moved for a new trial, arguing that the trial court violated the Fourteenth Amendment when it excluded the jurors because of their religious beliefs despite finding that those religious beliefs would not cause bias. App.47a–50a. The circuit court denied the motion. App.51a–52a, App.56a. The Department timely appealed.

III. The Missouri Court of Appeals decision

On appeal, the Missouri Court of Appeals readily acknowledged that the jurors were struck "based on specific views held"—namely their "*religiously based* beliefs" on relationships—but the Court of Appeals 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 (second emphasis added). The appellate court determined that discrimination based on religious views was permitted because the appellate court—like Finney's counsel, and *unlike* the trial court—assumed that these religious beliefs would

"prevent the juror from serving impartially." App.77a.

The Missouri Court of Appeals then determined that even if the trial court had violated the Constitution, the Court of Appeals would not reverse because "there is no allegation that any of the twelve jurors who decided the case were unqualified." App.79a.

The Department filed a motion for rehearing on January 11, 2023, which was denied on January 31, 2023. App.134a, App.155a. The Department then timely filed a petition asking the Supreme Court of Missouri to hear the case, which was denied on April 4, 2023. App.156a, App.177a.

REASONS FOR GRANTING THE PETITION

The decision below furthers a three-way split and creates another. It furthers a split between five jurisdictions that prohibit strikes based on religious beliefs, two jurisdictions that permit strikes based on those beliefs, and two jurisdictions that permit strikes based on beliefs and also on affiliation. It then creates a new split by concluding that a *Batson*-type violation can be cured if the jury ultimately empaneled is fair.

On the merits, the Court of Appeals is wrong on both fronts, and it is not close. *Batson* and its progeny make clear that the Fourteenth Amendment prohibits striking jurors based on any classification accorded heightened scrutiny under the Equal Protection Clause. Courts can of course exclude potential jurors if their religious views in fact cause bias—just as they can if race or sex causes bias. What they cannot do is assume, based on stereotypes, that

a person will be biased. Here, Finney's counsel expressly asked for, and received, a strike based on a stereotype that individuals would necessarily be biased against Finney because of their religious views.

No better is the Court of Appeal's attempt to create a distinction between forbidden discrimination based on religious "status" and permitted discrimination based on "religious belief." This Court recently rejected a distinction between religious "status" and religious "use." *Carson* v. *Makin*, 142 S. Ct. 1987, 1998 (2022). And there is similarly no meaningful difference between "status" and "belief." "A tax on wearing yarmulkes is a tax on Jews." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). And a strike against people because of their Christian beliefs is a strike against Christians.

Even more clearly wrong is the court's determination that a *Batson*-type violation can be cured by empaneling a fair jury. That fundamentally misunderstands that a *Batson* violation harms not only the party in litigation, but also the "constitutional rights of the excluded jurors," whose rights "the State is the logical and proper party to assert." *Georgia* v. *McCollum*, 505 U.S. 42, 56 (1992).

This petition is an excellent vehicle. Often, *Batson* issues arise within the messiness of the burden-shifting framework, where one party's reason for excluding a juror is far from clear, and the parties must argue about whether a stated reason for striking a juror was pretextual. Here, Finney's counsel was unusually open: he expressly asked for (and received) a strike based solely on the jurors' religion. And there is no doubt that the jurors' beliefs did not cause bias because the trial court made an explicit fact

finding that the jurors "were very clear in that they could be absolutely fair and impartial." A fact-pattern this clean may never arise again.

To be sure, this case arises after the state court (incorrectly) chose to apply plain-error review. But the state court did decide the federal issue, and in fact the plain-error review makes this case *more* cert-worthy because through plain-error review, the state court created a second split by holding that *Batson*-type violations can be harmless, not structural.

And in any event, not only does this Court routinely vacate decisions that apply the wrong standard under federal law (as the state court did here), but this Court has granted certiorari and vacated a decision *from Missouri* in exactly the same procedural posture of a state court misapplying federal law during plain-error review. *Harlin* v. *Missouri*, 439 U.S. 459, 459–60 (1979).

I. The Court of Appeals' decision deepens one split in authority and creates a second.

The Court of Appeals' decision presents two splits. First, it furthers a three-way split about whether striking jurors based on religious stereotypes is forbidden by the Equal Protection Clause. Second, it creates a split about whether a *Batson*-type claim is structural or subject to harmless-error analysis.

A. The decision deepens a three-way split about whether striking jurors based on religious stereotypes is forbidden by the Equal Protection Clause.

In 1994, this Court declined to grant certiorari in a case addressing whether juror strikes because of religion are subject to *Batson* and its progeny. *See Davis*, 511 U.S., at 1115 (Thomas, J. and Scalia, J., dissenting from denial of certiorari). The split has only deepened, as at least eight more courts have now addressed and resolved this issue in different ways. Many courts have expressly recognized the split. As the Third Circuit noted, federal and state courts are "not uniform in their approach to this issue." *United States* v. *DeJesus*, 347 F.3d 500, 510 n.7 (CA3 2003); *accord United States* v. *Stafford*, 136 F.3d 1109, 1114 (CA7 1998), *modified*, 136 F.3d 1115 (CA7 1998) ("[Appellant] also argues that *Batson* should be extended to religion. This is a matter on which there is a division of judicial opinion."); *United States* v. *Brown*, 352 F.3d 654, 666 (CA2 2003) ("State courts have not been unanimous in their disposition of this issue.").

The only thing all these courts appear to agree on is the obvious conclusion that jurors may be removed for religious beliefs if those beliefs would prevent the jurors from applying the law—a fact pattern irrelevant here. But courts are split about whether parties can *assume* that jurors would behave a certain way based on stereotypes about that juror's religious views. Five say no: jurors cannot be struck on the basis of religious belief (unless the belief would in fact prevent the juror from applying the law). Three say yes (including the court below). Two more say that

jurors can be struck not only for their religious beliefs, but also for their religious affiliation.

a. Five jurisdictions hold that courts cannot exclude jurors based on stereotypes about a juror's religious beliefs.

1. In a challenge to the removal of a black juror who was active in a predominantly black Christian denomination, the Second Circuit held that *Batson* and its progeny prohibit strikes on the basis of religious affiliation or belief. *Brown*, 352 F.3d, at 657, 667, 669–70. Citing this Court's determination that the Constitution prohibits "state-sponsored group stereotypes," *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994), the Second Circuit concluded that, under the Constitution, "parties cannot be permitted to strike a juror simply based on his religion." *Brown*, 352 F.3d, at 669.

The Second Circuit made clear that a strike of a juror is "based on his religion" if it is based on "belief *or* affiliation." *Ibid.* (emphasis added). A party could not constitutionally strike a juror "because she was Muslim, or Catholic, or evangelical," nor could the party strike a juror because the party thinks the juror "hold[s] certain religious *beliefs*." *Id.*, at 669–70 (emphasis in original). The court affirmed the strike, however, because the moving party could not establish the evidentiary burden to show that the strike was in fact based on religious affiliation or belief. *Id.*, at 669–71.

The Second Circuit recognized that other courts had focused on a "distinction between affiliation and belief," but it declined to adopt that distinction because there was no indication that the juror's

religious belief in that case would "prevent him from basing his decision on the evidence and instructions." *Id.*, at 670 n.19 (quoting *Stafford*, 136 F.3d, at 1114).

2. Four other courts have adopted a distinction between religious affiliation and religious belief, but their holdings allow strikes based on religious belief *only* when the belief would prevent the juror from applying the law.

First, the Supreme Court of Indiana has adopted this rule, holding that "strikes based on religious affiliation are impermissible" under the Equal Protection Clause, but that strikes based on religious belief are permissible so long as they are "religious beliefs *that prevent* the juror from following the law." *Highler* v. *State*, 854 N.E.2d 823, 826, 830 (Ind. 2006) (emphasis added).

Second, the Seventh Circuit similarly determined that it would be improper "to strike a juror on the basis of his being a Catholic, a Jew, a Muslim" but that strikes based on religious belief could be proper if the strike was based on "a belief *that would prevent him* from basing his decision on the evidence and instructions." *Stafford*, 136 F.3d, at 1114 (emphasis added).

Third, the Connecticut Supreme Court determined that strikes based on religious affiliation are always barred but that strikes based on religious belief can be allowed in the limited circumstance of beliefs that prevent a juror from applying the law. The court "conclude[d] that the equal protection clause of the fourteenth amendment to the United States constitution prohibits the exercise of a peremptory challenge to excuse a venireperson because of his or her religious affiliation." *State* v. *Hodge*, 726 A.2d

531, 553 (Conn. 1999). Recognizing that religious affiliation is intertwined with religious beliefs, the court further held that a person's religious beliefs "*may* render a prospective juror unsuitable for service *in a particular case*," but the court affirmed removal of a juror—a black Muslim—only because the juror admitted he might not apply the law based solely on the evidence: the prosecutor "questioned him extensively about his religious beliefs" and elicited testimony that the juror in some circumstances "would seek guidance from his religious leader about how to handle the situation." *Id.*, at 551, 553–54 (emphasis added).

Fourth, Arizona courts have expressly adopted the position of the Connecticut Supreme Court. They have held that the Equal Protection clause prohibits peremptory strikes based upon religious membership or affiliation. *State* v. *Purcell*, 18 P.3d 113, 120–22 (Ariz. Ct. App. 2001) ("[W]e believe that *Batson* and *J.E.B.*, pursuant to the First and Fourteenth Amendments, prohibit the use of peremptory strikes based upon one's religious affiliation."). And they have acknowledged that, in limited circumstances, "one's religious beliefs *may* render a prospective juror unsuitable for service *in a particular case*." *Id.*, at 121 (emphasis added) (quoting *Hodge*, 726 A.2d, at 553). In the Arizona case, striking the juror for the juror's religious opposition to the death penalty was not unconstitutional because it impeded "her ability to apply the law as required on the capital charges." *Purcell*, 18 P.3d, at 122.

Here, the trial court deviated from all five decisions. The trial court struck the jurors *for cause* despite determining that the jurors "were very clear in that they could be absolutely fair and impartial."

App.42a. None of these five jurisdictions permit striking jurors for religious beliefs absent a showing that the religious beliefs would prevent them from following the law. In these jurisdictions, jurors cannot be stricken based on stereotypes about their religious views.

b. Two courts hold that striking a juror based on stereotypes about that person's religious views does not violate Equal Protection.

In contrast to the five jurisdictions above, at least two jurisdictions permit parties to strike jurors based on stereotypes about those jurors' religious views.

First, the Third Circuit affirmed strikes of jurors based on a party's stereotypes about their religious beliefs in *DeJesus*, 347 F.3d, at 500. There, the prosecutor adopted a stereotype that two black jurors who engaged in religious activities such as "reading the bible" would believe in forgiveness and therefore be less likely to convict. *Id.*, at 502–03. The prosecutor never questioned the jurors to determine if the stereotypes were accurate; the prosecutor instead acted on stereotypes, merely assuming that a juror's "'religious beliefs' might prevent him from rendering judgment against another human being." *Id.*, at 503, 507 (extraneous comma omitted). The prosecutor formed that stereotype from a previous mistrial, which had included a religious individual, and the prosecutor "speculated that it may very well have been some type of religious belief that infected or paraded into the jury's province in the first trial." *Id.*, at 503, 508 (alteration adopted) (quotation marks omitted).

The Third Circuit held that even if "the exercise of a peremptory strike on the basis of religious *affiliation* is unconstitutional [under Equal Protection], the exercise of a strike based on religious *beliefs* is not." *Id.*, at 510 (emphasis added). "The distinction drawn by the District Court between a strike motivated by religious beliefs and one motivated by religious affiliation is valid and proper." *Id.*, at 511.

Second and similarly, in California, *Batson* applies to discrimination on the basis of religious affiliation, but not to discrimination based on a prosecutor's stereotypes about a juror's religious beliefs. *People* v. *Martin*, 75 Cal. Rptr. 2d 147, 151 (Cal. App. 1998). *Martin* concerned peremptory strikes against the only two black jurors, who were Jehovah's Witnesses, and the prosecutor justified the strikes by citing the prosecutor's stereotypical views about Jehovah's Witnesses: the "prosecutor's experience with Jehovah's Witnesses had been that they have a hard time with criminal trials." *Id.*, at 148. As in *Davis*, the prosecutor did not ask the excluded jurors questions about how their religious beliefs might affect their service on a jury. The prosecutor merely assumed based on the prosecutor's stereotypes that the jurors would have a hard time convicting. *Id.*, at 148–49.

Even these two decisions are inconsistent with the trial court's decision here. In neither *Martin* nor *DeJesus* did the party in fact inquire into how and whether a juror's religious beliefs might affect their judgment. Here, Finney's counsel did inquire, the trial court determined that the individuals could be fair, and yet the trial court still struck the jurors—*for cause*—based on the already-proven-false stereotypes adopted by Finney's counsel.

c. Two courts allow jurors to be struck based on religious belief and *also* religious affiliation.

1. The Minnesota Supreme Court—in a 4-3 decision—affirmed striking a black juror because the prosecutor assumed that Jehovah's Witnesses "are reluctant to exercise civil authority over their fellow human beings." *State* v. *Davis*, 504 N.W.2d 767–69, 771 (Minn. 1993). Again, the prosecutor never asked the juror if the prosecutor's assumption was correct; the prosecutor was permitted to make assumptions based on stereotypes about the person's religious beliefs. *Id.*, at 768 ("she did not feel it appropriate 'to further pry' into this matter").

The court acknowledged that, "[i]f the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias." *Id.*, at 769. But the 4-3 court decided to follow "experience" rather than "logic" because juror strikes based on religion were "not as prevalent" as those based on race, and the court was concerned about "complicat[ing] voir dire." *Id.*, at 769, 771. The court thus concluded that peremptory strikes based on stereotypical assumptions about religious beliefs do not violate the Equal Protection Clause. *Id.*, at 771–72.

Unlike the Third Circuit, and the California courts, the Minnesota Supreme Court went even further. Recognizing that it is "difficult to distinguish" between "religious beliefs" and "religious affiliation," the Minnesota Supreme Court concluded that the Equal Protection Clause permits not only discrimination based on religious beliefs, but also discrimination based on religious affiliation. *Id.*, at

771–72. Forced to choose between protecting both and protecting neither, the court chose the latter.

2. In a 5-4 decision, the Texas Criminal Court of Appeals (the highest criminal court in Texas) came to the same conclusion. *Casarez* v. *State*, 913 S.W.2d 468, 495 (Tex. Crim. App. 1994) (en banc). After two black jurors were removed, the criminal defendant raised a standard *Batson* challenge, only for the prosecutor to allege that he did not remove the jurors because they were black, but because they were Pentecostal. *Id.*, at 470, 492. The court acknowledged that it was "constitutionally risky" to strike jurors on the basis of religion given that it is not "immediately apparent" why religion should be treated differently from race or sex. *Id.*, at 490, 492, 494. But the 5-4 court nonetheless concluded that the Equal Protection Clause permits striking jurors on the basis of belief *and* on the basis of religious status: "We therefore hold that the interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries in individual cases on the basis of their religious affiliation" or "on the basis of belief." *Id.*, at 496.

Both decisions are inconsistent with the decision at issue in this petition. The Missouri Court of Appeals determined that individuals cannot be struck based on religious affiliation (in contrast with both these decisions), and the trial court struck the jurors *for cause* despite determining that they could be fair jurors. The decision below thus creates a fourth branch in this deep split.

B. The Missouri Court of Appeals' decision creates a split about whether a *Batson*-type error is structural or can be harmless.

The Missouri Court of Appeals determined that there could be no "manifest injustice" from the *Batson* violation here because there was no question whether the ultimately empaneled jury was fair. Because every other court recognizes that a *Batson* error also harms the excluded juror, *no* other court has concluded that *Batson* errors can be anything other than manifestly unjust.

a. Ten Circuit Courts and at least eight State Supreme Courts treat *Batson* error as structural error.

The Second Circuit has held that *Batson* errors are structural errors, which are not subject to a harmless-error analysis. *Tankleff* v. *Senkowski*, 135 F.3d 235, 248 (CA2 1998) ("[W]e hold that a *Batson/Powers* claim is a structural error that is not subject to harmless error review."). The First, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits expressly agree.[1]

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[1] *Porter* v. *Coyne-Fague*, 35 F.4th 68, 82 (CA1 2022) ("Reversal of the conviction is automatic because . . . a completed *Batson* violation is a 'structural error' that defies harmless error analysis."); *Ramseur* v. *Beyer*, 983 F.2d 1215, 1225 n.6 (CA3 1992) (en banc) ("It should be noted that harmless error analysis is inappropriate in cases involving discrimination in the jury selection process."); *United States* v. *Broussard*, 987 F.2d 215, 221 (CA5 1993), *abrogated on other grounds by J.E.B.*, 511 U.S. 127; *United States* v. *Atkins*, 843 F.3d 625, 634 n.2 (CA6 2016) ("*Batson* error is a structural error that commands automatic reversal . . . ."); *Rosa* v. *Peters*, 36 F.3d 625, 634 n.17 (CA7 1994)

The Tenth, and Eleventh Circuits treat *Batson* errors as structural (by skipping the harmless-error analysis) without expressly saying so. See *United States* v. *Brown*, 817 F.2d 674, 676 (CA10 1987); *Adkins* v. *Warden, Holman CF*, 710 F.3d 1241, 1258 (CA11 2013) (same, in a habeas case).

State courts also treat *Batson* violations as structural and therefore not subject to harmless-error or manifest-injustice review, including Nebraska, Vermont, Kentucky, Massachusetts, California, Washington, Texas, and Pennsylvania, among others.[2]

("[W]e do not believe that the Supreme Court would deem a *Batson* violation a 'constitutional error of the trial type' so that we would apply the harmless error standard . . . ."); *Ford* v. *Norris*, 67 F.3d 162, 170–71 (CA8 1995) ("[A] constitutional violation involving the selection of jurors in a racially discriminatory manner is a 'structural defect' in the trial mechanism which cannot be subjected to a harmless error analysis."); *Crittenden* v. *Chappell*, 804 F.3d 998, 1003 (CA9 2015) ("[I]t is well established that a Batson violation is structural error.").

[2] *See State* v. *Lowe*, 677 N.W.2d 178, 188 (Neb. 2004), *abrogated in part on other grounds by State* v. *Thorpe*, 783 N.W.2d 749 (Neb. 2010) ("[A] *Batson* violation is a structural error not subject to harmless error review."); *State* v. *Donaghy*, 769 A.2d 10, 16 (Vt. 2000) ("[A] *Batson* claim is not subject to harmless error review."); *Johnson* v. *Commonwealth*, 450 S.W.3d 696, 706 & n.8 (Ky. 2014), *abrogated in part on other grounds by Roe* v. *Commonwealth*, 493 S.W.3d 814 (Ky. 2015) ("[A] *Batson* violation is structural error not subject to harmless error review."); *Commonwealth* v. *Robertson*, 105 N.E.3d 253, 266 (Mass. 2018) ("Because such an error is structural, carrying the presumption of prejudice, we vacate the convictions and remand the case for a new trial."); *People* v. *Gutierrez*, 395 P.3d 186, 201 (Cal. 2017) (stating that *Batson* "error is structural and requires reversal of defendants' resulting convictions"); *State* v. *Wise*, 200

2. The Missouri Court of Appeals split with all of these courts by applying harmless-error analysis to *Batson* errors. As far as the Department can tell, Missouri is the only State that holds that *Batson* errors may be harmless when a fair jury is ultimately empaneled.

II. The decision below is incorrect on both splits.

The Missouri trial court struck the jurors—for cause—solely because they held traditional religious beliefs, not because of any court finding that they were biased. Indeed, the trial court expressly determined that the jurors "were very clear in that they could be absolutely fair and impartial." App.42a. And the distinction the Court of Appeals drew between these persons' "status as Christians" and their "specific views" is both illogical and contrary to precedent. These strikes violate the Equal Protection Clause of the U.S. Constitution, and the question is not close.

The Missouri Court of Appeals also incorrectly determined that, even if the trial court erred by striking the jurors, that error would have been harmless because the jury ultimately empaneled was fair. App.79a. This ruling is incorrect under this Court's precedent, which recognizes that a *Batson* violation harms not only the litigants, but also the

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P.3d 266, 273–74 (Wash. Ct. App. 2009) ("Batson errors are structural."); *Bausley* v. *State*, 997 S.W.2d 313, 318–19 (Tex. Ct. App. 1999) ("[T]he Batson error occurring in this case is not subject to a harm analysis."); *Commonwealth* v. *Basemore*, 744 A.2d 717, 734 (Pa. 2000) ("Batson violations . . . are not subject to conventional harmless error or prejudice analysis.").

jurors. Empaneling a fair jury leaves the juror's harms entirely unrectified.

A. Batson and its progeny undoubtedly prohibit striking jurors for their religion.

As this Court has already made clear, striking a juror on the basis of race or sex triggers heightened scrutiny. *Batson* v. *Kentucky*, 476 U.S. 79 (1986) (race); *J.E.B.*, 511 U.S. 127 (sex). That is true in both criminal and civil cases. *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

It clearly follows from these cases that discriminating against jurors on the basis of religion also triggers heightened scrutiny. As this Court held in *J.E.B.*, when a trial court strikes a juror based on a classification afforded "heightened scrutiny" under the Equal Protection Clause, the "*only* question is whether discrimination on the basis of [that classification] in jury selection" satisfies that scrutiny. *J.E.B.*, 511 U.S., at 136 (emphasis added). Because religion is a protected characteristic that triggers heightened scrutiny, *e.g.*, *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam), this Court's cases compel the conclusion that the strike is invalid unless the moving party can satisfy strict scrutiny, *Davis*, 511 U.S., at 1115 (Thomas, J. and Scalia, J., dissenting from denial of certiorari) ("[G]iven 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.").

The distinction drawn by the Missouri Court of Appeals between religious status and religious belief

is artificial, illogical, and contrary to precedent. "A tax on wearing yarmulkes is a tax on Jews." *Bray*, 506 U.S., at 270. And a strike against people because of their Christian beliefs is a strike against Christians.

That is why, just two terms ago, this 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*, 142 S. Ct., at 2001. And it is why the Constitution protects both religious *exercise* (like prayer) as well as religious status. *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407, 2421–22 (2022); *see also Fulton* v. *City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021) (holding that "religious *beliefs*" are protected).

In a way, the courts in Minnesota and Texas were both correct to recognize that there is no meaningful distinction between religious affiliation and religious belief. They were just wrong to conclude that neither deserves protection. Simply put, whether a court strikes a juror because of her religious affiliation or religious beliefs, the court strikes the juror because of her religion.

Because the *Batson* progeny prohibits peremptory strikes based on religion, it follows even more clearly that it prohibits strikes *for cause*. Peremptory strikes are made based on mere suspicion of bias. Strikes for cause require an actual judicial determination. *E.g.*, *Adams* v. *Texas*, 448 U.S. 38, 45 (1980) (allowing strikes when a juror's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"). Because religion is a protected characteristic, the Constitution does not—without

more—permit a court to assume that a person is biased based on stereotypes about the juror's religion.

It is of course true that persons may be excluded—for cause or through peremptory strikes—if their religion will in fact impair their ability to perform the role of jurors. The same is true with race and gender. But what is prohibited in all circumstances is "reliance upon stereotyp[es]." *J.E.B.*, 511 U.S., at 143. A court can strike a juror when it becomes clear that the juror is biased because of her race (or sex or religion), but the court cannot simply *assume* the juror is biased because of those factors.

When the trial court struck the jurors for cause "to err on the side of caution" despite finding that the jurors "were very clear in that they could be absolutely fair and impartial," the court gave legal effect to one attorney's religious stereotypes. App.42a, App.45a. That deprived the Department of its "right to jury selection procedures that are free from state-sponsored group stereotypes." *J.E.B.*, 511 U.S., at 128.

As with race and gender, "[s]triking individual jurors on the assumption that they hold particular views simply because of their" religious beliefs "is practically a brand upon them, affixed by the law, an assertion of their inferiority." *Id.*, at 142. "The message" that Missouri courts have "sen[t] to all those in the courtroom, and all those who may later learn of" these strikes "is that certain individuals, for no reason other than" their religious beliefs "are presumed unqualified by state actors to decide important questions." *Id.*, at 142.

This Court called such strikes "gross generalizations," "stereotypes," "assumptions," and "unconstitutional prox[ies] for . . . impartiality," and

this Court was right. *J.E.B.*, 511 U.S., at 129, 138–39, 146. It is a gross generalization to strike jurors on the untested assumption that they cannot fairly apply the law because of their religion.

Courts that have rejected this argument have expressly abandoned "logic" in favor of prudential concerns of avoiding "complicat[ing] voir dire." *Davis*, 504 N.W.2d, at 769, 771 ("If the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias."). There is only one "logical" conclusion, and this Court should speedily adopt it.

B. Batson-type harms are structural.

This Court's precedents already establish that *Batson*-type harms are structural. Racial discrimination in grand jury selection is structural error on direct review. *Vasquez* v. *Hillery*, 474 U.S. 254, 263–64 (1986). And 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) (internal citations omitted). For instance, this Court granted automatic relief to defendants alleging discrimination in jury selection in both *Batson* and *J.E.B.* *See Batson*, 476 U.S., at 100; *J.E.B.*, 511 U.S., at 145–46; *see also Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009) (describing *Batson* as an "automatic reversal precedent").

The language of *Batson* and its progeny also suggests that the error is structural. For instance, in *Powers* v. *Ohio*, this Court stated that "wrongful

exclusion of a juror by a race-based . . . challenge . . . 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." 499 U.S. 400, 412 (1991). Similarly, in *J.E.B.*, this Court noted that "discrimination in the courtroom raises serious questions as to the fairness of the proceedings." 511 U.S., at 140 (internal quotation marks omitted).

The Missouri Court of Appeals stands as a sole outlier on this question. And the fundamental problem with its decision is that it fails to understand that a *Batson* violation harms not only the party in litigation, but also 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. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2238 (2019); *accord Powers*, 499 U.S., at 415 (allowing defendants to "raise the third-party equal protection claims of jurors excluded").

Indeed, if it is even a somewhat-close question whether summary reversal is appropriate with respect to the first question presented, it is plainly appropriate for the second.

III. This case is a better vehicle than the Court is likely to see again.

A. The trial record is unusually clear about what happened.

From an evidentiary standpoint, *Batson* challenges usually are messy. The challenger must

establish a prima facie case of discrimination, the opposing party must then proffer a discrimination-neutral reason for the strike, and then the court must determine whether the proffered reason is pretextual. *Flowers*, 139 S. Ct., at 2241. All this occurs on a backdrop where "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney." *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991).

Here, in contrast, Finney's attorney was unequivocally clear that he sought to exclude jurors because of their religious beliefs. He made clear his view that if a person holds what he at one point labeled as "conservative Christian" views, "there's no way to rehabilitate." App.29a, 43a. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." App.45a. Not often does a trial counsel admit to seeking to exclude a juror based on a characteristic protected by the Constitution. A record this clear may never occur again.

Equally unusual was the court's explicit finding that the jurors "were very clear in that they could be absolutely fair and impartial." App.42a. The trial court struck the jurors *despite* a finding of no bias simply to "err on the side of caution."[3] App.45a. This

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[3] Even if the trial record were ambiguous about the reason the trial court struck the jurors, any ambiguity must be construed against Respondent. In the standard *Batson* case, when a party makes a prima facie case of discrimination, the court presumes discrimination unless the respondent is able to proffer a neutral reason. *E.g.*, *Flowers*, 139 S. Ct., at 2241. Here, Respondent's counsel requested the strike on explicitly religious grounds, not

kind of judicial finding will not appear in cases where juror strikes are made peremptorily instead of for cause. And in other cases, the record is almost certain to be complicated by other factors that a party claims justifies a strike. *See, e.g.*, *Hodge*, 726 A.2d, at 554–56 (listing five reasons for the strike other than religion); *Brown*, 352 F.3d, at 669–71 (stating that it was impossible to tell whether the strikes were based on religion or community activism more generally). In short, every future case presenting this issue is likely to have serious vehicle problems.

It is highly unlikely this Court will again see a transcript where a court strikes jurors expressly because of their religious views *after* determining that the jurors' views would not affect their judgment. This Court should take the opportunity now to conclude that—absent a finding that a religious view

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neutral grounds, so the Court is presumed to have granted the strike on religious grounds.

For that reason, the Missouri Court of Appeals' misconstruction of the trial transcript is irrelevant. The Court of Appeals concluded from the transcript that the trial court found that the jurors "could not impartially and fairly decide [plaintiff's] claim." App.78a. Even if that reading is reasonable when looking only at *part* of the transcript, it cannot at all be squared with the district court's explicit finding that the jurors "were very clear in that they could be absolutely fair and impartial." The Court of Appeals almost certainly overlooked this part of the transcript, as the Court of Appeals cited parts of the transcript at length but never once cited this portion. The Court of Appeals' reading also fails because it presumes that Finney's counsel did *not* receive what he asked for when the trial court granted his motion to strike on religious grounds—the exact opposite presumption courts normally apply in like circumstances.

will in fact cause bias—the Constitution does not permit striking jurors because of their religion.

B. The (incorrect) decision by the Missouri Court of Appeals to apply plain error review poses no obstacle.

Although the Missouri Court of Appeals applied plain-error review, that poses no obstacle. Indeed, this Court previously granted certiorari to another petition 1) from Missouri, 2) about exclusion of individuals from the jury, 3) in the same procedural posture of a state court misapplying federal law on plain-error review. *Harlin*, 439 U.S., at 459. There, the Missouri Supreme Court "reviewed the issue under its 'plain error' rule," and because the state court "reached and decided this [federal] issue," this Court granted certiorari. *Id.*, at 459. *Harlin* is on all fours with this petition.

This Court can grant certiorari, decide the questions presented, and reverse because the Missouri Court of Appeals' judgment was grounded in errors about federal law. But even if this Court believed that state-law issues were interwoven with the federal-law issues, this Court could still decide the federal law issues, vacate, and remand:

> When "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," the proper course is for this Court to "review the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception 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 Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984)).

If anything, the Missouri court's incorrect decision on plain-error review only makes this petition a *better* vehicle because it presents an additional circuit split. See Part I.B, *supra*. The Second Circuit has already held that *Batson*-type error is plain. *Brown*, 352 F.3d at 669. And in Missouri, plain-error review is substantively the same as federal plain-error review. *Compare* Mo. Sup. Ct. R. 84.13(c) (permitting review for "[p]lain errors affecting substantial rights" "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom") *and Williams* v. *Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. 2019) (allowing plain error review in civil cases when "there are substantial grounds for believing that the trial court committed error that is evident, obvious and clear and where the error resulted in manifest injustice or miscarriage of justice"), *with* Fed. R. Civ. P. 51(d)(2); *cf., e.g.*, *Rush* v. *Smith*, 56 F.3d 918, 992 (CA8 1995) ("Under plain error review, an error not identified by a contemporaneous objection is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if left uncorrected."). Thus, this Court can readily reverse the decision below, notwithstanding the Missouri Court of Appeals' incorrect decision to apply plain-error review.

IV. This issue is growing in importance and affects the fundamental religious rights of countless Americans.

Establishing definitive precedent is critical because 1) the lack of precedent risks allowing litigants to evade *Batson* by striking racial minorities on putatively religious grounds, 2) the case law in many States encourages *over*-excluding jurors, 3) and this issue will harm individuals of all religious faiths.

1. Failure to establish definitive precedent "could frustrate the purpose of *Batson* itself." *J.E.B.*, 511 U.S., at 145. "Because [religion] and race are overlapping categories, [religion] can be used as a pretext for racial discrimination." *Ibid.* Indeed, nearly every case discussed in Part I.A concerns the exclusion of a racial minority. Especially for racial groups that have a high percentage of religious attendance, continuing to permit jury discrimination based on religion risks rendering *Batson* a dead letter.

Take, for example, the prosecutor in the Third Circuit who struck a racial minority and then justified the strike by saying the juror "was probably Hindu in religion" and that "Hindus tend . . . to have feelings a good bit different from ours about all sorts of things." *United States* v. *Clemmons*, 892 F.2d 1153, 1155–56 (3d Cir. 1989). This Court had no clear precedent on the books, and so the defense counsel did not challenge the strike for religious discrimination. The outcome was that the prosecutor's action, while "troubling," was not "clearly erroneous." *Id.*, at 1157.

Or take the trial counsel who struck a black juror supposedly for "wearing a crucifix." *James* v. *Commonwealth*, 442 S.E.2d 396, 397 (Va. 1994). With no Supreme Court precedent on the books, the

defendant did not raise a religious discrimination claim. Over a dissent arguing that the strike was "pretextual," *id.*, at 399 (Hassell, J., dissenting), the court upheld the strike.

Then there was the New York trial attorney who struck a black juror supposedly because "she reads the Bible." *People* v. *Knowles*, 79 A.D.3d 16, 18–19 (N.Y. App. Div. 2010). With no precedent on the books, the defendant did not challenge the strike on the basis of religious discrimination, and the New York Court of Appeals affirmed. *Id.*, at 21.

Finally, consider the three black women excluded from a jury in Illinois, one of whom was excluded because "she read the Bible every day." *People* v. *Malone*, 570 N.E.2d 584, 587–88 (Ill. App. 1991). Again, with no Supreme Court precedent on the books, the defense did not challenge the strike on the basis of religion.

2. This Court cannot rely on state law to fill the gap because state laws affirmatively make the problem worse. In many States, trial courts are expressly directed to "err on the side of caution" and overexclude jurors rather than risk motions for a mistrial based on speculative concerns of bias. In Missouri, for example, binding precedent instructs trial courts that "[i]t 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." *Brown* v. *Collins*, 46 S.W.3d 650, 652 (Mo. Ct. App. 2001). State laws across the country direct the same.[4] The

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[4] *E.g.*, *Ordway* v. *Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013) ("The trial court should err on the side of caution by striking the doubtful juror[.]"); *Black* v. *CSX Transp., Inc.*, 648 S.E.2d 610, 615 (W.V. 2007) ("[I]f any doubts remain as to the

combination of these directives with religious stereotypes creates a perfect storm that excludes jurors solely because of their religion.

3. Given the increasing legal conflicts between newer antidiscrimination laws and traditional religious beliefs, *see, e.g., 303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), a lack of clarity here risks largescale exclusion of religious groups from the jury box not seen for a century. *See Juarez* v. *State*, 277 S.W. 1091, 1094 (Tex. Crim. App. 1925) (systematic

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juror's neutrality, the trial court should err on the side of caution and excuse the prospective juror for cause."); *Trim* v. *Shepard*, 794 S.E.2d 114, 179 (Ga. 2016) ("[I]t would be better that the trial court err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors." (internal quotation marks omitted)); *State* v. *Saunders*, 992 P.2d 951, 965 (Utah 1999) ("[T]rial judges should err on the side of caution in ruling on for-cause challenges[.]"); *People* v. *Cummings*, 157 A.D.3d 982, 985 (N.Y. App. Div. 2018) ("[I]f there is any doubt about a prospective juror's impartiality, the trial court should err on the side of excusing the juror[.]"); *State* v. *Sellhausen*, 809 N.W.2d 14, 22 (Wisc. 2012) ("We have urged circuit courts . . . to err on the side of striking prospective jurors who appear to be biased." (internal quotation marks omitted)); *Carratelli* v. *State*, 961 So.2d 312, 318 (Fla. 2007) ("[T]he trial court must allow the strike when there is basis for any reasonable doubt that the juror had that state of mind which would enable him to render an impartial verdict[.]" (internal quotation marks and brackets omitted)); *Cortez ex rel. Est. of Puentes* v. *HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005) ("[T]rial courts exercise discretion in deciding whether to strike veniremembers for cause when bias or prejudice is not established as a matter of law . . . ."); *Brown* v. *Commonwealth*, 510 S.E.2d 751, 753 (Va. Ct. App. 1999) ("Any reasonable doubt regarding the prospective juror's ability to give the accused a fair and impartial trial must be resolved in favor of the accused."); *Sanders* v. *Sears-Page*, 354 P.3d 201, 206 (Nev. Ct. App. 2015) ("[T]he district court should err in favor of seating an impartial jury whenever doubts remain as to the juror's impartiality.").

exclusion of Catholics from juries barred by Fourteenth Amendment). Of course, if a person's traditional religious beliefs in fact suggest that the person could not be a fair juror, that individual may be excluded. But parties and courts cannot *assume* based on religious stereotypes that a person of a specific religious belief would be an unfair juror.

4. The decision here and others like it should not be allowed to stand because they have no limiting principle. If religious jurors determined by the court to be fair can be struck simply because the case happens to involve a lesbian plaintiff, then 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 underpaying employees at a restaurant that serves pork. In short, under the rule adopted by the Court of Appeals, whenever a party allegedly does something that members of one religion disagree with, members of that religion can be categorically excluded from the jury even absent a finding of bias.

The Constitution does not tolerate this discrimination. This Court should grant this petition and speedily condemn religious stereotyping in the jury box.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ANDREW BAILEY
Missouri Attorney General

JOSHUA M. DIVINE
Solicitor General
Counsel of Record
MARIA A. LANAHAN
Deputy Solicitor General
PATRICK SULLIVAN
Chief Counsel - Litigation
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(573) 751-8870
Joshua.Divine@ago.mo.gov

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