

No. 23-203

**In the
Supreme Court of the United States**

MISSOURI DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JEAN FINNEY,

Respondent.

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

**BRIEF FOR AMICI CURIAE JEWISH
COALITION FOR RELIGIOUS LIBERTY AND
ISLAM AND RELIGIOUS FREEDOM ACTION
TEAM IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

The **Jewish Coalition for Religious Liberty** (“JCRL”) is a cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to religious liberty. As adherents of a minority religion, its members have a strong interest in ensuring that religious liberty rights are protected.

The **Religious Freedom Institute’s Islam and Religious Freedom Action Team** (“RFI”) explores and supports religious freedom from within the traditions of Islam. RFI is committed to achieving broad acceptance of religious liberty as a fundamental human right. This includes ensuring that adherents of Islam in the United States, representing a minority religion, are protected equally in their religious status and belief as are individuals who adhere to majority religious faiths.

SUMMARY OF THE ARGUMENT

The undersigned *amici* write in support of the petition for certiorari because the decision of the Missouri Court of Appeals poses a particular threat to the religious liberty of adherents of minority religious traditions, like Judaism and Islam.

The decision below would allow courts to strike jurors for cause based solely on their religious beliefs or status, even where the court determines (as the

¹ No counsel for a party authored this brief in whole or in part or made a monetary contribution to fund its preparation and submission. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

trial court did here) that a prospective juror is able to remain neutral and unbiased in carrying out the duties of a juror. That is a remarkable holding that is out of step with the First Amendment of the Constitution. While that holding and its endorsement of religious discrimination poses a threat to people of all faiths, it promises to fall more heavily on observers of minority religious traditions.

If religious belief or status alone can support striking a prospective juror for cause, then both Jews and Muslims will be effectively rendered ineligible for jury service. Judaism's 613 commandments and its more numerous rabbinic laws speak to nearly every facet of public life, which could be used to exclude Jews from juries in nearly any kind of case. Similarly, Islam's religious views of marriage and divorce, tort liability, and property law touch on many aspects of public life and could lead to Muslims' exclusion from all types of juries.

Minority religious adherents, like Jews and Muslims, are also more likely to be identified, and therefore questioned and struck from jury service under the rationale of the decision below. Many Jews and Muslims wear outward signs of their religious beliefs and identity, like the *kippah* or *yarmulke* for Jewish men or the *hijab* for Muslim women. These outward signs make them easy targets for religious discrimination of the kind that occurred in the trial court proceedings here.

Finally, experience teaches that Jews and Muslims will suffer religious discrimination unless they are afforded the full protections of the First Amendment's religious liberty guarantee. Jewish

religious obligations, like the placing of an *eruv* around a community, have been the target of discriminatory local ordinances. Muslim women have been excluded from employment and recreation based on their head coverings and modest dress. These discriminatory actions are inconsistent with our country's history and tradition of religious liberty, as is the decision of the Missouri Court of Appeals here.

This Court should grant certiorari and reverse the decision of the Missouri Court of Appeals.

ARGUMENT

I. IF RELIGIOUS BELIEF OR STATUS CAN SUPPORT A FOR-CAUSE STRIKE, JEWS AND MUSLIMS COULD BE EFFECTIVELY RENDERED INELIGIBLE FOR JURY SERVICE.

The Missouri Court of Appeals' decision, if allowed to stand, could effectively render Jews and Muslims ineligible for jury service. Adherents of both Judaism and Islam hold religious beliefs on a wide variety of topics that are relevant to the questions juries decide. If the decision below is applied beyond the context of religious beliefs related to human sexuality—and the opinion gives no reason why it would apply only in that limited context—then Jewish and Muslim religious belief could be deemed to affect nearly any case that a jury may decide. Jews and Muslims could therefore be struck for cause from service on nearly any jury in Missouri or in any other jurisdiction that follows the reasoning of the court below.

Tenets of Judaism. Judaism sets out 613 commandments, including 248 positive commandments (what an adherent must *do*) and 365 negative commandments (what an adherent must *not* do). In addition to these, there are many rabbinic rules intended to guard and preserve the biblical commandments. The result is a wide-ranging series of religious requirements that touch on many aspects of public and private life.

For example, Judaism prohibits adherents from charging interest under certain circumstances,² and religious rules govern the relationship between employers and their workers.³ There are Jewish rules governing marriage and divorce.⁴ Jewish law governs land transactions: according to the letter of the biblical law, no land sale can last more than fifty years, at which times all debts are also annulled.⁵ Judaism also supplies a comprehensive system of tort law,⁶ and it even specifies rules for how a court system should operate.⁷ These examples illustrate just some of the many and varied aspects of public life for which

² George Robinson, *Interest-Free Loans in Judaism*, MYJEWISHLARNING.COM, <https://tinyurl.com/25arnk3n>.

³ Aryeh Citron, *The Obligation to Pay Workers on Time*, CHABAD.ORG, <https://tinyurl.com/349x62ws>.

⁴ Maurice Lamm, *The Jewish Marriage Ceremony*, CHABAD.ORG, <https://tinyurl.com/4abn8b6t>; *Jewish Divorce Basics: What is a 'Get'?*, CHABAD.ORG, <https://tinyurl.com/3vhx9sax>.

⁵ *Yovel*, OU.ORG, <https://tinyurl.com/nnf782f6> (June 21, 2006).

⁶ *Issues in Jewish Ethics: Tort Law*, JEWISHVIRTUALLIBRARY.ORG, <https://tinyurl.com/2t3ywdaz>.

⁷ Rabbi Aryeh Kaplan, *The Jewish Court System*, AISH.COM, <https://tinyurl.com/32hayx2z>.

Judaism supplies religious rules: banking, finance, real estate, family law, tort, and civil procedure.

Tenets of Islam. Similar to the Jewish beliefs outlined above, Islam also prohibits charging interest⁸ and supplies a comprehensive view of tort law.⁹ Islamic teachings govern the framework of employer-employee relationships, including the obligations of each side of the employment relationship to the other.¹⁰ Islamic law speaks to sales of land and land ownership,¹¹ to philanthropic giving, and to the rules governing marriage agreements and divorce.¹² These examples provide only an illustrative list of the aspects of public life touched by Islam.¹³

Under the reasoning of the decision below, a Jewish or Muslim prospective juror could be questioned about any of the religious beliefs just described (or many others) and struck for cause because of them. Wherever a Jewish or Islamic

⁸ Hesham M. Sharawy, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds*, 29 GA. J. INT'L & COMPAR. L. 153 (2000).

⁹ Abdul Basir bin Mohamad, *Strict Liability in the Islamic Law of Tort*, 39(3) ISLAMIC STUDIES 445 (2000).

¹⁰ Akhtar, M Ramzan, *An Islamic Framework for Employer-Employee Relationships*. 9(2) AMERICAN JOURNAL OF ISLAMIC SOCIAL SCIENCES 202 (Summer 1992).

¹¹ S. Sait and H. Lim, *LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD* (New York: Zed Books, 2006).

¹² Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 Utah L. Rev. 287 (2011)

¹³ Shaukat Hayat. *AN ISLAMIC CODE OF JUDICIAL CONDUCT*, (Auraq Publications 2019).

religious belief relates to the prospective juror's "views regarding an issue central" to the legal case at hand, a for-cause strike would be available. App.80a-81a. This could include any case concerning banking and finance, real estate, family law, tort, or civil procedure, and many other areas, too, based on aspects of Jewish and Islamic law too numerous to describe here. It would be irrelevant if the prospective juror also professed the ability to remain neutral and apply the governing law without bias in the particular case. That is exactly what the Christian jurors did in the trial at issue in this case, yet the court below determined that their religious beliefs justified a for-cause strike, "even if those veniremembers claimed that their religious beliefs would not prevent them from serving." App.78a.

If not reversed, the decision below could effectively exclude Jews and Muslims from jury service in Missouri and in any other jurisdictions that choose to follow the same rule.

II. MINORITY RELIGIOUS ADHERENTS ARE EASILY IDENTIFIED AND MORE LIKELY TO BE TARGETED FOR DISCRIMINATION IF THE DECISION BELOW STANDS.

Minority religious adherents, including but not limited to Jews and Muslims, are often easy to identify, making them likely targets for discrimination if the lower court's decision is not reversed. Believers who belong to majority religions are more likely to blend into a jury pool because their outward religious signs, if any, are commonly worn in

the community. Minority believers are often too visible to simply blend in.

Jewish visibility. Observant Jewish men often wear a *kippah*, a skullcap that is also commonly known by its Yiddish name: *yarmulke*. The *kippah* is a tangible, outward symbol meant to draw out one's inner sense of respect for God.¹⁴ This head covering also makes Jewish men instantly recognizable in the wider community.

Married Jewish women may also cover their hair as a religious observance. The practice has biblical origins, and the Talmud concludes that hair covering under normal circumstances is a biblical requirement for women.¹⁵ Methods of hair covering vary based on communal standards. In recent decades, there is a renewed interest in hair covering after marriage, as represented in the book *Hide and Seek*. Lynn Schreiber, ed. (2003).

Some Jewish men, particularly Orthodox Jews, may wear a four-cornered garment under their clothing, to which is attached fringes called *tzitzit*. The *tzitzit* may be worn so as to hang from beneath a man's shirt and are therefore visible to observers. The *tzitzit* are a tangible reminder of all the commandments of the Torah, but also a tangible indication that the man wearing *tzitzit* is Jewish.

¹⁴ Rabbi Shraga Simmons, *Kippah: A Blessing On Your Head*, AISH.COM, <https://tinyurl.com/2hxtzt8v/>.

¹⁵ Alieza Salzberg, *Hair Coverings for Married Women*, MYJEWISHLARNING.COM, <https://tinyurl.com/56xrb32m>.

Jewish men may be visibly Jewish in other ways, too. *Payos* are sideburns, which the Torah commands to be worn.¹⁶ Individuals may grow them long or curl them, depending on taste or communal custom. Some Jews also interpret the Torah to forbid shaving and accordingly wear facial hair, including in recognizable styles.¹⁷

Observance of these commandments is not uniform among Jews, but this fact only exacerbates the risk that the visible symbol of head coverings, garments, or facial hair will be used to discriminate against minority religious adherents. In this circumstance, the bearer of these visible signs can easily be identified not only as Jewish, but as a member of a minority Jewish sect within an already minority religion.

Muslim visibility. Observant Muslim women are readily identifiable because they wear headscarves (*hijab*) and modest dress. This practice stems from the Quran’s command: “And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what ordinarily appears thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands.” Quran, Surah-an-Nur 24:31.

In all of these examples, Jews and Muslims are visibly identifiable to the wider community. In the context of *voir dire*, this visibility will invite questions

¹⁶ Peyos – Sidelocks, AISH.COM, <https://tinyurl.com/ep7fvsmv>.

¹⁷ Menachem Posner, *Why Don't Chassidic Men Shave Their Beards?*, CHABBAD.ORG, <https://tinyurl.com/y6hbtyej>.

about a prospective juror's religious beliefs or status, the mere existence of which will provide sufficient cause to strike a juror, according to the reasoning of the Missouri Court of Appeals. Not only does this lead to striking jurors based solely on religious belief or status (both of which are repugnant to the U.S. Constitution), but it will disproportionately lead to striking jurors from minority religious traditions like Judaism and Islam, whose adherents wear external markers of their faith and whose beliefs are less likely to be understood by the wider community.

III. EXPERIENCE TEACHES THAT JEWS AND MUSLIMS WILL SUFFER DISCRIMINATION IF THEY ARE NOT PROTECTED BY THE FOURTEENTH AMENDMENT.

The religious freedom enjoyed by believers of all religious backgrounds in the United States—majority and minority—is unparalleled anywhere in the world. Because of that, Jews and Muslims have thrived in the United States and will continue to do so. That, however, is what makes the decision of the Missouri Court of Appeals here so galling: it breaks with a long history of protecting religious beliefs, not permitting discrimination because of them. Experience teaches that in the United States, some factions *will* seek to discriminate against religious minorities like Jews and Muslims unless courts are willing to enforce the Constitution's robust protections for their religious liberty. What follows are examples of just such circumstances. Again, these are not the norm in American life, but an aberration, and for present purposes, an instructive one. If decisions like the one

below are allowed to stand, experience teaches that discrimination against minority religious adherents like Jews and Muslims will follow.

Discrimination against Jewish Americans. The tumult surrounding the *eruv* in Mahwah, New Jersey provides an ignominious example of antisemitic religious discrimination in the United States. On the Sabbath, religious Jews are prohibited from carrying any objects outside of their home—even mundane items such as keys or baby supplies. An *eruv* is a ceremonial wire that many religious Jews¹⁸ set up around their neighborhoods because they believe that doing so allows them to create a zone in which carrying is permissible. Unfortunately, some people who would prefer to exclude religious Jews from their neighborhoods sought to prohibit an *eruv* in Mahwah as a means of keeping Jews out of their community.

In Mahwah, the City Council proposed an ordinance that would expand existing regulations pertaining to placing signs on utility poles to prohibit affixing any “other matter”—like an *eruv*. It was generally understood that the sole purpose for this ordinance was to prevent the building of an *eruv*. When the issue was discussed at a session of the City Council, proponents of the ordinance described Orthodox Jews as a “cult” and “an infection.”¹⁹ The order passed, but the City Council was later forced to

¹⁸ Sharonne Cohen, *What is an Eruv?*, MYJEWISHLARNING.COM, <https://tinyurl.com/4v368dtm>.

¹⁹ Tom Nobile, *Mahwah Council repeals controversial parks ban*, NORTHJERSERY.COM. <https://njersy.co/3cxbHZe> (Dec. 28, 2017).

reverse course and amend the ordinance to permit the *eruv*.

Mahwah also tried to ban out-of-state residents from using its parks and playgrounds in a thinly-veiled attempt to prevent Orthodox Jewish families from using these public places. Those families would be captured by the ban because they lived in a town just across the border in New York.²⁰ In a legal settlement with New Jersey, Mahwah was forced to repeal this ordinance, too.

During the COVID-19 pandemic, New York Governor Cuomo similarly targeted the Orthodox Jewish community with onerous and discriminatory restrictions. Members of Agudath Israel accused the Governor of specifically targeting the Orthodox Jewish community by gerrymandering the boundaries of “red” and “orange” COVID regulatory zones to ensure that heavily Orthodox areas were included. Indeed, before the Governor enacted the policy, he made public statements indicating that the restrictions were motivated by concerns about religious gatherings. For example, “he noted that the source of the first coronavirus hot spot in New York ‘was an Orthodox Jewish man who went to a temple’ and observed that ‘Orthodox Jewish gatherings often are very, very large and we’ve seen what one person can do in a group.’” *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 627 (2d Cir. 2020). He also announced that he would meet with members of the “ultra-Orthodox community,” and if they would “not agree to

²⁰ Marsha A. Stoltz, *Mahwah silent on eruv, parks ordinance settlement with state*, NORTHJERSERY.COM <https://tinyurl.com/2s4d7np6> (Sept. 25, 2018).

enforce the rules, then we'll close the institutions down." *Id.* This Court concluded that these statements "can be viewed as targeting the 'ultra-Orthodox [Jewish] community.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

There is unfortunately reason to believe that, if the decision below is allowed to stand, this sort of anti-semitic discrimination would creep into jury selection.

Discrimination against Muslim Americans. Muslim Americans have also been the targets of religious discrimination when American institutions have failed to live up to their constitutional ideals. In *Equal Employment Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), this Court vindicated the religious liberty of a young Muslim woman who had been discriminated against because of her *hijab*, a head covering. The popular clothing brand had refused to hire the young woman because the headscarf she wore as a practicing Muslim conflicted with the brand's employee dress policy.

Separately, a public pool in Wilmington, Delaware excluded Muslim children from swimming because they wore modest dress consistent with their religious beliefs rather than a more typical swimsuit.²¹ Wilmington ultimately agreed to pay the school and students involved \$50,000 after they filed a discrimination lawsuit.

²¹ Christina Jedra, *Wilmington agrees to pay Muslim school, students \$50,000 in pool discrimination lawsuit*, DELAWAREONLINE, <https://tinyurl.com/3hsv7ja4> (Jan. 22, 2019).

Just *this year* Pennsylvania is moving to repeal a state law restricting public school teachers from wearing anything that could signify their religious beliefs in the classroom.²² The law, originally passed under the influence of the Ku Klux Klan to bar Catholics from teaching in public schools, has been on the books for over 100 years, and the threat of its enforcement has been wielded against a Muslim teacher who dressed in a *hijab* and modest dress.²³

Muslims have also been targeted by formal legal attempts to exclude them from particular communities through land use and planning laws. This can include both attempts to block the construction of Islamic cemeteries,²⁴ and attempts to block the construction of mosques.²⁵

In one way or another in each of these examples, the religious liberty guarantee of the U.S. Constitution ultimately prevailed over discrimination targeted at Jews and Muslims. Unless this Court grants certiorari, however, the same will not be true for jury service in the United States. According to the Missouri precedent at issue here and the precedents

²² *Pennsylvania Senate passes bill allowing teachers to wear religious garb, insignia*, ABC27.COM, <https://tinyurl.com/bdf6yaph> (Jan. 18, 2023).

²³ Aubri Juhasz, *Sporadic and subjective: How Pennsylvania's religious 'garb ban' has impacted teachers*, WHY.ORG, <https://tinyurl.com/2pw6k462> (Feb. 14, 2023).

²⁴ *Stafford County, Virginia, to Allow Islamic Cemetery in Response to Justice Department Lawsuit*, JUSTICE.GOV, <https://tinyurl.com/mryf9se8> (Oct. 14, 2021).

²⁵ Emma Green, *A New Jersey Mosque Wins in a Religious-Discrimination Lawsuit—Over Parking Lots*, THE ATLANTIC, <https://tinyurl.com/r5chh8ff> (May 30, 2017).

of Missouri's sister jurisdictions that have adopted the same rule, a Jew or Muslim (or indeed, *any* religious person) can be struck from jury service based solely on that individual's religious status or beliefs. That outcome is dramatically inconsistent with the First Amendment and amounts to outright religious discrimination. While of course a religious adherent can be struck where he *acknowledges* that his religious beliefs would preclude him from fulfilling the duties of a juror, such is not the case here. Here, the trial court agreed that the jurors could remain impartial and unbiased despite their religious beliefs, but nonetheless allowed those jurors to be struck for cause based on their religious views alone. That dangerous and discriminatory precedent should not be allowed to stand.

CONCLUSION

Amici urge the Court to grant the petition for a writ of certiorari and reverse the holding of the Missouri Court of Appeals.

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