No. 23A___

In the Supreme Court of the United States

MISSOURI DEPARTMENT OF CORRECTIONS,
Applicant,

v.

JEAN FINNEY,
Respondent.

Application for Extension of Time to File a Petition for Writ of Certiorari to the Missouri Court of Appeals

ATTACHMENTS TO APPLICATION TO THE HONORABLE BRETT M. KAVANAUGH REQUESTING AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI PURSUANT TO RULE 13

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IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
DIVISION 1

FILED
11/9/2021
ASHLEY THRASHER
CLERK CIRCUIT COURT
BUCHANAN COUNTY, MO

JEAN FINNEY,	)	
	)	
Plaintiff,	)	
	)	**Case No.: 18BU-CV04465**
v.	)	
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
Defendant.	)	

FINAL JUDGMENT AND ORDER

This case came on for trial by jury beginning August 23, 2021. Plaintiff, Jean Finney, appeared in person and by counsel Rachel C. Rutter, David A. Lunceford, and Peter Gardner. Defendant, Missouri Department of Corrections, appeared by corporate representative Neil Wolfford and by trial counsel Patrick Sullivan, Abbie Rothermich, and Derek Spencer. The case proceeded with voir dire and a jury was selected.

On August 23, 2021, the jury was sworn. On August 24, 2021, jury instructions were read and opening statements were made. Plaintiff presented evidence. Plaintiff's evidence continued until August 30, 2021. Plaintiff rested. Plaintiff and Defendant both made oral Motions for Directed Verdict, which were overruled. Thereafter, Defendant presented evidence. Defendant rested on August 30, 2021. At the close of all evidence, Defendant made an oral Motion for Directed Verdict and Plaintiff renewed her oral Motion for Directed Verdict, which were both overruled and denied. A final instruction conference occurred on August 30, 2021. Jury instructions and closing statements were made by both sides on August 30, 2021. Trial resumed

on August 31, 2021 with jury deliberations. On August 31, 2021, after due deliberation, the jury returned to open court with the following verdicts:

Verdict A: On the claim of Plaintiff Jean Finney for sex discrimination against Defendant Missouri Department of Corrections; as submitted in Instruction No. 8, we the undersigned jurors find in favor of Plaintiff Jean Finney and award, **for non-economic losses: $70,000.00.** We, the undersigned jurors find that Defendant **is** liable for punitive damages.

Verdict B: On the claim of Plaintiff Jean Finney for retaliation against Defendant Missouri Department of Corrections, as submitted in Instruction No. 13, we the undersigned jurors find in favor of Missouri Department of Corrections. We, the undersigned find that Defendant **is not** liable for punitive damages.

Verdict C: On the claim of Plaintiff Jean Finney for hostile work environment against Defendant Missouri Department of Corrections; as submitted in Instruction No. 18, we the undersigned jurors find in favor of Plaintiff Jean Finney, **for non-economic losses in the amount of $105,000.00**. We, the undersigned jurors find that Defendant is liable for punitive damages.

There was no motion by either party for a bifurcated trial, so the jury simultaneously returned the following punitive damages verdicts:

Verdict D: On the claim of Plaintiff Jean Finney for punitive damages against Defendant Missouri Department of Corrections, on the Plaintiff's claim for: Sex Discrimination, Retaliation and Hostile Work Environment; we the undersigned jurors, assess the punitive damages of Plaintiff Jean Finney as follows:

Sex Discrimination, $25,000.00; Hostile Work Environment, $75,000.00.

On the 8th day of October, 2021, this Court took up Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, filed September 30, 2021 and Plaintiff's Amended Motion for Attorney's Fees, Costs, and Post-Judgment Interest with Supporting Suggestions, filed on October 1, 2021. Defendant did not appear. (The Court later

learned this was due to a calendaring error.) The Court ruled on these motions and the Defendant's Post-Trial Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial is **OVERRULED AND DENIED**.

On the 12th day of October, 2021, Defendant filed its Suggestions in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Post-Judgment Interest. On October 13, 2021 Defendant filed its Motion for Rehearing on Plaintiff's Motion for Attorney's Fees, Costs, and Post-Judgment Interest. Defendant specifically did not ask for a rehearing on the Court's ruling denying its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

On this 8th day of November, 2021, the Court takes up Defendant's Motion for Rehearing on Plaintiff's Motion for Attorney's Fees and, overruling Plaintiff's objection to a rehearing, **SUSTAINS** the Motion for Rehearing. The attorneys proceed with arguments on the Motion for Attorney's Fees, Costs and Post-Judgment Interest. Now, after considering the arguments of counsel, upon careful review, and being fully apprised in the premises:

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiff Jean Finney and against Defendant Missouri Department of Corrections in the amount of **$175,000.00 for non-economic losses and $100,000.00 for punitive damages**. Pursuant to MO. REV. STAT. § 408.040.3, interest shall accrue on this Judgment at the rate of 5.08%.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney's Fees, Costs and Post-Judgment Interest is **GRANTED**. Pursuant to MO. REV. STAT. §213.111.2, this Court finds that Plaintiff is entitled to reasonable attorneys' fees and costs. *See also Gilliland v. Mo. Athletic*

Club, 273 S.W.3d 516, 523 (Mo. *banc* 2009). This Court has fully considered Plaintiff's Motion, Plaintiff's Suggestions in Support thereof, and Plaintiff's Exhibits in support thereof. This Court has also considered Defendant's Suggestions in Opposition to Plaintiff's Amended Motion for Attorneys' Fees, Costs, and Post-Judgment Interest.

Plaintiff seeks attorney fees totaling $503,858.75 (which include a 1.5 multiplier), statutory costs of $4,015.96, and litigation expenses of $80.00. Plaintiff also requests post-judgment interest at a rate of 5.08% per annum until the judgment is paid. In support of their claim for attorney fees, Plaintiff's counsel provides time logs and affidavits of David Lunceford, Rachel Rutter, and Christina Nielsen; time logs of Peter Gardner; affidavits of Gene P. Graham Jr., Dennis E. Egan, and Martin M. Meyers; and a copy of Volume 33, Number 31 of the *Missouri Lawyers Weekly* published August 3, 2019. Defendant argues that Plaintiff is only entitled to $229,675.00 in attorneys' fees. Defendant seeks a reduction in Plaintiff's attorney fees because Plaintiff's fee application is based on *Missouri Lawyers Weekly* survey of the highest rates charged in the state and no attempt was made to compare those rates to those of practitioners in Buchanan County, Missouri. Defendant also argues the 1.5 multiplier is improper.

The evidence reflects Plaintiff's attorneys expended 725 hours working on this case, which this Court finds reasonable. Even though Defendant prevailed on Plaintiff's retaliation claim (Verdict B), Plaintiff is still the "prevailing party" in the litigation as a whole. *See Alhalabi v. Mo. Dept. of Natural Resources*, 300 S.W.3d 518 (Mo. App. E.D. 2009). The legal work required to substantiate the claims on which Plaintiff prevailed are interrelated and overlapping with the claim on which Plaintiff did not prevail.

After review of billing records and affidavits submitted by Plaintiff, the Court finds that the hourly rates of attorneys, David Lunceford, Christina Nielsen, Rachel Rutter, and Peter Gardner of:

- $600 per hour for attorney David Lunceford;
- $600 per hour for attorney Christina Nielsen;
- $475 per hour for attorney Rachel Rutter; and
- $250 per hour for attorney Peter Gardner.

are reasonable and customary for attorneys in this area for attorneys of comparable experience.

This Court also finds that litigation expenses sought by Plaintiff ($80.00 for meals during trial) are of the kind of litigation expenses normally paid by fee-paying clients and are hereby included in the total award of attorneys' fees. *See Harrison v. Harris-Stowe State Univ., ED109012, *27-28* (Mo. App. E.D. May 04, 2021). This Court also finds that Plaintiff has incurred a total of $4,095.96 in costs.

Plaintiff seeks a multiplier of 1.5%. Defendant argues that this multiplier is unreasonable and improper under the law and, further, that Plaintiff's attorneys have not shown that they were precluded from taking less risky employment cases or that they missed out on work. Defendant reminds the Court that Mr. Lunceford was not present on August 30 or August 31 because he was otherwise engaged in another civil trial in Jackson County. However, the Court notes Ms. Rutter was lead counsel on this case and proceeded with Plaintiff's case in Mr. Lunceford's absence.

As evidenced by the billing records attached to Plaintiff's Motion for Attorney's Fees, the Court finds a 1.5% multiplier is reasonable for Plaintiff's attorneys' billable hours, and it will be applied here. This Court has fully considered the factors set forth in *Gilliland* to determine the appropriate lodestar award in this case. This Court finds the reasonable lodestar is $335,932.50 (hours multiplied by the hourly rates plus litigation expenses which are included in the total award of attorneys' fees). This Court has fully considered whether to award a multiplier based on the factors set forth in *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 432 (Mo. *banc* 2013), factors which are not included in this Court's initial lodestar analysis. Based on these separate factors, this Court finds that a multiplier of 1.5 is reasonable.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that attorney's fees and costs shall be awarded to Plaintiff in the following amounts (attorneys' fees include a 1.5 multiplier, but statutory costs do not):

a. $209,363.46 to David A. Lunceford
($205,267.50 attorneys' fees + $4,015.96 (costs));

b. $273,751.25 to Rachel C. Rutter
($273,671.25 attorneys' fees + $80.00 (costs)); and

c. $24,840.00 to Christina J. Nielsen (attorneys' fees).

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to MO. REV. STAT. § 408.040.3, interest shall accrue on the total attorneys' fees and costs awarded herein at the rate of 5.08%.

IT IS ORDERED.

Date: November 9, 2021

Kate Schaefer, Circuit Judge

COURT SEAL OF
CIRCUIT COURT OF MISSOURI
BUCHANAN COUNTY

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IN THE CIRCUIT COURT OF BUCHANNAN COUNTY, MISSOURI AT KANSAS CITY

JEAN FINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 18BU-CV04465
	)	
MISSOURI DEPARTMENT OF CORRECTIONS, RYAN CREWS, and CYNDI PRUDDEN,	)	
	)	
Defendants.	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Pursuant to Mo. Sup. Ct. R. 72.01(b) and Mo. Sup. Ct. R. 78.01, Defendant Missouri Department of Corrections hereby moves for judgment notwithstanding the verdict or, in the alternative, for new trial. In support of this Motion, Defendant states as follows:

1. The verdict in favor of Plaintiff on Plaintiff's claim of sex discrimination, Count I, is against the weight of the evidence, and Defendant is entitled to judgment as a matter of law thereon or, in the alternative a new trial.

2. The verdict in favor of Plaintiff on Plaintiff's claim of hostile work environment, Count II, is against the weight of the evidence, and Defendant is entitled to judgment as a matter of law thereon, or, in the alternative, a

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new trial.

3. The Court's blanket exclusion of potential jurors during voir dire based on their religious background and beliefs, despite such jurors testifying that they could be fair and impartial, violated the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause of the Missouri Constitution, and Article I section 5 of the Missouri Constitution. *See Strong v. State*, 263 S.W.3d 636 (Mo. 2008); *see also U.S. v. Greer*, 939 F.2d 1076 (5th Cir. 1991). Several potential jurors testified that, while they grew up in a religion that taught that homosexuality was a sin, they did not view it as different from any other sin and could be fair and impartial. The effect of the Court's decision, for example, is that no Catholic in good standing who receives communion could have served on the jury. Defendant is therefore entitled to a new trial on Counts I and II.

4. The Court's blanket exclusion of jurors during voir dire based on their religious background, without further inquiry by the Court or plaintiff's counsel into whether such jurors could be fair and impartial, violates the Equal Protection Clauses of both the United States and Missouri Constitutions, (*see* authorities cited above), and Missouri law. *See State v. Carter*, 807 S.W.2d 218, (Mo. Ct. App. E.D. 1991) (participation in organization or activities suggesting bias does not indicate juror unable to be fair and impartial); *see also State v. Moore*, 927 S.W.2d 439, 441 (Mo. Ct. App.

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W.D. 1996) (court has duty to make independent inquiry of a potential juror when potential juror equivocates about ability to be fair and impartial); *State v. Holliman*, 529 S.W.2d 932, 939 (Mo. Ct. App. St. Louis Div. 1975) (same). Here, several jurors were excluded for cause solely because they indicated that they grew up in a religion that taught that homosexuality was a sin. The potential jurors were not asked if they could be fair and impartial or even if they agreed with that teaching. The exclusion of those potential jurors for cause was error, and Defendant is therefore entitled to a new trial on Counts I and II.

For the foregoing reasons, therefore, Defendant respectfully requests that this Court grant its motion for judgment notwithstanding the verdict on Counts I and II or, in the alternative, order a new trial on Counts I and II.

Respectfully submitted,
ERIC S. SCHMITT
Attorney General

/s/ J. Patrick Sullivan
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Email: Patrick.sullivan@ago.mo.gov

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 30, 2021, the foregoing was filed electronically with the Clerk of Court and was served upon all counsel of record via the Courts e-filing.

/s/ J. Patrick Sullivan
Assistant Attorney General

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
DIVISION 1

FILED
10/8/2021
03:20 PM
ASHLEY THRASHER
CLERK CIRCUIT COURT
BUCHANAN COUNTY, MO

JEAN FINNEY,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18BU-CV04465
	)	
MISSOURI DEPARTMENT	)	
OF CORRECTIONS,	)	
	)	
Defendants.	)	

JUDGMENT DENYING DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

On this 8th day of October, 2021, the Court takes up and considers Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial filed September 30, 2021. Being fully advised in the premises, the Court hereby **DENIES** Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial in its entirety.

IT IS SO ORDERED.

Dated: October 8, 2021

Kate Schaefer, Circuit Judge

COURT SEAL OF
BUCHANAN COUNTY

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	WD84902 (Consolidated with WD84949)
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	Order filed: December 27, 2022
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
THE HONORABLE KATE H. SCHAEFER, JUDGE

Division One: W. Douglas Thomson, Presiding Judge,
Alok Ahuja, Judge and Edward R. Ardini, Jr., Judge

O R D E R

PER CURIAM:

The Missouri Department of Corrections appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney on her discrimination claims brought under the Missouri Human Rights Act alleging the trial court committed constitutional error when it struck certain members of the venire for cause. We affirm. Because a published opinion would have no precedential value, we have provided the parties an unpublished memorandum setting forth the reasons for the order. Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY, Respondent, v. MISSOURI DEPARTMENT OF CORRECTIONS, Appellant.	))))))))))	WD84902 (Consolidated with WD84949) Filed: December 27, 2022

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

The Missouri Department of Corrections ("DOC") appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney ("Finney") on her discrimination claims brought under the Missouri Human Rights Act ("MHRA") alleging the trial court committed constitutional error when it struck certain members of the venire for cause. We affirm.

Factual and Procedural Background

Since 2002, Finney has been an employee of the DOC, spending her entire career as a corrections officer at the Western Reception, Diagnostic, and Correctional Center ("WRDCC") in St. Joseph, Missouri. Finney worked with Gaye Colborn ("Gaye") and Jon Colborn ("Jon")[1] at WRDCC from 2002 until Gaye was transferred to another DOC institution in 2010. Gaye and Jon had been married but divorced in 2003.

In 2010, after Gaye had been transferred, Finney and Gaye began a romantic relationship. After learning of Finney's relationship with Gaye, Jon repeatedly sent Gaye text messages about Finney, calling her names including "lesbo, lessie, just derogatory statements like that." Gaye did not initially report the text messages to her superiors because she wanted to maintain a peaceful relationship with Jon out of respect for their children.

However, beginning in 2015, when Finney was chosen for a promotion over Jon, Jon's actions intensified. Jon kept information from Finney that she needed to safely perform her duties, he spread rumors that Finney was romantically involved with a female subordinate, and he submitted multiple complaints to supervisors about Finney and threatened to lodge additional complaints about employees he believed were friends of Finney. Finney complained to her supervisor about these incidents in 2016. Also, in 2016, Gaye reported the text messages Jon had sent indicating that Finney was attempting to sleep with a subordinate at WRDCC. No investigations came from either of these reports, so Finney again reported the conduct in 2017.

After Finney's second complaint, the warden of WRDCC sent a memo to his supervisors and human resources personnel detailing an "increasing level of hostility and aggression from [Jon,]" including "erratic, aggressive [behavior], inciting and retaliatory in nature." The warden

[1] To avoid confusion, we refer to certain individuals by their first names; no disrespect or familiarity is intended.

expressed concern that Jon would bring a gun to work to shoot Finney and others. Based on Jon's conduct, the warden determined that Jon was creating a harassing, discriminatory, and retaliatory work environment for Finney based on her sexual orientation.

Finney filed suit against DOC, alleging that DOC had violated the MHRA by discriminating against her, creating a hostile work environment, and by retaliating against her. Finney alleged that she is a lesbian who presents masculine, and she was improperly stereotyped and discriminated against based on sex.

During *voir dire*, Finney's counsel sought information about the venire's views on homosexuality:

> 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?

A number of people raised their hands, including venirepersons 4 and 45. Counsel for Finney continued, asking how many people could not set aside these views. Several more people raised their hands, including Venireperson 13. Venireperson 13 then made the following comment:

> The comment is that according to my belief, homosexuality is a sin. . . . But you still have to love those people, and 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. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.

Finney's counsel asked if anyone else shared those views. Several veniremembers raised their hands, including venireperson 45. Counsel for DOC followed up with venireperson 13:

> [Counsel for DOC:] Okay. Thank you. Earlier I think that you had raised your paddle on the question about growing up in a religion where it was taught that homosexuality was a sin. Do you – can you – was that something that you were taught when you were growing up?
>
> [Venireperson 13:] No, it's in the Bible. . . . The Bible talks about it. But as I tried to say, a sin is a sin. And every one of us here sins. And I don't imagine any of you would deny it. We all do. It's just part of our nature. And it's something we struggle

> with, hopefully, throughout our life. So there isn't – homosexuality isn't any worse sin than stealing something. It's all – a sin is a sin. It's all on the same level.
>
> [Counsel for DOC:] Do you think that would impact your ability to be a fair and impartial juror in this case?
>
> [Venireperson 13:] Absolutely not. That has really nothing to do with – in a negative way with whatever this case is going to be about.

Finney's counsel later inquired of venireperson 4's views on homosexuality:

> . . . I firmly stand on the word of God and what the word of God says. And much 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. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic duty. 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.

After *voir dire*, Finney's counsel sought to strike venirepersons 4, 13, and 45 for cause. Counsel for DOC objected, arguing that venirepersons 4 and 13 indicated they could be fair and impartial despite their views on homosexuality and that venireperson 45 did not state that she continued to hold negative views concerning homosexuality. DOC's counsel further stated that, "I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination." The trial court sustained Finney's request to strike all three venirepersons for cause.

The jury returned verdicts in favor of Finney on the discrimination and hostile work environment claims and for DOC on the retaliation claim and awarded Finney a total of $175,000.00 in non-economic damages and $100,000.00 in punitive damages.

In its motion for new trial, DOC argued that "[t]he Court's blanket exclusion of potential jurors during voir dire based on their religious background and beliefs, despite such jurors testifying that they could be fair and impartial, violated the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause of the Missouri Constitution, and Article I section 5

of the Missouri Constitution." The trial court denied DOC's motion for new trial.

DOC appeals.

Discussion

DOC raises three points on appeal, all arguing that the trial court's decision to strike veniremembers 4, 13, and 45 for cause violated provisions of the United States and Missouri constitutions. Specifically, in Point I, DOC claims that the trial court's actions violated article I, section 5 of the Missouri Constitution, which prohibits the disqualification of jurors based on their religious beliefs or persuasion. In Points II and III, DOC asserts that the trial court violated the Equal Protection Clauses contained in the United States and Missouri constitutions, arguing again that the jurors were improperly struck based on their religion.

Standard of Review

When properly preserved, "[a] strike for cause is reviewed for abuse of discretion." *State v. Johnson*, 284 S.W.3d 561, 580 (Mo. banc 2009) (citation omitted). However, "'[f]or an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the [circuit] court in a motion for new trial.'" *State v. Minor*, 648 S.W.3d 721, 729 (Mo. banc 2022) (quoting *State v. Loper*, 609 S.W.3d 725, 732 (Mo. banc 2020) (additional citation omitted). Moreover, "[a] claim of constitutional error must be raised at the first opportunity and with citation to specific constitutional objections." *Id*. (citing *State v. Driskill*, 459 S.W.3d 412, 426 (Mo. banc 2015)). Here, although DOC objected to the strikes at issue during jury selection, it did not cite to specific constitutional provisions or in any manner put forth an argument founded on constitutional principles, relying instead on the claim that the strikes could "get[ ] into the bounds of religious discrimination." Counsel never stated an *objection* on the basis of religious discrimination, claimed that exclusion of veniremembers 4, 13

and 45 would actually *constitute* religious discrimination, or identified the legal authority which would prohibit such discrimination. Counsel's ambiguous and ambivalent statement falls well short of the specificity required to preserve a constitutional objection. *See G.B. v. Crossroads Acad.-Central St.*, 618 S.W.3d 581, 593 (Mo. App. W.D. 2020) (stating that the assertion that a form violated "the Missouri Constitution regarding freedom of religion, separation of religion, as well as the Missouri RFRA" was insufficient to preserve an Equal Protection claim); *State v. Steidley*, 533 S.W.3d 762, 777 (Mo. App. W.D. 2017) (stating that a general argument that evidence "would violate [the defendant's] rights 'under the Missouri Constitution and the Constitution of the United States'" was insufficient to preserve a Sixth Amendment confrontation clause claim).

DOC also argues that, despite any deficiencies in its statement of an objection, opposing counsel and the circuit court *understood* that DOC was invoking constitutional principles, and the issues should accordingly be treated as preserved. We disagree. The single, ambiguous statement to which DOC refers occurred in the middle of a lengthier discussion concerning whether veniremembers 4, 13 and 45 had exhibited a disqualifying bias and whether they had been successfully rehabilitated. This broader discussion involved typical, "run-of-the-mill" questions presented to a trial court whenever a litigant seeks to strike a veniremember for cause. Nothing in the broader discussion would have alerted the trial court that DOC was raising some sort of religion-specific, constitutional objection requiring a different legal analysis and a heightened level of scrutiny. Confirming that the trial court did not view this as a constitutional issue, following DOC counsel's "objection," the court stated that it would "err on the side of caution" by striking the challenged veniremembers – a statement which invokes general, *non-constitutional* caselaw concerning for-cause strikes. *See, e.g. Brown v. Collins*, 46 S.W.3d 650, 652 (Mo. App. W.D.

2001) ("It 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 . . . by retaining the questionable juror.")

Because DOC's claims are not preserved, we can review them only for plain error. *See* Rule 84.13(c).[2] "Appellate courts 'will review an unpreserved point for plain error only if there are substantial grounds for believing that the trial court committed error that is evident, obvious and clear and when the error resulted in manifest injustice or miscarriage of justice.'" *Veal v. Kelam*, 624 S.W.3d 172, 178 (Mo. App. E.D. 2020) (quoting *Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019)) (additional citation omitted). "Reversal for plain error in a civil case further requires the injustice to be 'so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.'" *Id*. (quoting *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 176 (Mo. App. W.D. 2012)) (additional citation omitted).

Point I

In its first point, DOC asserts that the trial court erred in granting Finney's request to strike for cause veniremembers 4, 13, and 45, arguing that they were excluded "on the grounds that they were Christians who believed homosexual acts are sinful[.]" DOC further argues that the strikes were improper because veniremembers 4 and 13 stated that they "believed that everyone was a sinner and would follow the law;" and there was no evidence that venireperson 45 was unwilling to follow the law.

Article I, section 5 of the Missouri Constitution states, in relevant part, that "no person shall, on account of his or her religious persuasion or belief, . . . be disqualified from . . . serving as a juror[.]" This safeguard enshrined in our constitution serves as an invaluable tool to prohibit

[2] Rule references are to the Missouri Supreme Court Rules (2017).

the exclusion from jury service of individuals based on their chosen religion. DOC attempts to trigger the protections of article I, section 5 by arguing that the removal of the prospective jurors at issue in this appeal was based on their status as Christians. This effort mischaracterizes the nature of the inquiry pursued during *voir dire* and ignores the broader proposition that article I, section 5 does not render an individual's views on issues relevant to the pending case immune from scrutiny during the jury selection process when those views are grounded in or evolve from religious sources or teachings. Indeed, "no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person[ ] . . . shall be sworn as a juror in the same cause." § 494.470.1, RSMo.[3]

While *voir dire* unquestionably touched upon religion, contrary to DOC's assertion, it did not serve to identify and exclude prospective jurors of certain religious persuasions. Rather, the questioning 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. DOC's efforts to narrowly cast the challenged strikes for cause as being based on the prospective jurors being Christians – as opposed to an issue-based determination founded on their views on homosexuality – is further undermined by the fact that several other prospective jurors who identified as religious or Christian but did not express strong views on homosexuality were not struck for cause.[4] Based on this record, we are simply not persuaded that the relevant venirepersons were "disqualified" from jury service "on account of [their] religious persuasion or belief" in violation of article I, section 5 of the Missouri Constitution; rather we conclude those individuals were disqualified as

[3] Statutory citations are to the Missouri Revised Statutes (2016).

[4] For example, veniremembers 8, 12, 19, 52, and 56, each indicated that they were raised in or went to conservative Christian churches. Juror 19 served on the jury. Juror 56 was struck for cause on other grounds.

jurors based on strongly held views relevant to the predominant issue in the case. *See Thomas by and through Thomas v. Mercy Hosps. E. Cmtys.*, 525 S.W.3d 114, 118 (Mo. banc 2017) (citing Mo. Const. art. I, § 22(a)) (additional citation omitted) (stating that civil litigants have a constitutional right to a fair and impartial jury); *Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351, 353 (Mo. banc 1990) ("Even in a civil trial, where a jury decision need be made by only a three-fourths majority, the civil litigant is still entitled to a jury of twelve impartial persons").

Finney's sexual orientation and her same-sex relationship with Gaye were at the heart of her claim of discrimination against DOC and it was not a clear, evident and obvious violation of article I, section 5 of the Missouri Constitution 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.

At least two additional considerations persuade us that there was no plain error injustice here. As reflected in our description of the relevant facts, Finney's counsel asked extensive questions during voir dire, explicitly asking veniremembers whether they harbored *religious-based views* concerning homosexuality. Despite this extensive questioning, DOC's counsel never lodged an objection that it was inappropriate to examine veniremembers about their religiously based beliefs. In addition, it is not at all clear that either the State or federal constitutions prohibit exclusion from jury service based on an individual's *beliefs* – even *religiously based* beliefs – which prevent the juror from serving impartially in a particular case. *See, e.g., United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003) (drawing a distinction between an arguably improper strike based on a venire member's "religious *identity*," versus a permissible strike based on a venire member being a "'religious *activist*'" (emphasis added)); *United States v. DeJesus*, 347 F.3d 500, 511 (3d Cir. 2003) ("The distinction drawn by the District Court between a strike motivated by

religious beliefs and one motivated by religious affiliation is valid and proper."); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) ("It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, [or] a Muslim," but it would be "proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing").

As we have explained above, this case involved claims by Finney that she was mistreated, harassed, disparaged, and vilified by Jon *based on her homosexuality*. Given that the stricken veniremembers believed that Finney's conduct was sinful (meaning immoral and wrong), it is not "evident, obvious and clear" that the circuit court erred in concluding that they could not impartially and fairly decide her claim that she was unlawfully harassed due to her homosexuality – even if those veniremembers claimed that their religious beliefs would not prevent them from serving. *Henderson v. Fields*, 68 S.W.3d 455, 475 (Mo. App. W.D. 2001) ("The trial court is not required to accept as credible a venireperson's testimony that he or she will be able to overcome previously disclosed biases, prejudices and affiliations in rendering a verdict").

Finally, even if we were to find the trial court committed plain error when it excluded the three veniremembers for cause (a finding we do not make), DOC's claim on appeal would still fail as manifest injustice is not shown where, as here, there is no allegation that any of the twelve jurors who decided the case were unqualified. *See Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 203 (Mo. App. W.D. 2012) (quoting *State v. Robinson*, 26 S.W.3d 414, 418 (Mo. App. E.D. 2000) ("A party 'do[es] not have a right to a specific juror or to representation on the jury of a particular point of view'"). No manifest injustice exists "where there is no claim or suggestion from the record that any of the jurors selected to deliberate on the case was biased and should have been removed." *Id*; *see also State v. Reynolds*, 502 S.W.3d 18, 28 (Mo. App. E.D. 2016) (finding no manifest injustice

from the dismissal of two female jurors when there was no indication that the jurors who served were not impartial).

Point denied.

Points II and III

In Points II and III, DOC alleges that the trial court's striking of veniremembers 4, 13, and 45 for cause violated the Equal Protection Clauses of the United States and Missouri constitutions.

The Equal Protection Clause, found in the United States Constitution, states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Similarly, the equivalent provision contained in the Missouri Constitution states, in relevant part, that "all persons are created equal and are entitled to equal rights and opportunity under the law[.]" Mo. Const. art. I, § 2. The Equal Protection Clause prohibits striking a juror on the basis of race, gender, or another legally protected class. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-42 (1994).

DOC argues that because religion is a legally protected classification, the trial court's granting of the for-cause strikes must comply with strict scrutiny. However, consistent with our finding in Point I, the premise of DOC's arguments in Points II and III is incorrect as the strikes at issue in this appeal were not based on the veniremembers' religion; instead the strikes were founded on the veniremembers' views regarding an issue central to Finney's case. As a result, DOC's claims in Points II and III must fail.

Because the strikes at issue were not based on the veniremembers' status as Christians and instead were based on specific views held by the prospective jurors directly related to the case, as

we reasoned in Point I, the trial court did not commit plain error by granting Finney's for-cause strikes.

Points II and III denied.

Conclusion

The judgment of the trial court is affirmed, and the case is remanded to the trial court for a determination of attorney fees.[5]

[5] Finney filed a motion for attorney's fees and motion to deem the motion for attorney's fees timely filed. Both motions were taken with the case. Finney had attempted to electronically file her motion for attorney's fees on November 15, 2022 – a day prior to the case being submitted. However, due to an issue with two supporting exhibits, and not the motion itself, the clerk's office rejected the filing of both the motion and the exhibits. This rejection was electronically communicated to Finney's counsel. Finney subsequently filed – after the case was submitted – an Amended Motion for Attorneys' Fees Incurred on Post-Trial Motions and on Appeal with Suggestions in Support Thereof that rectified the issues related to the two exhibits that "did not scan correctly."

Our Local Rule 29 requires that a party must file "a separate written motion [for attorney's fees] before submission of the cause." In this instance, there was no deficiency identified in the motion for attorney's fees that was timely submitted for filing by Finney on November 15, 2022. Nevertheless, the motion was "returned to filer" due to issues related only to the exhibits. Under these circumstances, we will deem that Finney's motion for attorney's fees was timely filed under Local Rule 29. As the prevailing party, Finney's motion for attorney's fees is granted and we remand to the trial court for determination of the appropriate award. *Gray v. Mo. Dep't of Corr.*, 635 S.W.3d 99, 108 (Mo. App. W.D. 2021) ("[W]hile appellate courts have the authority to award attorney fees on appeal, because the trial court is better equipped to hear evidence and determine the reasonableness of the fee requested, we remand to the trial court to determine a reasonable award of attorney['s] fees on appeal.").

Finney's motion to dismiss this appeal or, in the alternative, to strike DOC's brief, which was also taken with the case, is denied.

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JEAN FINNEY,	)	
	)	
Respondent,	)	
	)	
v.	)	Case No. WD84902
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Appellant.	)	

APPELLANT'S MOTION FOR REHEARING OR APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

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Appellant Missouri Department of Corrections respectfully moves this Court to vacate its December 27, 2022 Order and grant rehearing under Rule 84.17(a)(1) or, alternatively, transfer the case to the Missouri Supreme Court under Rule 83.02.

I. Questions of General Interest and Importance

1. Whether "religious belief," as opposed to just "religious status," is a protected classification under the U.S. and Missouri Equal Protection clauses for purposes of a *Batson*-type challenge.
2. Whether striking for cause jurors solely because they held traditional Christian beliefs on sexuality, despite the circuit court finding that those jurors could apply the law fairly, violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.
3. Whether trial counsel preserves for ordinary review a *Batson*-type challenge by objecting in court and noting that a strike would amount to "religious discrimination," even if trial counsel does not specifically cite a constitutional clause as the basis for the objection.
4. Whether a *Batson*-type violation causes a miscarriage of justice, or whether instead a *Batson* violation can be cured by empaneling a fair jury.

II. Appellate Authority Contrary to the District's Opinion

- *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)
- *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–42 (1994)
- *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987)
- *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992)
- *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016)

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REASONS FOR GRANTING REHEARING OR TRANSFER

I. Statement of Facts

This appeal arises from a suit against the Missouri Department of Corrections alleging that an employee in the Department was unlawfully harassed because of her relationship with another female employee. The appeal, however, concerns not the underlying merits, but the exclusion of prospective jurors because of their religious views. Counsel for the plaintiff asked the trial court to strike—categorically—all prospective jurors who held traditional Christian views on sexuality. Tr. 281–82. The trial court, "to err on the side of caution," granted that request. Tr. 283:21–284:3.

Counsel for the plaintiff began the relevant part of voir dire by asking what he admitted was "a tricky question." Tr. 105:10. 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 what they did?" Tr. 105:10–16. Juror 4 raised a hand. *Id.* 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." Tr. 106:19–24. Juror 13 raised a hand. *Id.*

When allowed to explain, both Juror 4 and Juror 13 revealed that they were confused about counsel's compound questions and uses of double negatives. They *did* believe that all people, including those who identify as gay, have sinned as a religious matter. But they did *not* believe that "homosexuals shouldn't have the same rights as everyone else."

Just the opposite. Juror 13 explained, "Everybody sins. All of us here do. So that sin isn't any more or worse than any other." Tr. 108:7–8. Because of the belief that everybody sins and that all sins are equal, Juror 13 believed "you still have to treat them right in society" and, "[t]herefore, I think I could be a fair juror." Tr. 108:1–7. When counsel for the plaintiff asked prospective jurors to raise their hands if they agreed with Juror 13, Juror 45 did so. Tr. 108:11–12. Similarly, Juror 4 explained that, "much 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." Tr. 266:10–18.

Counsel for the plaintiff then moved to strike for cause the jurors who held traditional Christian views on sexuality. Counsel argued that a person with traditional Christian beliefs necessarily "embraces the idea that [gay individuals] are less than everybody else" and that such Christians should thus never sit on a jury when a plaintiff is gay because when a prospective juror believes "that is a sin, there's no way to rehabilitate." Tr. 281:19, 24–25. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." Tr. 283:10–12.

The Department's counsel objected to the strike motion and protested the request for "a categorical exclusion like that," saying that it would be "getting into the bounds of religious discrimination." Tr. 282:14–16. Jurors 4 and 13 could not be struck on the basis of their religious beliefs, the Department's counsel said, because they testified they would be fair and impartial. Tr. 282:4-6. (Juror 45 was not given the opportunity to clarify.)

In response to the argument by plaintiff's counsel that the prospective jurors could not be fair, the trial court expressly disagreed. Those jurors, the trial court said, "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. "I don't agree that they said [gay plaintiffs] could never be protected because they're in this category." Tr. 283:13–15. Rather, 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." Tr. 283:13–20.

But despite finding that the jurors "were very clear in that they could be absolutely fair and impartial," the trial court decided that "we have enough jurors. So to err on the side of caution," the trial court granted the request to strike the three jurors—Jurors 4, 13, and 45—who held traditional Christian beliefs. Tr. 283:21–22.

After the later-empaneled jury returned a verdict against the Department, the Department moved for a new trial, arguing that excluding potential jurors based solely on their traditional religious beliefs about sexuality violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution. D88, pp.1–3. The circuit court denied this motion. D122. The Department timely appealed.

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D126.

On appeal, the Department argued that the circuit court violated Equal Protection as well as article I, section 5 of the Missouri Constitution by striking for cause veniremembers on the basis of their traditional religious beliefs about sexuality without finding that they could not be fair and impartial. On December 27, 2022, this Court affirmed the circuit court.

This Court readily agreed that the jurors were struck "based on specific *views* held"—namely, their traditional Christian views on sexuality—but the Court concluded that no violation occurred "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians." Op. at 11 (emphasis added).

II. Argument

This Court should reconsider its decision or transfer this case to the Missouri Supreme Court. The jurors were struck solely because they held traditional religious beliefs, not because of any court finding that they would be biased. Indeed, the trial court expressly determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. And the distinction this Court drew between these persons' "status as Christians" and their "specific views" has been rejected by the U.S. Supreme Court. These strikes violate the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.

A. A new trial is necessary because striking jurors on the basis of their traditional religious beliefs violates Equal Protection.

Under both the Missouri Constitution and the Fourteenth Amendment to the U.S. Constitution, striking a juror on the basis of protected characteristics like race or sex triggers the applicable level of heightened scrutiny. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *see also Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 805 (Mo. banc 2013) ("[T]he Missouri Constitution's equal protection clause is coextensive with the Fourteenth Amendment."). This rule applies in cases both criminal and civil. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

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Religion also is a protected characteristic, so a trial court cannot exclude jurors because of their religion without satisfying strict scrutiny. As the U.S. Supreme Court has held, when a trial court strikes a juror based on a classification that triggers "heightened scrutiny," the "*only* question is whether discrimination … in jury selection" satisfies that scrutiny. *J.E.B.*, 511 U.S. at 136 (emphasis added). Religious discrimination triggers heightened scrutiny—strict scrutiny. *E.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). So to strike these jurors on the basis of their religious beliefs, the trial court needed to satisfy strict scrutiny.

The trial court did not. It did not even try to. It found that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. But then, "to err on the side of caution" because "we have enough jurors," the trial court struck these potential jurors solely because they held traditional religious beliefs. Tr. 283:21–22.[1] The trial court made no attempt to establish that it was pursuing a "compelling interest" and that striking the jurors was the least restrictive means to achieve that interest.

Nor could the court have made that showing. Striking jurors on behalf of their religious beliefs, without finding that they are biased, fails to satisfy strict scrutiny for the same reasons the strikes did in *Batson* and *J.E.B*. In *Batson*, counsel struck a juror based on a stereotype: he "assum[ed] that black jurors as a group" could not "impartially [ ] consider the State's case against a black defendant." 476 U.S. at 89. *J.E.B.* similarly warned against using "state-sponsored group stereotypes" and "unconstitutional prox[ies] for . . . impartiality." 511 U.S. at 128–29. Here, the trial court acknowledged that the jurors' testimony showed they could be fair. And the trial court never identified any evidence against their impartiality. But then, "to err on the side of caution"—presumably out of a concern that the plaintiff would move for a mistrial if she lost—the trial court simply

[1] In determining that the trial court had found that the jurors "could not impartially and fairly decide [plaintiff's] claim," Op. at 10, this Court overlooked this critical part of the transcript. The trial court accepted the prospective jurors' statements that they could be fair and impartial, and it never identified any evidence to the contrary. It simply assumed, because "we have enough jurors," that it could avoid claims of bias (by the plaintiff) later by excluding jurors on the basis of religious belief earlier.

assumed that individuals who hold traditional religious views might not be impartial. That unconstitutional stereotyping placed "a brand upon them, affixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142.

In affirming the judgment below, this Court did not dispute—and could not reasonably dispute—that Equal Protection prohibits striking potential jurors because of their religion (absent satisfying strict scrutiny). Instead, this Court upheld the strikes "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians and instead were based on specific *views* held by the prospective jurors directly related to the case." Op. at 11 (emphasis added).

But the U.S. Supreme Court has repeatedly rejected attempts to distinguish between religious status, religious conduct, and religious belief. Just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), so too a strike against jurors because they hold traditional Christian beliefs is a strike against traditional Christians. Just last term, the U.S. Supreme 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 v. Makin*, 142 S. Ct. 1987, 2001 (2022); *see also Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022) (protecting voluntary religious conduct, such as praying, not just religious status). Nobody doubts that a trial court can strike a juror if his religious beliefs or status would cause him to be biased. But where a trial court—as here—has no evidence that a juror would be biased because of his beliefs, those beliefs cannot serve as the basis to strike that juror.

This Court's opinion also has no limiting principle. If admittedly fair jurors can be struck from a case about sexual orientation discrimination simply because of their religious views about sexuality, then so too can many others. To "err on the side of caution," a court could categorically strike all Mormons from a contract dispute involving a bar and grill 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 allegations of food poisoning at a pork barbecue restaurant.

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In short, under the rule adopted by this Court, whenever a plaintiff or defendant does something that members of one religion disagree with, members of that religion can be categorically excluded from any jury even absent a finding that those members are biased.

B. Striking all identified jurors who held traditional religious views violated article I, section 5 of the Missouri Constitution.

Because the Missouri Supreme Court evaluates article I, section 5 violations like it does *Batson* challenges, *see Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008), the Equal Protection analysis in Part II.A applies the same here. The circuit court struck the jurors expressly because of their religious beliefs but did not even try to satisfy strict scrutiny. Rather than determine whether each juror was actually biased, the circuit court considered the jurors' religious beliefs as a "proxy" for bias, which is unconstitutional group stereotyping. *See J.E.B.*, 511 U.S. at 128–29. To avoid creating an underclass of citizens, this Court should rehear this case or transfer it to the Missouri Supreme Court.

The distinction drawn in the opinion by this Court between religious "status" and religious "views" fails here as well. Article I, section 5 of the Missouri Constitution expressly protects religious belief, not just status: "[N]o person shall, on account of his or her religious persuasion *or belief* . . . be disqualified from . . . serving as a juror[.]" (Emphasis added.) This Court's contrary holding erases the term "belief" from the Constitution and conflicts with Missouri Supreme Court precedent. For example, after a trial court excused a potential juror who did not believe in the death penalty, the Missouri Supreme Court determined that the trial court excused the potential juror "not for his religious beliefs, but because he indicated that he would not follow the laws of this State." *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987).

C. This Court should review the claims under ordinary appellate standards, not plain-error review.

To preserve appellate review of *Batson*-type strikes, counsel need only (1) object and (2) "identify the discriminatory criterion." *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016). The Department met this standard. It expressly objected to the plaintiff's request to categorically strike all persons who held traditional religious beliefs.

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Counsel for the Department noted that the plaintiff was seeking "a categorical exclusion" and that striking these jurors "starts getting into the bounds of religious discrimination." Tr. 282:4–16. In doing so, the Department notified the trial court of the Department's objection and the discriminatory criterion—religion—on which the objection was made. *See Singletary*, 497 S.W.3d at 809.

A party can also preserve a *Batson*-type challenge for review even without expressly identifying the discriminatory criterion so long as "[i]t appears from the transcript . . . that the [opposing party] and the trial court understood" the basis for the challenge. *Id*. Here, again, the Department met this standard. Right after the Department opposed a "categorical exclusion" of jurors for their religious beliefs, counsel for the plaintiff argued that jurors who hold these beliefs necessarily must be excluded. Tr. 283:10–12 ("I don't think that you can ever rehabilitate yourself.") The parties and the court all understood that counsel for the plaintiff was seeking a categorical exclusion on the basis of religious viewpoint and that the Department was opposing this request.

Instead of applying either of these standards, the Court applied a third: to preserve a challenge to a strike, counsel must "cite to specific constitutional provisions." Op. at 5. But none of the cases this Court cited were *Batson*-type cases. In the *Batson* context, Missouri courts have not required counsel during voir dire to cite specific constitutional provisions. *See, e.g.*, *Singletary*, 497 S.W.3d at 809. This Court's opinion is thus contrary to *Singletary*. Under the standard established in *Singletary*, the Department preserved the issue for review, and this Court should not have reviewed under plain error.

D. Even under plain-error review, the trial court unlawfully struck the jurors.

This Court determined that the Department failed to meet both plain-error requirements: (1) that manifest injustice or miscarriage of justice resulted; and (2) that the error was evident, obvious, and clear. *See* Mem. at 8–10 & n.4; *see also Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019). This Court erred on both counts.

1. When a court removes a prospective juror in a way that unlawfully discriminates

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on the basis of a protected characteristic, that act causes structural error. It necessarily creates manifest injustice. The reason is simple: This kind of discrimination occurs under the imprimatur of the court itself. As the U.S. Supreme Court has explained, "wrongful exclusion of a juror" for protected characteristics "is a constitutional violation committed in open court… [that] casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). A *Batson*-type violation "in the courtroom 'raises serious questions as to the fairness of the proceedings.'" *J.E.B.*, 511 U.S. at 140.

It is thus beside the point whether the panel of jurors ultimately seated is fair. Citing decisions unrelated to the *Batson* context, this Court determined here that there was no manifest injustice because "there is no allegation that any of the twelve jurors who decided the case were unqualified." Op. at 10. But the U.S. Supreme Court has rejected harmless-error analysis in *Batson*-type cases. *Batson*, 476 U.S. at 100 (structural error); *compare J.E.B.*, 511 U.S. at 146 (structural error), *with id.* at 159 (Scalia, J. dissenting) (arguing that any error was harmless); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (permitting a defendant who experienced no identifiable harm to "raise the third-party equal protection claims of jurors"); *Vasquez v. Hillery*, 474 U.S. 254, 261–62 (1986) (structural error when a grand jury is chosen through race discrimination). So lower courts regularly hold that *Batson*-type claims are structural and treat them accordingly. *See, e.g.*, *Winston v. Boatright*, 649 F.3d 618, 628 (7th Cir. 2011) ("[I]ntentional discrimination on the basis of race in jury selection is a structural error" that "def[ies] analysis by 'harmless-error' standards" because the "entire conduct of the trial from beginning to end is . . . affected by the error" (internal quotation marks omitted)); *United States v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014) ("Because *Batson* error is structural and is not subject to harmless error review, only reversal of the conviction and a new trial could remedy any *Batson* error found."); *United States v. Blake*, 819 F.2d 71, 73 (4th Cir. 1987) ("If the Government's reasons fail to satisfy the *Batson* standards, appellants must be granted a new trial.").

The reason error is structural in the *Batson* context is simple: a defendant who makes a *Batson* claim is in fact asserting "the equal protection rights of the excluded

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venirepersons." *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992). Asking whether the empaneled jury was fair is the wrong approach because then "the discrimination endured by the excluded venirepersons goes completely unredressed." *See id.* at 936; *see also State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009) (reviewing unconstitutional discrimination in jury selection for plain error); *State v. Smith*, 595 S.W.2d 764, 766 (Mo. App. W.D. 1980) (holding that discrimination against women in jury selection satisfied the plain-error standard); *State v. Hudson*, 815 S.W.2d 430, 432, 434 (Mo. App. E.D. 1991) (indicating that it would review an unpreserved *Batson* claim under the plain-error standard after remanding to the trial court for additional findings).

2. As argued in more detail above, the error here was plain. The trial court determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. There was no evidence that the jurors would fail to be impartial—indeed, they took pains to say that they had religious beliefs that gay individuals are no better or worse than anybody else and that they should absolutely be treated equally. Tr. 108:1–8, 266:10–18. Yet the trial court, "to err on the side of caution" and because "we have enough jurors," merely assumed that the jurors could potentially be biased because they held traditional religious views.

None of this Court's reasons for declining to find plain error is correct. The trial court never identified any evidence that the jurors would be biased. There is no legal distinction between discrimination based on religious "status" and discrimination based on religious "views." And contrary to this Court's determination (Op. at 8 n.4), the trial court's empaneling of people who might hold views different from those of the prospective jurors does not save the trial court's actions from scrutiny. The trial court struck these jurors solely on the basis of their religious views. That the trial court did not make it worse by also incorrectly striking *other* jurors means nothing. The circuit court's error was plain.

III. Conclusion

It is paramount that this Court clarify that trial courts cannot simply "err on the side of caution" and strike jurors who have religious views about sexuality. After the U.S. Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), and the

Missouri Supreme Court's decision in *Lampley v. Missouri Comm'n on Hum. Rts*., 570 S.W.3d 16 (Mo. banc 2019), cases involving allegations of sexual orientation discrimination are bound to increase. Without a clear holding from this Court or the Missouri Supreme Court, trial courts will be stuck on the horns of a dilemma: either empanel jurors who have declared their religious beliefs (and thus invite arguments by a losing plaintiff that the jury was biased) or discriminate against prospective jurors who hold traditional beliefs. The trial court here chose the latter. This Court should make clear that striking a prospective juror because of her religious beliefs—without making any determination that the juror would be biased—is unconstitutional.

Because this Court's decision contradicts controlling U.S. Supreme Court, Missouri Supreme Court, and Missouri Court of Appeals precedent, this Court should grant this motion for rehearing or transfer the case to the Missouri Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2023, the foregoing was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record.

/s/ Maria A. Lanahan
Maria A. Lanahan

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APPLICATION FOR TRANSFER
TO THE MISSOURI SUPREME COURT

Applicant Missouri Department of Corrections respectfully moves this Court grant this Application for Transfer to the Missouri Supreme Court under Rule 83.04.

I. Questions of General Interest and Importance

1. Whether "religious belief," as opposed to just "religious status," is a protected classification under the U.S. and Missouri Equal Protection clauses for purposes of a *Batson*-type challenge.
2. Whether striking for cause jurors solely because they held traditional Christian beliefs on sexuality, despite the circuit court finding that those jurors could apply the law fairly, violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.
3. Whether trial counsel preserves for ordinary review a *Batson*-type challenge by objecting in court and noting that a strike would amount to "religious discrimination," even if trial counsel does not specifically cite a constitutional clause as the basis for the objection.
4. Whether a *Batson*-type violation causes a miscarriage of justice, or whether instead a *Batson* violation can be cured by empaneling a fair jury.

II. Appellate Authority Contrary to the District's Opinion

- *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)
- *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–42 (1994)
- *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987)
- *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992)
- *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016)

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REASONS FOR GRANTING REHEARING OR TRANSFER

When the trial court excluded jurors for cause solely because of their Christian beliefs, that order violated both the federal and state constitutions. The U.S. Supreme Court has repeatedly held that courts cannot exclude jurors on the basis of sex or race. Religion is no different: The Constitution does not permit religious Americans to be treated as second-class citizens. This Court should grant transfer, reverse, and remand.

I. Statement of Facts

This appeal arises from a suit against the Missouri Department of Corrections alleging that an employee in the Department was unlawfully harassed because of her relationship with another female employee. The appeal, however, concerns not the underlying merits, but the trial court's exclusion of prospective jurors because of their religious views. Counsel for the plaintiff asked the trial court to strike—categorically—all prospective jurors who held traditional Christian views on sexuality. Tr. 281–82. The trial court, "to err on the side of caution," granted that request. Tr. 283:21–284:3.

Counsel for the plaintiff began the relevant part of voir dire by trying to determine who on the jury held traditional Christian beliefs. He began by asking what he admitted was "a tricky question"—in fact a series of compound questions that used double negatives. Tr. 105:10. He asked, among other things, "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 what they did?" Tr. 105:10–16. Juror 4 raised a hand. *Id.* 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." Tr. 106:19–24. Juror 13 raised a hand. *Id.*

When allowed to explain, both Juror 4 and Juror 13 clarified that, although they raised their hands, they could not agree with counsel's compound questions. They *did* believe that all people, including those who identify as gay, have sinned as a religious matter. (And they did not think one could simply stop believing in their religion. *E.g.*, Tr. 266:10–11.) But they did *not* believe that "homosexuals shouldn't have the same rights as

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everyone else."

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." Tr. 108:7–8. Because he believed that everybody sins and that all sins are equal, Juror 13 maintained that "you still have to treat them right in society" and, "[t]herefore, I think I could be a fair juror." Tr. 108:1–7. When asked whether his religion would "impact your ability to be a fair and impartial juror," Juror 13 was emphatic and unequivocal: "Absolutely not." Tr. 257:4–7. When counsel for the plaintiff asked prospective jurors to raise their hands if they agreed with Juror 13, Juror 45 did so. Tr. 108:11–12.

Similarly, Juror 4 explained why she believed gay plaintiffs should be treated the same as everybody else: "much 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." Tr. 266:10–18.

Counsel for the plaintiff then moved to strike for cause the jurors who held traditional Christian views on sexuality. Counsel argued that a person with traditional Christian beliefs should never sit on a jury when a plaintiff is gay because when a prospective juror believes "that is a sin, there's no way to rehabilitate." Tr. 281:19, 24–25. "I don't think that you can ever rehabilitate yourself, no matter what you turn around and say after that." Tr. 283:10–12. Counsel also argued that Juror 4 should be struck because she was married to a pastor. Tr. 265:18-19, 282:21–24 ("She married herself to the idea that if you're gay, then you are—you are a sinner.").

The Department's counsel objected to the strike motion, arguing that the request for "a categorical exclusion like that" would be "getting into the bounds of religious discrimination." Tr. 282:14–16. Jurors 4 and 13 could not be struck on the basis of their religious beliefs, the Department's counsel said, because they testified they would be fair and impartial. Tr. 282:4-6. (Juror 45 was not given the opportunity to clarify.)

The trial court expressly agreed that the jurors "were very clear in that they could

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be absolutely fair and impartial." Tr. 280:3–6. "I don't agree that they said [gay plaintiffs] could never be protected because they're in this category." Tr. 283:13–15. Rather, 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." Tr. 283:13–20.

But despite finding that the jurors "were very clear in that they could be absolutely fair and impartial," the trial court decided that "we have enough jurors. So to err on the side of caution," the trial court granted the request to strike for cause the three jurors—Jurors 4, 13, and 45—who held traditional Christian beliefs. Tr. 283:21–22.

After the later-empaneled jury returned a verdict against the Department, the Department moved for a new trial, arguing that excluding potential jurors based solely on their traditional religious beliefs about sexuality violated the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution. D88, pp.1–3. The circuit court denied this motion. D122. The Department timely appealed. D126.

On appeal, the Department argued that the circuit court violated Equal Protection as well as article I, section 5 of the Missouri Constitution by striking for cause veniremembers on the basis of their traditional religious beliefs without finding that they could not be fair and impartial. On December 27, 2022, the Court of Appeals affirmed the circuit court.

The Court of Appeals readily acknowledged that the jurors were struck "based on specific *views* held"—namely, their traditional Christian views on sexuality—but the Court of Appeals concluded that no violation occurred "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians." Op. at 11 (emphasis added).

The Department filed a motion for rehearing and application for transfer with the Court of Appeals on January 11, 2023, which was denied on January 31, 2023.

II. Argument

This Court should grant this application for transfer. The jurors were struck solely because they held traditional religious beliefs, not because of any court finding that they would be biased. Indeed, the trial court expressly determined that the jurors "were very

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clear in that they could be absolutely fair and impartial." Tr. 280:3–6. And the distinction the Court of Appeals drew between these persons' "status as Christians" and their "specific views" has been rejected by the U.S. Supreme Court. These strikes violate the Equal Protection clauses of the U.S. and Missouri constitutions and article I, section 5 of the Missouri Constitution.

A. A new trial is necessary because striking jurors on the basis of their traditional religious beliefs violates Equal Protection.

Under both the Missouri Constitution and the Fourteenth Amendment to the U.S. Constitution, striking a juror on the basis of protected characteristics like race or sex triggers heightened scrutiny. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *see also Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 805 (Mo. banc 2013) ("[T]he Missouri Constitution's equal protection clause is coextensive with the Fourteenth Amendment."). This rule applies in cases both criminal and civil. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

Religion also is a protected characteristic, so a trial court cannot strike a juror based on religion without satisfying strict scrutiny. As the U.S. Supreme Court has held, when a trial court strikes a juror based on a classification that triggers "heightened scrutiny," the "*only* question is whether discrimination … in jury selection" satisfies that scrutiny. *J.E.B.*, 511 U.S. at 136 (emphasis added). Religious discrimination triggers heightened scrutiny—strict scrutiny. *E.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). So to strike these jurors on the basis of their religious beliefs, the trial court needed to satisfy strict scrutiny.

The trial court did not. It did not even try to. It found that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. But then, "to err on the side of caution" because "we have enough jurors," the trial court struck these potential jurors solely because they held traditional religious beliefs. Tr. 283:21–22.[1] The trial court

[1] In construing the transcript to say that the trial court had found that the jurors "could not impartially and fairly decide [plaintiff's] claim," Op. at 10, the Court of Appeals entirely

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made no attempt to establish that it was pursuing a "compelling interest" and that striking the jurors was the least restrictive means to achieve that interest.

Nor could the court have made that showing. No doubt, a trial court can strike a juror whom the court finds to be biased, but under *Batson* and *J.E.B.*, a court cannot assume a juror will be biased simply because of her religious beliefs. In *Batson*, counsel struck a juror based on a stereotype: he "assum[ed] that black jurors as a group" could not "impartially [ ] consider the State's case against a black defendant." 476 U.S. at 89. *J.E.B.* similarly warned against using "state-sponsored group stereotypes" and "unconstitutional prox[ies] for . . . impartiality." 511 U.S. at 128–29. Here, the trial court acknowledged that the jurors' testimony showed they could be fair. And the trial court never identified any evidence against their impartiality. But then, "to err on the side of caution"—presumably out of a concern that the plaintiff would move for a mistrial if she lost—the trial court simply assumed that individuals who hold traditional religious views might not be impartial. That unconstitutional stereotyping placed "a brand upon them, affixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142.

In affirming the judgment below, the Court of Appeals did not dispute—and could not reasonably dispute—that Equal Protection prohibits striking potential jurors because of their religion (absent satisfying strict scrutiny). Instead, the Court of Appeals upheld the strikes "[b]ecause the strikes at issue were not based on the veniremembers' *status* as Christians and instead were based on specific *views* held by the prospective jurors directly related to the case." Op. at 11 (emphasis added).

But the U.S. Supreme Court has repeatedly rejected attempts to distinguish between religious status, religious conduct, and religious belief. Just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263,

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overlooked this critical passage. Reading the full transcript, the trial court accepted the prospective jurors' statements that they could be fair and impartial, and it never identified any evidence to the contrary. It simply assumed, because "we have enough jurors," that it could avoid claims of bias (by the plaintiff) later by excluding jurors on the basis of religious belief earlier.

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270 (1993), so too a strike against jurors because they hold traditional Christian beliefs is a strike against traditional Christians. Just last term, the U.S. Supreme 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 v. Makin*, 142 S. Ct. 1987, 2001 (2022); *see also Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022) (protecting voluntary religious conduct, such as praying, not just religious status). Nobody doubts that a trial court can strike a juror if his religious beliefs or status would cause him to be biased. But where a trial court—as here—has no evidence that a juror would be biased because of his beliefs, the trial court cannot engage in unconstitutional stereotyping to strike that juror.

The Court of Appeals opinion also has no limiting principle. If fair jurors can be struck from a case about sexual orientation discrimination simply because of their religious views about sexuality, then so too can many others. 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 allegations of food poisoning at a restaurant that serves pork. In short, under the rule adopted by the Court of Appeals, whenever a plaintiff or defendant does something that members of one religion disagree with, members of that religion can be categorically excluded from any jury even absent a finding that those members are biased.

B. Striking all identified jurors who held traditional religious views violated article I, section 5 of the Missouri Constitution.

Because this Court evaluates article I, section 5 violations like it does *Batson* challenges, *see Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008), the Equal Protection analysis in Part II.A applies the same here. The circuit court struck the jurors expressly because of their religious beliefs but did not even try to satisfy strict scrutiny. Rather than determine whether each juror was actually biased, the circuit court considered the jurors' religious beliefs as a "proxy" for bias, which is unconstitutional group stereotyping. *See*

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J.E.B., 511 U.S. at 128–29. To avoid creating an underclass of citizens, this Court should grant this application for transfer.

The distinction drawn in the Court of Appeals opinion between religious "status" and religious "views" fails here as well. Article I, section 5 of the Missouri Constitution expressly protects religious belief, not just status: "[N]o person shall, on account of his or her religious persuasion *or belief* . . . be disqualified from . . . serving as a juror[.]" (Emphasis added.) The Court of Appeals opinion's contrary holding erases the term "belief" from the Missouri Constitution and conflicts with this Court's precedent. For example, in a case where a trial court excused a potential juror who did not believe in the death penalty, this Court determined that the trial court excused the potential juror "not for his religious beliefs, but because he indicated that he would not follow the laws of this State." *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987).

C. This Court should review the claims under ordinary appellate standards, not plain-error review.

To preserve appellate review of *Batson*-type strikes, counsel need only (1) object and (2) "identify the discriminatory criterion." *State v. Singletary*, 497 S.W.3d 803, 809 (Mo. App. W.D. 2016). The Department met this standard. It expressly objected to the plaintiff's request to categorically strike all persons who held traditional religious beliefs. The Department's Counsel noted that the plaintiff was seeking "a categorical exclusion" and that striking these jurors "starts getting into the bounds of religious discrimination." Tr. 282:4–16. In doing so, the Department notified the trial court of the Department's objection and the discriminatory criterion—religion—on which the objection was made. *See Singletary*, 497 S.W.3d at 809.

A party may also preserve a *Batson*-type challenge for review without expressly identifying the discriminatory criterion so long as "[i]t appears from the transcript . . . that the [opposing party] and the trial court understood" the basis for the challenge. *Id*. Here, again, the Department met this standard. Right after the Department opposed a "categorical exclusion" of jurors for their religious beliefs, counsel for the plaintiff argued that jurors who hold these beliefs necessarily must be excluded. Tr. 283:10–12 ("I don't think that

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you can ever rehabilitate yourself."). The parties and the court all understood that plaintiff's counsel was seeking a categorical exclusion on the basis of religious viewpoint and that the Department was opposing this request.

Instead of applying either of these standards, the Court of Appeals applied a third: to preserve a challenge to a strike, counsel must "cite to specific constitutional provisions." Op. at 5. But the Court of Appeals cited no *Batson*-type cases to support this contention. In the *Batson* context, Missouri courts have not required counsel cite specific constitutional provisions when objecting to motions to strike jurors. *See, e.g.*, *Singletary*, 497 S.W.3d at 809. The Court of Appeals opinion is thus contrary to *Singletary*. Under the standard established in *Singletary*, the Department preserved the issue for review, and the Court of Appeals should not have reviewed under plain error.

D. Even under plain-error review, the trial court unlawfully struck the jurors.

The Court of Appeals also wrongly determined that the Department failed to meet both plain-error requirements: (1) that manifest injustice or miscarriage of justice resulted; and (2) that the error was evident, obvious, and clear. *See* Mem. at 8–10 & n.4; *see also Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019).

1. When a court removes a prospective juror in a way that unlawfully discriminates on the basis of a protected characteristic, that act causes structural error. It necessarily creates manifest injustice. The reason is simple: This kind of discrimination occurs under the imprimatur of the court itself. As the U.S. Supreme Court has explained, "wrongful exclusion of a juror" for protected characteristics "is a constitutional violation committed in open court… [that] casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). A *Batson*-type violation "in the courtroom 'raises serious questions as to the fairness of the proceedings.'" *J.E.B.*, 511 U.S. at 140.

It is thus beside the point whether the panel of jurors ultimately seated is fair. Citing decisions unrelated to the *Batson* context, the Court of Appeals determined here that there was no manifest injustice because "there is no allegation that any of the twelve jurors who

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decided the case were unqualified." Op. at 10. But the U.S. Supreme Court has rejected harmless-error analysis in *Batson*-type cases. *Batson*, 476 U.S. at 100 (structural error); *compare J.E.B.*, 511 U.S. at 146 (structural error), *with id.* at 159 (Scalia, J. dissenting) (arguing that any error was harmless); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (permitting a defendant who experienced no identifiable harm to "raise the third-party equal protection claims of jurors"); *Vasquez v. Hillery*, 474 U.S. 254, 261–62 (1986) (structural error when a grand jury is chosen through race discrimination). So lower courts regularly hold that *Batson*-type claims are structural and treat them accordingly. *See, e.g.*, *Winston v. Boatright*, 649 F.3d 618, 628 (7th Cir. 2011) ("[I]ntentional discrimination on the basis of race in jury selection is a structural error" that "def[ies] analysis by 'harmless-error' standards" because the "entire conduct of the trial from beginning to end is . . . affected by the error" (internal quotation marks omitted)); *United States v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014) ("Because *Batson* error is structural and is not subject to harmless error review, only reversal of the conviction and a new trial could remedy any *Batson* error found."); *United States v. Blake*, 819 F.2d 71, 73 (4th Cir. 1987) ("If the Government's reasons fail to satisfy the *Batson* standards, appellants must be granted a new trial.").

The reason error is structural in the *Batson* context is simple: a defendant who makes a *Batson* claim is in fact asserting "the equal protection rights of the excluded venirepersons." *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992). Asking whether the empaneled jury was fair is the wrong approach because then "the discrimination endured by the excluded venirepersons goes completely unredressed." *See id.* at 936; *see also State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009) (reviewing unconstitutional discrimination in jury selection for plain error); *State v. Smith*, 595 S.W.2d 764, 766 (Mo. App. W.D. 1980) (holding that discrimination against women in jury selection satisfied the plain-error standard); *State v. Hudson*, 815 S.W.2d 430, 432, 434 (Mo. App. E.D. 1991) (indicating that it would review an unpreserved *Batson* claim under the plain-error standard after remanding to the trial court for additional findings).

2. As argued in more detail above, the error here was plain. The trial court

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determined that the jurors "were very clear in that they could be absolutely fair and impartial." Tr. 280:3–6. There was no evidence that the jurors would fail to be impartial—indeed, they took pains to say that they had religious beliefs that gay individuals are no better or worse than anybody else and that they should absolutely be treated equally. Tr. 108:1–8, 266:10–18. Yet the trial court, "to err on the side of caution" and because "we have enough jurors," merely assumed that the jurors could potentially be biased because they held traditional religious views.

None of the reasons cited by the Court of Appeals for declining to find plain error is correct. The trial court never identified any evidence that the jurors would be biased. There is no legal distinction between discrimination based on religious "status" and discrimination based on religious "views." And contrary to the Court of Appeals determination (Op. at 8 n.4), the trial court's empaneling of people who might hold views different from those of the prospective jurors does not save the trial court's actions from scrutiny. The trial court struck these jurors solely on the basis of their religious views. That the trial court did not make it worse by also incorrectly striking *other* jurors means nothing. The circuit court's error was plain.

III. Conclusion

It is paramount that this Court clarify that trial courts cannot simply "err on the side of caution" and strike jurors who have religious views about sexuality. After the U.S. Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), and the Missouri Supreme Court's decision in *Lampley v. Missouri Comm'n on Hum. Rts.*, 570 S.W.3d 16 (Mo. banc 2019), cases involving allegations of sexual orientation discrimination are bound to increase. Without a clear holding from this Court, trial courts will be stuck on the horns of a dilemma: either empanel jurors who have declared their religious beliefs (and thus invite arguments by a losing plaintiff that the jury was biased) or discriminate against prospective jurors who hold traditional beliefs. The trial court here chose the latter. This Court should make clear that striking a prospective juror because of her religious beliefs—without making any determination that the juror would be biased—is unconstitutional.

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Because the Court of Appeals decision contradicts controlling U.S. Supreme Court, Missouri Supreme Court, and Missouri Court of Appeals precedent, this Court should grant this application for transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2023, the foregoing Application for Transfer and all required attachments was filed through the Missouri CaseNet e-filing system with the Missouri Supreme Court was served on counsel of record via email:

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Supreme Court of Missouri
en banc

SC99974
WD84902 consolidated with WD84949

January Session, 2023

Jean Finney,
Respondent,

vs. (TRANSFER)

Missouri Department of Corrections,
Appellant.

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2023, and on the 4th day of April, 2023, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 4th day of April, 2023.

_____, Clerk

_____, Deputy Clerk