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 Court of Appeals of Missouri, Western District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A fair and impartial state jury determined Petitioner violated the Missouri Human Rights' Act, MO. REV. STAT. § 213.010, *et seq.,* by creating a hostile work environment and discriminating against Respondent on the basis of sex. A central issue in the case was Respondent's homosexuality. During *voir dire*, Respondent's counsel asked the venire panel questions about beliefs, including whether, based on their religious teachings, they believed homosexuality was a sin. The trial court, *sua sponte*, raised striking for cause certain jurors who had answered that homosexuality was a sin or otherwise expressed bias against homosexuals. Respondent moved to strike for cause other jurors based on the same beliefs. Petitioner did not object to striking certain jurors, but objected to others and argued the jurors could be fair and impartial. The trial court granted Respondent's for-cause motion. The Missouri Court of Appeals held the trial court did not err when it excluded the jurors for cause because they had expressed strong feelings about homosexuality.

The questions presented are:

1. Did the Missouri Court of Appeals for the Western District of Missouri correctly apply state law when it held that prospective jurors who indicated a bias against homosexuality could be struck for cause in a civil case where the subject of homosexuality was a central issue in the case?

2. Does a private litigant in a civil case become a state actor for purposes of the Fourteenth Amendment

capable of depriving a State of equal protection based solely on the private litigant making a motion to strike for cause jurors who express bias on an issue central to the case?

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INTRODUCTION

At the trial of Respondent, Jean Finney's ("Finney"), state discrimination lawsuit against Petitioner, the Missouri Department of Corrections ("DOC"), Finney's counsel asked the venire panel questions that touched upon religion in an effort to identify persons with strong feelings on the subject of homosexuality because Finney's homosexuality was a central issue in the case. The DOC did not object to the questioning. The trial court, *sua sponte,* raised the issue of striking certain prospective jurors who stated that homosexuality was a sin and they could not be fair to a homosexual litigant. The DOC stated it had "no objection" to striking some of those prospective jurors, but sought to rehabilitate others. At the end of *voir dire,* Finney's counsel moved to strike for cause jurors he believed were biased against homosexuals. The DOC objected and argued the jurors could be fair and impartial. The DOC did not raise an equal protection issue at trial.

In an effort to give both parties a fair trial, the trial court granted Finney's motion to strike for cause some jurors who had expressed bias against homosexuals. The Missouri Court of Appeals held the jurors struck for cause held views relevant to the predominant issue in the case and the trial court did not err in striking them for cause.

The DOC asks this Court to consider whether excluding jurors solely on the basis of religion violates equal protection and whether *Batson's* prohibition on exercising peremptory strikes for discriminatory reasons extends to religion, but it lacks standing to do so. Finney is not a state actor and did not become one

by filing a motion. The DOC was also not injured by Finney's motion – the conduct about which the DOC complains is traceable, if at all, to the trial court, not Finney, but the trial court is not before this Court. In addition, answering the question the DOC poses about *Batson's* prohibition on exercising peremptory challenges would not affect the rights of the parties before this Court because the issue below is the use of for-cause strikes. Accordingly, any opinion would be advisory.

In addition, the DOC concedes jurors may be struck for cause when their beliefs may cause them to be biased against a party, even if those beliefs are based on religion (Pet. 24). The state appellate court made factual determinations that the trial court did not strike jurors based on religion but, instead, properly struck jurors for cause based on the jurors' disqualifying bias against Finney. That conclusion should preclude review because it provides adequate state grounds independent of the equal protection challenge the DOC now presents.

Contrary to the DOC's argument, there is no split in authority or other basis for granting review. The DOC points exclusively to criminal cases involving peremptory strikes for the proposition that courts are split about whether jurors may be excluded based on stereotypes about religion. Those cases have no application to this case where the only issue is for-cause strikes in a civil case. Moreover, the only cases on which the DOC relies to claim that some courts treat *Batson*-like claims as structural errors and others employ a harmless error analysis are criminal cases in

which the defendant preserved objections at trial. Those cases are inapplicable to this civil case where the DOC did not raise equal protection objections at trial.

At its core, DOC asks this Court to hear its plea that, *if* Finney became a state actor by filing a motion to strike for cause (which she did not), and *if* the DOC was a "person" entitled to equal protection from Finney (which it is not), and *if* Finney had peremptorily struck jurors (which she did not), and *if* those strikes were based on stereotypes about Christians (which they were not), and *if* the DOC had raised the equal protection issue to the trial court (which it did not), would the DOC be entitled to a new trial even though it suffered no injury?

The Petition should be denied.

STATEMENT OF FACTS

Finney has been employed by the DOC since 2002 (66a). When Finney began a same-sex relationship, a co-worker (Colborn) began calling Finney names such as "tardo boy," "lesbo," "lessie," and "butch dyke" (66a). Colborn's aggression toward Finney escalated to the point where the warden of the facility where Finney and Colborn worked wrote to DOC describing Colborn's behavior as "out of control," "erratic, aggressive, inciting and retaliatory" and expressing concerned that Colborn would show up at work with a gun and shoot Finney and possibly others (67a).

Finney filed suit against the DOC in which she alleged the DOC violated the Missouri Human Rights' Act, MO. REV. STAT. § 213.010, *et seq.* (67a). The jury

returned verdicts in favor of Finney on her hostile work environment and sex discrimination claims (70a).

The DOC misstates what occurred during *voir dire*. Finney did not discriminate against Christians nor did she ask the trial court to strike all prospective jurors who held traditional Christian views and the trial court did not strike all Christians. The DOC claims the exclusion of Jurors 4, 13, and 45 demonstrates the categorical exclusion based on religion, but Finney asked, without objection, who "went to a conservative Christian church" where they were taught that homosexuals should not have the same rights as everyone else because homosexuality was a sin? (29a-30a). Several prospective jurors raised their hands, but the jurors about whom the DOC complains (Jurors 4, 13, and 45) did not respond to the question (29a-30a).

Juror 4 attended a religious organization where it was taught that homosexuality was a sin and homosexuals should not have the same rights as non-homosexuals (29a-30a).

Juror 13 answered that he had religious beliefs he could not set aside, he believed he was not qualified to sit on a jury that involves someone who is homosexual, and could not treat a homosexual fairly (30a-31a). Juror 13 later asked to make a comment in which he confirmed that "according to [his] belief, homosexuality is a sin" (31a-32a). The trial court first raised the issue of striking Juror 13 because it "was very concerned about his answers" (App. 3-4), but DOC asked for an opportunity to try and rehabilitate the juror which the trial court granted (32a).

Juror 45 agreed with Juror 13 that homosexuality was a sin (32a).

At the end of *voir dire*, Finney's counsel moved to strike for cause Jurors 4, 13, and 45 based on their biases against homosexuals (43a-44a). The DOC understood the for-cause motions to be based on *beliefs,* not religion. Lead counsel for the DOC with respect to Jurors 4 and 13: "I think the question was whether they were raised like that. And my hang-up is that it wasn't: Do you still *believe* this? And, like, that's where I have an objection to this. Because I think there would be a number of people who still don't hold the *beliefs* that they held when they were children" (44a) (emphasis added).

Two other jurors should be mentioned. Juror 19 answered that she went to a religious organization growing up where it was taught that people who are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did?" (29a). Juror 19 served on the jury (App. 7).

Juror 20 answered that he went to a religious organization growing up where it was taught that homosexuals should not have the same rights because homosexuality was a sin (30a-31a; 76a). Both Juror 20 (who the DOC does not mention) and Juror 13 (about whom the DOC complains), answered that they could not set aside their religious convictions, believed they were not qualified to sit on a jury that involves someone that is homosexual, or could not treat a homosexual fairly (30a-31a). The trial court, *sua sponte,* proposed striking Juror 20 for cause because he answered that "he had religious beliefs that he would

not be able to set aside" (App. 4-5). The DOC stated "[w]e don't have an objection" to striking Juror 20 for cause (App. 6), but it now asserts that Juror 13 was categorically excluded based on her status as a Christian when her answer was the same as Juror 20.

The trial court *did not* find, as the DOC claims, that the jurors struck for cause "could be absolutely fair and impartial" (Pet. 28). The trial court restated what the jurors had said during *voir dire*, that the jurors thought they could be fair and impartial but, when considering totality of their answers, the trial court struck Jurors 4, 13, and 45 (and 20 by agreement of the DOC) for cause (42a-46a).

The Missouri Court of Appeals affirmed the trial court, concluding that "Finney's sexual orientation and her same-sex relationship . . . were at the heart of her claim of discrimination against DOC," so it was not error "for the trial court to strike for cause those prospective jurors who expressed strong feelings on the topic of homosexuality during the *voir dire* process" (77a). The Court of Appeals held that "*voir dire* . . . did not serve to identify and exclude prospective jurors of certain religious persuasions" and that the "strikes at issue in this appeal were not based on the veniremembers' religion," nor on "the veniremembers' status as Christians" (76a, 81a). Instead, *voir dire* "was appropriately focused on identifying those members of the venire who possessed strong feelings on the subject of homosexuality – a central issue in the case" and the jurors were disqualified based on their "views relevant to the predominant issue in the case" (76a, 80a).

REASONS TO DENY THE PETITION

I. Respondent Is Not a State Actor.

The DOC asks this Court to consider whether Finney violated the Fourteenth Amendment, but it ignores a fundamental prerequisite to this Court's equal protection review – Finney must be a state actor. She is not.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Only intentional discrimination "by state actors" violates equal protection. *J.E.B v. Alabama,* 511 U.S. 127, 163 (1994). *See also Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 622 (1991) ("[D]iscrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action."). The Fourteenth Amendment "affords no shield" against private conduct. *National Collegiate Athletic Assn. v. Tarkanian,* 488 U.S. 179, 191 (1988).

Finney is the party before this Court; the trial court is not a party to this case. Assuming *arguendo* the acts of Finney's attorneys are attributable to Finney, whether an attorney is a state actor for a particular purpose depends on the nature and context of the function being performed. *Georgia v. McCollum,* 505 U.S. 42, 54 (1992) (citing *Polk County v. Dodson,* 454 U.S. 312 (1981)). Making a motion to the trial court is insufficient to confer state actor status. *Polk,* 454 U.S. at 314-315. On the other hand "a private entity becomes a government actor for the limited purpose of using peremptories during jury selection." *Edmonson,*

500 U.S. at 617. *See also McCollum,* 505 U.S. at 55 (criminal defendant may become a state actor when using peremptory strikes).

The DOC readily concedes Finney' attorney made a motion to strike jurors for cause and did not exercise peremptory strikes (Pet. 6). "The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense" because "[i]n exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body." *Id.* at 54. Making a motion during trial is not wielding any power to choose, it is surrendering the power to choose. Because Finney did not become a state actor by making a motion, there is no equal protection claim to review. The state actor at the core of the DOC's complaint (the trial court) is not before this Court. This of course, leads to another problem the DOC cannot overcome – Article III standing. *See* discussion, *infra* at § III.

II. The DOC Is Not a "Person" For Purposes of the Fourteenth Amendment.

The DOC, a state agency, is not a "person" entitled to equal protection. In *Haaland v. Brackeen*, the petitioners, including the state of Texas, filed suit in federal court challenging a statute as unconstitutional on multiple grounds, including equal protection. 143 S. Ct. 1609, 1638 (2023). This Court declined to reach the merits of Texas's equal protection challenge because Texas "has no equal protection rights of its own." *Id.* at 1640. *See also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) ("[A] political subdivision, 'created by the state for the better ordering

of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'") (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)).

The Fourteenth Amendment does not protect the DOC, a state agency, from acts of private citizens, like Finney. The DOC's Petition suggests the persons whose equal protection rights were violated were the excluded jurors, but Finney did not exclude jurors. Because the trial court excluded the jurors, but the trial court is not a party to this case, there is no Article III case or controversy. *See* discussion, *infra.*

III. There Is No Article III Case or Controversy.

The DOC asks this Court to consider a *question*, but this Court sits "to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian School Tuition Organization v. Winn,* 563 U.S. 125, 132 (2011) (citing U.S. Const., Art. III, §1). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles,* 476 U.S. 54, 62 (1986). The DOC ignores the case or controversy requirement, yet "Courts must determine that they have jurisdiction before proceeding to the merits." *Lance v. Coffman*, 549 U.S. 437, 439 (2007). One component of case-or-controversy requirement is standing which requires the DOC to show injury in fact, causation, and redressability. *Id.*

The DOC's Petition is unclear whether it seeks review based on direct standing or third party standing, but it lacks standing under either scenario.

A. No injury in fact.

"[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). The personal and tangible harm, or "injury in fact" is the "invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal quotations omitted).

The DOC has an interest in a fair trial, but it claims no invasion of that right because the empaneled jury was fair and impartial. In *Rivera v. Illinois*, the defendant was tried in state court and, during jury selection, was erroneously denied the use of a peremptory challenge to strike a juror he conceded was not biased against him. 56 U.S. 148 (2009). The defendant argued due process required automatic reversal because failure to dismiss a lawfully challenged juror is a structural error. *Id.* at 156. This Court disagreed, holding: "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Ibid.* So, too here. The DOC received a fair trial – it does not contend otherwise. Whether the trial court abused its discretion in striking a juror for cause is "a matter for the State to address under its own laws." *Ibid.*

The DOC suggests the injury is to the excluded jurors or all Christians who are excluded from jury

service, but "a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact.' And it consequently does not show standing." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) Although some cases allow a litigant to assert injuries of third parties, those cases are inapplicable because the second and third prongs of standing (traceability and redressability) are absent.

B. The injury is not fairly traceable to Finney's action.

"A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1991) (emphasis added). Finney's only conduct was making a motion to the trial court. The action about which the DOC complains – that jurors were struck for cause – is an independent action of the trial court judge who is not before the Court. *See Leeke v. Timmerman*, 454 U.S. 83, 85-87 (1981) (per curiam) (injury indirect because it turned on the action of a prosecutor, a party not before the Court); *Linda R. S. v. Richard D.,* 410 U.S. 614, 618 (1973) (injury indirect because it turned on the action of the father, a party not before the Court).

If the DOC's Petition is based on an alleged injury to the excluded jurors, that injury traceable, if at all, to the trial court, not Finney. In cases that have conferred third-party standing to challenge the alleged discriminatory exercise of peremptory strikes, the persons/entities before the Court were those who performed the exclusionary acts (*i.e.,* the parties who

exercised the peremptory strikes). *See e.g., Batson v. Kentucky,* 476 U.S. 79 (1986); *J.E.B,* 511 U.S. at 163; *Edmonson,* 500 U.S. at 617; *McCollum,* 505 U.S. at 54; *Powers v. Ohio,* 499 U.S. 400 (1991). *Contrast Ramseur v. Beyer,* 983 F.2d 1215 (CA3 1992) (*banc*) (defendant brought suit against the assignment judge for alleged violations of the Fourteenth Amendment where the trial judge did not utilize the establish random selection procedure to seat a grand jury and, instead, deliberately tried to get an even mix of people from different backgrounds and races).

C. No injury would be redressed by a favorable decision.

Article III standing is lacking where this Court is asked "to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States,* 319 U.S. 41, 42 (1943) (per curiam). The DOC does not ask this Court to review the state court's conclusion that the trial court did not err when it struck jurors for cause. Instead, the DOC improperly asks this Court to render an opinion on whether peremptory strikes based solely on religion violate *Batson* and its progeny in a case where no peremptory strikes are at issue and where the jurors were struck based on biases, not religion.

Thus, any opinion on the issue the DOC seeks to have reviewed would not affect the rights of the litigants in this case and would be nothing more than a prohibited advisory ruling. *See Carney v. Adams*, 141 S. Ct. 493, 498 (2020). *See also Haaland,* 143 S. Ct. at 1640 ("It is a federal court's judgment, not its opinion,

that remedies an injury; thus it is the judgment, not the opinion that demonstrates redressability.").

The DOC's ability to assert generalized injuries to the excluded jurors fares no better than its claim of direct standing under the third prong of Article III standing. Not only is there the problem of issuing an opinion on peremptory strikes in a case where there were no peremptory strikes, the reach of any such opinion would not extend to the trial court which is the source of the claimed injury to excluded jurors because the trial court is not before this Court.

"[R]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Haaland*, 143 S. Ct. at 1639 (internal quotations omitted) (emphasis in original). "[A] judgment's 'possible, indirect benefit in a future lawsuit' does not preserve standing." *Ibid.* (quoting *United States v. Juvenile Male,* 564 U.S. 932, 937 (2011) (per curiam)). "Otherwise, redressability would be satisfied whenever a decision might persuade actors who are not before the court—contrary to Article III's strict prohibition on "issuing advisory opinions." *Haaland*, 143 S. Ct. at 1639-1640 (quoting *Carney*, 141 S. Ct. at 498).

The Court in *Haaland* declined to address equal protection where an opinion "would not remedy the alleged injury" because the state officials who implement the statute under review "[were] 'not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the

suit produced." 143 S. Ct. at 1640 (quoting *Lujan*, 504 U.S. at 569). Even a serious equal protection issue must await a case where the parties have standing to raise it. *Haaland*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

The injury to the excluded jurors, if any, was caused by the trial court who exercised its discretion in an effort to give both parties a fair trial by excluding, for cause, jurors who expressed beliefs that indicated bias against Finney. The trial court is not before this Court. The DOC's quest to champion the rights of jurors excluded for cause by the trial judge cannot be had on the back of Finney's case.

IV. Adequate And Independent State Law Grounds.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural." *Ibid.* "When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing the judgment; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Ibid.* As discussed, *supra,* resolution of the federal question the DOC raises – whether peremptory strikes based on religion violate equal protection – would not affect the state court judgment finding no error in striking jurors for cause.

The DOC misrepresents the Court of Appeals' holding in an effort to manufacture an equal protection issue. The appellate court did not determine, as the DOC contends, that discrimination based on religious views was permitted nor did it assume that religious beliefs would prevent jurors from serving impartially (Pet. 7-8). The Court of Appeals held that "Finney's sexual orientation and her same-sex relationship . . . were at the heart of her claim of discrimination against DOC," so it was not error "for the trial court to strike for cause those prospective jurors who expressed strong feelings on the topic of homosexuality during the *voir dire* process" (App.77a). *See also* App.75a-76a (*voir dire* "did not serve to identify and exclude prospective jurors of certain religious persuasions"). The Court of Appeals concluded the strikes at issue in this appeal were not based on the venire members' religion nor their status as Christians, the jurors were disqualified because they held "views relevant to the predominant issue in the case" (76a, 80a).

These state-court findings of fact regarding the bias of prospective jurors "are to be accorded the presumption of correctness." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985). A trial judge's finding that a particular venireperson is not biased and is properly seated is a finding of fact. *Patton v. Young*, 467 U.S. 1025, 1037-1038 (1984) (state court's refusal to exclude juror for lack of bias is a finding of fact). The holding in *Patton* "applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause." *Wainwright,* 469 U.S. at 429.

Accordingly, the factual determinations of the Missouri Court of Appeals upholding the trial court's for-cause strikes based on the conclusion that the excluded jurors had exhibited a disqualifying bias against Finney are findings of fact providing adequate state grounds independent of the equal protection challenge the DOC now raises.

V. There Is No Conflict In Authority That Warrants This Court's Review.

Contrary to the DOC's suggestions, there is no conflict in authority that warrants this Court's intervention. The cases it cites are inapposite and readily distinguishable.

A. No conflict exists regarding striking jurors for cause.

All cases the DOC cites in an attempt show that circuits are conflicted about whether jurors may be struck solely based on religion involve peremptory strikes which is not an issue presented by this case. "[P]eremptory strikes, for which no reasons need be given (absent a *Batson* challenge), are different from challenges for cause, which by definition require a showing of cause." *U.S. v. Elliott,* 89 F.3d 1360, 1365 (CA8 1996) ("*Batson* applies only to peremptory strikes"), *cert. denied,* 519 U.S. 1118 (1997); *United States v. Blackman,* 66 F.3d 1572, 1575 n.3 (CA11 1995) ("[N]o authority suggests *Batson* extends to the area of challenges for cause."); *United States v. Bergodere,* 40 F.3d 512, 515-16 (CA1 1994) ("defendant must show that the challenge was peremptory rather than for cause" to invoke *Batson*).

The DOC's argument presupposes that the law regarding peremptory strikes applies equally to for-cause strikes, but it would be inconsistent with *Batson* to subject the different strikes to the same analysis. When analyzing a *Batson* claim, courts follow a three step process. If the defendant makes a prima facie showing that a peremptory challenge has been exercised on the basis of race, the prosecution must offer a race-neutral basis for striking the juror in question, then the trial court decides whether the defendant has shown purposeful discrimination. *Batson,* 476 U.S. at 97. In the second step, "we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* at 96-97. If the prosecutor's explanation to justify a peremptory strike does not need to rise to the level of a cause strike, but the trial court determines that the standard for striking jurors for cause has been satisfied, then *Batson* cannot be implicated. *See Reid v. Moore,* 2008 WL 596781, *18 (S.D. Ohio Mar. 5, 2008) ("If a prospective juror is excusable for cause, it is difficult to imagine how it could be a *Batson* violation.").

B. No conflict exists regarding structural versus harmless error.

There is no merit to DOC's argument that the Missouri Court of Appeals decision in this case creates a split about whether a *Batson*-type errors are structural or harmless.

First, all cases the DOC cites which address whether *Batson* errors are structural are criminal cases where peremptory strikes were used (Pet. 19-21). No

case cited by the DOC applies structural error to for-cause strikes in a civil case. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1908 (2017*). See also United States v. Davila*, 569 U.S. 597, 611 (2013) ("We have characterized as structural a very limited class of errors that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole.") (internal quotations omitted); *Javitz v. Luzerne Cnty.,* 2023 WL 5842299, *2 (CA3 Sept. 11, 2023) ("[T]he structural error doctrine applies only in a 'very limited class' of criminal cases, . . . not in civil cases like this one") (quoting *Greer v. United States,* 141 S.Ct. 2090, 2099 (2021)).

Second, in cases applying automatic reversal, the objections "were preserved and then raised on direct appeal." *Weaver*, 137 S. Ct. at 1911-1912. Automatic reversal in a case of structural error may apply in cases "where there is an objection at trial and the issue is raised on direct appeal." *Id.* at 1919. Indeed, in all cases cited by the DOC for the proposition that structural errors require automatic reversal, the party claiming error raised *Batson* objections or other specific constitutional objections at trial. The DOC made no such objection at trial.

The Missouri Court of Appeals held the DOC "never stated an objection on the basis of religious discrimination, [never] claimed that exclusion of venire members 4, 13, and 45 would actually constitute religious discrimination, [and never] identified the

legal authority which would prohibit such discrimination (72a). Accordingly, "the DOC's claims are not preserved [and] we can review them only for plain error" (74a). The DOC does not contend that it preserved its objection, just that the lower court's plain error review "poses no obstacle" (Pet. 29). But it does. "If the defendant has 'an opportunity to object and fails to do so, he forfeits the claim of error." *Greer,* 141 S. Ct. at 2096. "If the defendant later raises the forfeited claim on appeal, . . . plain-error standard applies." *Ibid.*

To obtain plain error relief, the DOC must show an error, the error must be plain, and the error must affect "substantial rights" which means "there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer*, 141 S. Ct. at 2096 (internal quotations omitted). The DOC cannot meet this standard because the Missouri Court of Appeals has already made factual determinations that there was no error, plain or otherwise, and the DOC's rights were not affected (78a-79a). The DOC has a legally-protected interest in a fair trial, but it claims no invasion of that right because the empaneled jury was fair and impartial. Its inability to show its rights were affected is likely why the DOC has framed this issue as a structural error requiring automatic reversal by relying on criminal cases discussing *Batson* violations in the exercise of peremptory strikes. But, the DOC cannot avail itself of the harms in the cases on which it relies because this case is neither a criminal case nor one where peremptory strikes were exercised.

A petition for writ of certiorari was denied in *Calhoun v. United States,* where the prosecutor's racially charged question of the defendant "should have never been posed" and was "an affront to the Constitution's guarantee of equal protection of the laws." 133 S. Ct. 1136, 1137 (2013). The defendant's counsel did not object to the question at trial, so the challenge "comes to us on plain-error review" which would require the defendant to show the error affected the outcome of the trial court proceedings. *Ibid.* The defendant's petition for writ of certiorari did not attempt to make that showing. *Id.* Instead, just as the DOC does in this case, the defendant sought automatic reversal by arguing the denial of equal protection was "either structural error or plain error regardless of whether it prejudiced the outcome." *Ibid.* Certiorari was denied.

The DOC's Petition should also denied. It does not contend that Finney's motion to strike or the trial court's exclusion of jurors for cause affected the outcome of the trial. Instead, as in *Calhoun*, the DOC asks for automatic reversal even though it failed to object at trial based on equal protection grounds and concedes the empaneled jury was fair and impartial.

CONCLUSION

The Court should deny the Petition for Certiorari.

Respectfully submitted,

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APPENDIX 1

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD84949

[Filed March 1, 2022]

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

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

Case No. 18BU-CV04465

JEAN FINNEY,	)
Plaintiff,	)
v.	)
	)
MISSOURI DEPARTMENT	)
OF CORRECTIONS,	)
Defendant.	)
	)

RECORD ON APPEAL - TRANSCRIPT

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APPEARANCES

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position. She's in the Kansas City ER. So I would ask -- I would release Mr. Arnold for hardship. Any objection, Ms. Rutter?

MS. RUTTER: Is there any way we could wait to speak to him and see if he can find a babysitter?

THE COURT: And I'm not saying that you can't after Ms. Rothermich's and Mr. Sullivan's questions, redirect your questioning again. You'll have time for rebuttal, for lack of a better description. So that's fine. I'll show at this time we will not release Mr. Arnold.

All right, No. 11, Ms. Paolillo. The lab during COVID and very short staffed with people out. I was going to release Ms. Paolillo for hardship. Ms. Rutter?

MS. RUTTER: No objection, Judge. I think she said that not only would she be concerned, but it sounded like she said she would try to make up work while she was in trial.

THE COURT: After hours.

MS. RUTTER: Yes.

THE COURT: Even with my direction, I was worried about that as well. Ms. Rothermich, any objection?

MS. ROTHERMICH: No objection on her.

THE COURT: No. 11 will be released for hardship.

No. 13, Mr. Harris, I was going to release for cause. He indicated that -- at first he said he

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couldn't set aside his religious beliefs, but then indicated he would still treat everyone fairly because that's what you're supposed to do. I was very concerned about his answers. Obviously, you could have the opportunity to rehabilitate him, Ms. Rothermich, but at this point he's pretty -- 13 and 14, Mr. Harris and Mr.

Pierce -- I'm sorry, not Mr. Pierce, Mr. Harris. Any objection, Ms. Rutter?

MS. RUTTER: No, Judge. I believe he did confirm that he thinks that homosexuality is a sin.

THE COURT: Maybe it was Mr. Ehlert. I'm thinking of No. 20 as well.

MR. SULLIVAN: I think 20.

MS. ROTHERMICH: Yeah.

THE COURT: Okay. So No. 13, Mr. Harris, will be released for cause.

MS. ROTHERMICH: Wait, pardon me? We did have an objection to that.

THE COURT: Oh, yes, I'm sorry.

MS. ROTHERMICH: We followed up, and he said that he would be fair and impartial, but he did not pass judgment.

THE COURT: Okay. I will show there's an objection by defendant, and I will leave Mr. Harris for now. And Ms. Rothermich, you'll have an opportunity to

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MS. ROTHERMICH: No objection.

THE COURT: No. 17 will be released for hardship.

No. 18, Mr. Miller. I have also, he was the one who indicated he has a very small company, a very small staff right now. I think he said they were handing out

PPEs to veterinarians and animal handlers right now. Correct me if I'm wrong, but I would release Mr. Miller, No. 18, for hardship.

MS. RUTTER: No objection.

THE COURT: Ms. Rothermich?

MS. ROTHERMICH: I would like to talk to him, Your Honor.

THE COURT: Yes, absolutely. Ms. Rothermich will have the opportunity to rehabilitate. He will not be released just yet.

And No. 20 is the other one we had to release for cause potentially without objection, if the parties don't have any. He was the other one who indicated he had religious beliefs that he would not be able to set aside. He's in the back row.

MS. RUTTER: Yeah, he was the one that started that off. No objection.

THE COURT: That first started it. Ms. Rothermich, No. 20?

MS. ROTHERMICH: He just said that he had a

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religious --

THE COURT: He was the one that indicated that his religion was very --

MS. RUTTER: The question was: Is there anybody here that cannot set aside their religious convictions if

this case is about a gay person? And he raised his hand.

THE COURT: I don't believe he was rehabilitated. The other one did indicate that --

MS. ROTHERMICH: We don't have an objection.

THE COURT: No. 20 will be released for cause.

No. 28 has a vacation scheduled with tickets leaving on Friday the 27th. I'll release him for hardship. Ms. Rutter?

MS. RUTTER: No objection, Judge.

THE COURT: Ms. Rothermich?

MS. ROTHERMICH: No objection, Judge.

THE COURT: No. 28 will be released for hardship.

No. 30, I'd like to hear from the attorneys. I understand how frustrating that would be. She is the nurse with a new doctor in the office without a nurse today, so I would release her for hardship, No. 30, Ms. Waggoner. Ms. Rutter?

MS. RUTTER: No objection, Judge.

THE COURT: Ms. Rothermich?

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(A brief recess was taken and a brief discussion was held off the record between the Court and Counsel.)

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

THE COURT: The attorneys can come have a seat. All right. Thank you for your patience again. It took a little longer than we anticipated. But if I call your name, if you will please come up here.

Now, tomorrow we will be in Division 1, so you will be in a different jury box. But right now, this will be the order that you will be in. So I want to go ahead. Jennie, come on up and make sure they're in the right order. And then have a seat and you'll know what order you're in so when you're in a different courtroom, you'll know who you're supposed to be by. All right.

Ann Aubrey, No. 1.

No. 2, Raymond Day.

No. 3, Neva Carrell. Is it Neva or Neva Carrell?

JUROR CARRELL: Neva.

THE COURT: Neva Carrell.

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No. 4, John Green.

Watch that step, Ms. Carrell. Mr. Green.

No. 5, Caroline Merrigan.

No. 6, Holly Messick.

No. 7, Alanna Brush.

No. 8, Cheryl Admire.

No. 9, Tara Wade.

No. 10, Lavar Felder.

No. 11, Sheryl Walker.

No. 12, Cody Salem.

Our two alternates will be Luzminde Phillippe -- did I say that right, Ms. Phillippe?

JUROR PHILLIPPE: Yes.

THE COURT: Luzminde, come on up. And Susan Sollars.

Ms. Rutter, does the jury that I've just sat match your jury?

MS. RUTTER: Yes, Judge.

THE COURT: Ms. Rothermich?

MS. ROTHERMICH: Yes, Judge.

THE COURT: All right, ladies and gentlemen, if you are not seated in the jury box, I think you can probably guess you are free to go. Thank you again for your service. I know it was a very long day. Annette is at the back door. She wants your jury badges to make sure

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