No. 19-0210

In The

Commonwealth of Ames

Court of Appeals

PATRICK FINLEY,

Appellant,

v.

COMMONWEALTH OF AMES,

Appellee.

ON APPEAL FROM A FINAL JUDGMENT
OF THE SUPERIOR COURT, BEVERLY COUNTY

BRIEF FOR APPELLEE

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Oral Argument

QUESTIONS PRESENTED

1. Whether the First Amendment protects the intentional incitement of a man considering suicide to jump off a bridge to his death, and whether Ames General Laws chapter 265, § 60, which criminalizes such conduct, is unconstitutional.

2. Whether the Superior Court was clearly erroneous to hold that the Commonwealth's peremptory challenge against Juror One due to her professed hesitation about remaining impartial because of her religious beliefs was not a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

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STATEMENT OF JURISDICTION

The final judgment of the Superior Court was entered on June 28, 2019. J.A. 46. Defendant-Appellant filed a timely notice of appeal on July 11, 2019. J.A. 47. This Court has appellate jurisdiction pursuant to Ames General Laws chapter 28, § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First and Fourteenth Amendments to the United States Constitution and Ames General Laws chapter 265, § 60. All relevant provisions are reproduced in the Appendix.

STANDARDS OF REVIEW

The standard of review for constitutional questions is *de novo*. *United States v. Neal*, 512 F.3d 427, 434 (7th Cir. 2008). The standard of review for *Batson* claims is clear error. *Hernandez v. New York*, 500 U.S. 352, 369 (1991).

STATEMENT OF THE CASE

Botany Bay Bridge

September 2, 2018 was the last day of Victor Malone's life. That evening, Malone drove to Botany Bay Bridge. *See* J.A. 31–32. He was considering committing suicide that night, but had not yet made the decision to take his own life. J.A. 33, 43. Along the bridge, public "help phones" offered assistance to suicidal individuals, while scattered pink leaflets read "Considering Suicide?" and "Jump!" J.A. 37. The author of the leaflets, Defendant-Appellant Patrick Finley, included his phone number and encouraged readers to call him for "assistance with committing suicide." J.A. 34, 37.

Malone saw the leaflets, J.A. 43, and called Finley just after 11 p.m., J.A. 32. Malone described his suicidal thoughts over the phone, telling Finley he was "thinking of ending this suffering." J.A. 43. In response, Finley explained his "philosophy of evolution," counseling Malone that he could "evolve . . . through the crucible of death." J.A. 41–42. Before they hung up, Finley offered to "provide any support [he] could" to assist Malone in committing suicide. J.A. 43.

The Text Messages

Finley then repeatedly directed Malone to commit suicide through text messages. J.A. 43. At multiple points, Malone indicated

that he was considering suicide but was apprehensive; at each moment of hesitation, Finley directed Malone to jump off the bridge:

> MALONE: Thanks for speaking with me Patrick. This is really hard.
>
> FINLEY: I know Victor, but you know what you want to do, so do it. You told me yourself! Jump!
>
> MALONE: I'm scared. I'm so confused.
>
> FINLEY: Of course it is scary, nothing important is easy. You told me how you feel. Time to go. Do it!
>
> FINLEY: Go ahead and jump. End your worries. That's why you called me, to help you realize your dreams. Jump!
>
> *Six minutes pass.*
>
> MALONE: I'm still here. I don't know what to do. Please help.
>
> FINLEY: I am helping. Just like you asked me. You told me what you wanted to do, and I told you how to do it. You're on the bridge and your salvation is below.
>
> FINLEY: The only way to evolve is to jump. Be a shining light and DO IT! Don't leave now.

J.A. 33–34.

Malone messaged Finley one last time: "thank you for showing me the way past the edge of the bridge. Goodbye Patrick." J.A. 34. That was the last message Victor Malone ever sent. J.A. 34.

The Investigation

The next morning a patrolman found Malone's body along the rocky shoreline directly under Botany Bay Bridge. J.A. 31, 35. The police

quickly surmised that Malone had committed suicide. J.A. 36. Detectives interviewed Finley, and Finley wrote and signed a statement confirming his communication with Malone. J.A. 39.

Finley's Indictment and First Trial

In January 2019, Finley was indicted for violating Ames General Laws chapter 265, § 60 ("§ 60") for his role in Victor Malone's death. J.A. 2–3.

Section 60(a) provides criminal penalties when a person knows that another person is planning to commit suicide, "intentionally directs, counsels, or incites the other person to" commit suicide, and the other person does actually "commit or attempt to commit" suicide. § 60(a); *see* App. A-1 (reproducing statute in full). Section 60(b) exempts "medical treatment . . . provided by a licensed physician." § 60(b).

Finley moved to dismiss the indictment, arguing that the prosecution criminalized his First Amendment free speech rights. J.A. 4. The Superior Court denied Finley's motion. J.A. 6. Finley's first trial ended in mistrial. J.A. 7.

The Second Trial and Finley's Conviction

During voir dire in Finley's second trial, the judge asked Juror One, Aurora Vescovi, whether there was anything in her background that "might make it tough for [her] to serve fairly and impartially as a juror." J.A. 21. Vescovi expressed concerns about her impartiality,

responding that, as a Catholic nun, she held "strong doctrinal beliefs about suicide." J.A. 21. She also stated that "punishment belongs to divine authorities, not to worldly authorities." J.A. 21. After more back-and-forth, Vescovi offered a lukewarm assurance that she could "evaluate the facts and apply the law." J.A. 23.

Ames Assistant Attorney General Rose Zuckerman continued the questioning, asking Vescovi if her "strong religious beliefs about suicide" would influence her ability to be impartial. J.A. 24. Vescovi expressed discomfort, answering, "That's difficult to say. My beliefs are my beliefs. My religion is my religion," before granting that she could "do" impartiality. J.A. 24. Vescovi also hesitated when asked if her beliefs about punishment would make her more or less likely to find someone guilty: "That's also a really difficult question. . . . My beliefs tell me not to sit in judgment of others, especially those who sin." J.A. 24–25.

Zuckerman moved to strike Vescovi for cause because of her inability to be impartial. J.A. 25. The judge followed up with Vescovi, asking if she could "fairly and impartially consider the evidence and render a verdict." J.A. 25–26. Vescovi answered, "I *think* the answer is yes. It will be *difficult*, but not impossible for me, based on my religion and my beliefs and my views on punishment. But I can do it." J.A. 26 (emphasis added). The judge overruled the Commonwealth's for-cause challenge. J.A. 26.

Zuckerman then exercised a peremptory strike. J.A. 26. Defense counsel objected to the strike on *Batson* grounds, accusing the Commonwealth of exercising the peremptory because of Vescovi's religion, J.A. 26, while admitting that whether or not *Batson* applies to religion is "an open issue," J.A. 27. Without deciding that the defense had met its prima facie burden, the judge asked Zuckerman about the basis for the peremptory. J.A. 28. Zuckerman explained that Vescovi's "beliefs made it impossible for her to fairly evaluate the evidence," citing Vescovi's "hesitancies about punishment" and that Vescovi was "unsure if she [could] pass judgment." J.A. 28. The judge upheld the Commonwealth's peremptory, accepting the prosecutor's proffered reason as neutral. J.A. 29.

On June 14, 2019, more than nine months after Finley directed Malone to jump to his death, the jury delivered its verdict: the Commonwealth proved all three elements of § 60(a) beyond a reasonable doubt. J.A. 15.

Two weeks later, the trial court denied Finley's renewed motion for judgment as a matter of law or, in the alternative, for a new trial, rejecting both Finley's First Amendment and *Batson* claims. J.A. 13–14. This appeal follows. J.A. 47–48.

SUMMARY OF THE ARGUMENT

Patrick Finley caused the death of a vulnerable person. After his conviction in a fair trial, Finley seeks to overturn this ruling based on unfounded First and Fourteenth Amendment claims. This Court should affirm the judgment of the Superior Court.

I. The First Amendment does not protect a defendant who directs a vulnerable person to jump off a bridge. Section 60 is constitutional on its face and as applied to Finley. Appellant's many attempts to trigger strict scrutiny review under the Free Speech and Free Exercise Clauses are unavailing.

Section 60 proscribes a narrowly defined act: intentionally directing, counseling, or inciting suicide, when the speaker knows that another person is considering suicide, and that other person commits suicide. Finley was not convicted for his leaflets or his proselytizing. The jury concluded beyond a reasonable doubt that when Finley repeatedly directed Malone to jump to his death, such incitement violated § 60.

The Free Speech Clause does not protect intentionally directing, counseling, or inciting suicide. Such speech falls under two categories of unprotected expression: speech integral to criminal conduct, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), and incitement to imminent violence, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). First, directing suicide is integral to criminal conduct when the speaker

intends to cause harm to another individual, and that harm actually occurs. Second, speech like Finley's text messages incites victims like Malone to commit imminent violence against themselves. Furthermore, § 60 does not implicate speech of public concern or discriminate among viewpoints—and even if it did, the *Giboney* and *Brandenburg* exceptions would still apply.

The Free Exercise Clause does not exempt Finley from prosecution for directing and inciting suicide. Finley was not prosecuted for his *beliefs*, but for his *conduct*. Government action that incidentally burdens religious exercise is constitutional when it is neutral and generally applied. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990). There is no dispute that § 60 satisfies this test. Appellant cannot then aggregate two failing constitutional challenges into a "hybrid right" that triggers strict scrutiny, nor may Appellant use such a "hybrid right" to justify an individualized exemption to the criminal code. Finley's religious motivation was irrelevant to his prosecution.

Even if Finley were protected by the First Amendment, § 60 passes strict scrutiny. The Commonwealth has a compelling interest in preventing suicides by incitement, and § 60 is narrowly tailored to that interest. Section 60 proscribes conduct that bears a direct causal relation to suicide deaths. Moreover, § 60 is neither overbroad nor

underinclusive, reaching *only* situations in which a defendant has knowledge of another's suicidality and intentionally incites that person to commit suicide. And this statute is the least restrictive means of effectuating this compelling government interest.

II. This Court should affirm the Superior Court's decision and hold that the Commonwealth's peremptory strike against Juror One, a Catholic nun, did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* protection does not extend to religious affiliation or expressed religious beliefs, so there are no grounds for such a challenge. Even if *Batson* applied, the prosecution offered a valid neutral explanation for the strike: Vescovi could not serve impartially.

The Supreme Court has never applied *Batson* protection to strikes exercised on the basis of religion, nor should this Court do so here. Peremptory strikes are a critical tool for ensuring the impartiality of juries. Exercising strikes on the basis of religious affiliation or expressed religious beliefs does not implicate any of the equal protection concerns underlying race- or gender-based peremptory strikes: religion *does* relate to one's ability to serve as a juror in a particular case, religion is not immutable, and religious affiliations have not been historically excluded from jury service. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994); *Batson*, 476 U.S. at 89. Moreover, strict scrutiny is not the correct framework for determining whether *Batson* extends here.

Extending *Batson* to religious affiliation or religious beliefs would undermine a key tool for ensuring jury impartiality. It would result in intrusive questioning during voir dire and would require courts to determine what does—and does not—constitute a religion or a religious belief. Further, such an extension would cause the entire regime of peremptory strikes to fall; there would be no reason not to extend *Batson* protection to other deeply-held beliefs that might indicate bias.

Moreover, even if *Batson* did extend to religion, this Court should still affirm that the peremptory strike of Juror One was permissible under *Batson*'s burden-shifting framework. *See Batson*, 476 U.S. at 197–98. Vescovi repeatedly wavered in her answers, indicating doubt in her ability to fairly judge Finley's case. The trial court did not clearly err in upholding the strike: neither the questioning itself nor any supposed pattern of striking Catholics indicated discriminatory intent. Vescovi was struck for her stated beliefs, which indicated potential bias given the facts of the case at hand.

ARGUMENT

I. SECTION 60 IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO FINLEY'S CONDUCT, SO FINLEY'S CONVICTION SHOULD STAND.

At trial, the Commonwealth provided ample evidence to prove that Finley violated § 60. J.A. 49. Yet Appellant claims that the First Amendment protects his conduct, triggering strict scrutiny review.[1] Appellant's Br. 10.

However, § 60 is constitutional on its face and as applied to Finley. The Commonwealth may regulate Appellant's speech without infringing upon his free speech rights. *See Brandenburg*, 395 U.S. at 447; *Giboney*, 336 U.S. at 498. Appellant's free exercise claim fails because § 60 is a neutral, generally applied criminal law. *See Smith*, 494 U.S. at 878. Nevertheless, the statute satisfies strict scrutiny because it is narrowly tailored to the Commonwealth's compelling interest in preserving life through the prevention of suicide. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

A. Finley's conduct unquestionably constitutes the specific behavior that § 60 proscribes.

Section 60 does not punish Finley for distributing leaflets, for inviting "people to join [his] cause," or even for talking to Malone about his beliefs. J.A. 42–43. Rather, the statute penalizes a narrow behavior:

[1] The protections of the First Amendment apply to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

intentionally "direct[ing], counsel[ing], or incit[ing]" a suicidal person to take their own life. § 60(a). Appellant repeatedly suggests that § 60 criminalizes "encouraging suicide," *see, e.g.*, Appellant's Br. 14, but that is not so.

As the jury found beyond a reasonable doubt, Finley's actions clearly met all three elements of § 60(a). J.A. 15. Finley knew that Malone was considering suicide, satisfying § 60(a)(1). *See* J.A. 43. Then, Finley intentionally *directed* Malone to "jump" to his death and *incited* him to "DO IT," satisfying § 60(a)(2). *See* J.A. 33–34. Finally, Malone actually committed suicide, satisfying § 60(a)(3). *See* J.A. 36.

B. The Free Speech Clause does not protect speech that directs, counsels, or incites suicide.

The First Amendment does not protect all expression—the government may regulate certain "classes of speech" based on their content. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The speech that § 60 proscribes falls under two such exceptions to First Amendment protection: speech integral to criminal conduct, *Giboney*, 336 U.S. at 502, and speech that incites imminent violence or lawless action, *Brandenburg*, 395 U.S. at 447. Furthermore, § 60 neither proscribes speech concerning public affairs nor discriminates based on viewpoint, and the *Giboney* and *Brandenburg* exceptions apply regardless. *Contra* Appellant's Br. 10, 15. The First Amendment does not protect Finley's speech.

1. Speech directing, counseling, or inciting suicide falls under the Giboney *exception.*

The Superior Court correctly concluded that the "speech integral to criminal conduct" exception covers intentional incitement to suicide. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Giboney*, 336 U.S. at 498); J.A. 6. Speech is integral to criminal conduct where the speaker intends to harm another person and the speech causes that harm. *See United States v. Gonzalez*, 905 F.3d 165, 194 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2727 (2019). Speech also may be integral to criminal conduct when the government has historically prohibited that conduct. *See Brown*, 564 U.S. at 792. Both justifications apply here.

a. Section 60 concerns intentional speech that itself causes harm.

Speech alone may justify a criminal conviction when a defendant intends speech to harm a specific individual and harm actually occurs. *See Gonzalez*, 905 F.3d at 194. For example, the federal cyberstalking statute proscribes speech intended to harass or intimidate another person—without any other conduct. 18 U.S.C. § 2261A (2018); *see, e.g.*, *Gonzalez*, 905 F.3d at 193 (listing decisions rejecting First Amendment challenges to § 2661A); *United States v. Osinger*, 753 F.3d 939, 944, 946–48 (9th Cir. 2014) (affirming conviction when conduct consisted of messages alone). Similarly, § 60 enacts criminal penalties based on a defendant's intentionally harmful words and their harmful effects. *See*

§ 60(a)(2) (requiring intentionality); § 60(a)(3) (requiring harmful result).

Finley's actions are a case in point: Finley intentionally directed Malone to commit suicide and incited him to jump to his death. J.A. 33–34. Certainly, these actions were intended to cause harm and had that effect. *See Gonzalez*, 905 F.3d at 194. Because § 60 criminalizes intentional speech that itself causes harm, it falls within the *Giboney* exception.

b. Section 60 concerns speech with a longstanding history of government prohibition.

The First Amendment does not protect speech integral to criminal conduct—even if it implicates non-criminalized activity—when there is a history of government prohibition of that conduct. *Brown*, 564 U.S. at 792. American jurisdictions have long prohibited assisted suicide. *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997) (describing history of prohibitions on assisted suicide). Importantly, these prohibitions extend to *speech* directing, counseling, or inciting suicide. *See Commonwealth v. Carter*, 52 N.E.3d 1054, 1061 (Mass. 2016) (explaining that a defendant need not "commit a physical act in perpetrating a victim's death" to be criminally culpable for their suicide); *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) (concluding that state could prohibit "speech that assists suicide"). State statutes criminalizing such speech are widespread. *See* Guyora Binder & Luis

Chiesa, *The Puzzle of Inciting Suicide*, 56 Am. Crim. L. Rev. 65, 114–15 (2019) (listing twenty-three states that criminalize verbal acts encouraging or assisting suicide). Even the Model Penal Code provides that purposeful solicitation of suicide—speech—merits criminal penalties. Model Penal Code § 210.5 (Am. Law Inst. 1980). This Court would hardly create a "new exception" by acknowledging that *Giboney* applies to incitement to suicide. *Contra* Appellant's Br. 13.

2. Speech directing, counseling, or inciting suicide falls under the* Brandenburg *exception.

The First Amendment does not protect speech that incites imminent violence. *See Brandenburg*, 395 U.S. at 447. Speech falls into this exception when, first, the speech directs the "use of violence or lawless action"; second, the speaker intends that his speech will "result in violence or lawless action"; and, third, "the imminent use of violence or lawless action is the likely result of his speech." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc).

The *Brandenburg* exception encompasses speech directed at imminent *violence*, not just speech promoting activity that is technically criminal. *See Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018). Violence includes acts of individual harm—in *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), for example, a book instructing readers on murder methods fell under the *Brandenburg* exception because it prepared and "steel[ed]" readers for the violent act. *Id.* at 256.

Suicide is unquestionably an act of violence. *See, e.g.*, *People v. Kevorkian*, 527 N.W.2d 714, 732 (Mich. 1994) (characterizing suicide as "self-destruction").

Section 60 satisfies all three *Brandenburg* elements. First, a defendant's speech must "direct, counsel, or incite" a violent act—suicide. § 60(a)(2). Second, a defendant must "intentionally" incite a victim to commit or attempt to commit suicide. § 60(a)(2). Third, § 60 requires that a defendant *know* that the victim is considering suicide, so violence is imminent. § 60(a)(1). Section 60 does not merely punish "advocacy of illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973). Finley knew that Malone was considering suicide and standing on a bridge, J.A. 43, and nevertheless repeatedly instructed him to "Jump!" and to "DO IT," J.A. 33–34.

3. Section 60 neither restricts speech concerning public affairs nor discriminates based on a speaker's viewpoint.

In a final effort to bring Finley's actions under the Free Speech Clause, Appellant contends that his speech concerns public affairs and that § 60 discriminates against viewpoints. Appellant's Br. 10–11, 14–16. Neither is true.

To determine whether speech concerns public affairs, the Supreme Court requires analysis of the expression's "content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). Appellant's reliance on generalized societal debates

about suicide does not satisfy this requirement. *See* Appellant's Br. 10–11. Rather, incitement to suicide, in context, is "speech solely in the individual interest of the speaker and [his] specific . . . audience." *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). A § 60 offender like Finley addresses one individual whom he knows is considering suicide. § 60(a)(1). Finley did not direct his speech "to reach as broad a public audience as possible," *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), but to achieve *one* purpose: to incite Malone to "jump" immediately, J.A. 33. Such speech does not concern public affairs.

Neither is § 60 "a viewpoint-based law." *Contra* Appellant's Br. 15. While the government may not regulate speech when a speaker's perspective "is the rationale for the restriction," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), § 60 does not suppress speech because of speakers' opinions. It is difficult to see how § 60 could be construed as suppressing speech favoring suicide when it permits almost *all* such speech. Finley did not trigger § 60 by leafleting, distributing his phone number, or explaining his philosophy of "evolution" to Malone. J.A. 42–43. Moreover, the statute does not treat speakers differently because of their perspectives on suicide—had Finley expressed passionate opposition to suicide, but nevertheless incited Malone to kill himself, he still would have violated the statute.

The Commonwealth does not discriminate against viewpoints by addressing a specific, immediate harm.

More importantly, Appellant's public-concern and viewpoint-discrimination arguments do not affect this Court's analysis. If this Court concludes that § 60 addresses speech that is unprotected by the First Amendment under *Giboney* or *Brandenburg*, then the fact that a defendant's incitement discusses an issue of public concern or expresses a particular viewpoint makes no difference. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). On the other hand, if this Court concludes the speech *is* protected, it will still apply strict scrutiny—which § 60 satisfies. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (explaining that strict scrutiny analysis applies regardless of whether statute discriminates based on content or viewpoint); *infra* Section I.D.

C. The Free Exercise Clause does not exempt Finley from prosecution for counseling, directing, or inciting suicide.

Appellant next argues that even if § 60 is facially valid, the First Amendment protects *his* actions because they were taken in furtherance of his religious beliefs. *See* Appellant's Br. 20. This argument fails. While the government may not regulate *beliefs*, the First Amendment does not "bar[] application of a neutral, generally applicable law," even if it incidentally burdens religious *conduct*. *Smith*, 494 U.S. at 881. First, § 60 does not regulate Finley's *beliefs* but his *conduct*. Second, § 60 is neutral and generally applicable. Third, Appellant cannot aggregate his

failing free speech and free exercise claims into a "hybrid right" that triggers strict scrutiny. Finally, even if strict scrutiny did apply, Appellant is not entitled to an individualized exemption from the Ames criminal code.

1. The Free Exercise Clause does not protect unfettered freedom to act.

The First Amendment ensures that the freedom to *believe*, but not to *act*, is absolute. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The freedom to act pursuant to one's religious beliefs "remains subject to regulation for the protection of society." *Id.* at 304. Finley may sincerely believe that suicide is "evolution." *See* J.A. 43. But Finley was not prosecuted for his beliefs or discussion of his beliefs but for directing and inciting Malone's suicide. *See* § 60(a). Finley's *conduct* does not become less harmful merely because he *believes* it to be. To allow Finley to escape prosecution for criminal conduct—which led to someone's death—would, in essence, allow him "to become a law unto himself." *Smith*, 494 U.S. at 879.

2. Section 60 is a neutral law of general application, so Finley is not entitled to a free exercise exemption.

A regulation may incidentally restrict religious practice without contravening the First Amendment so long as it is neutral and generally applied. *Smith*, 494 U.S. at 878; *see also City of Boerne v. Flores*, 521

U.S. 507, 514 (1997) (upholding *Smith* test). As Appellant acknowledges, § 60 meets both requirements. *See* Appellant's Br. 22.

a. Section 60 is neutral as written, in operation, and as applied to Finley.

A law or regulation is "neutral" so long as it does not "regulate[] or prohibit[] conduct *because* it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). Laws are neutral when they do not "target[] religious conduct" as written or in operation, and the government does not enforce them by treating someone "more harshly" than "someone who engaged in the same conduct but held different religious views." *Fulton v. City of Philadelphia*, 922 F.3d 140, 154 (3d Cir. 2019).

Section 60 does not target religious beliefs. As written, it neither references belief systems that encourage committing suicide, nor employs terms with particularized religious meanings. *See* § 60; *see also Lukumi*, 508 U.S. at 533–34 (suspecting that ordinances targeted religious conduct because they referenced "ritual" and "sacrifice," which were "words with strong religious connotations").

Section 60 is neutral in operation, because it applies to conduct unrelated to religious beliefs. Intentional counsel to commit suicide in furtherance of some sort of sadistic pleasure, as in *Melchert-Dinkel*, 844 N.W.2d at 16–17, or of no comprehensible motive at all, as in *Carter*, 52

N.E.3d at 1056–59, both fall within the statute and are unrelated to Finley's belief in "evolution," J.A. 43.

Furthermore, the Commonwealth did not treat Finley more harshly because of his religious beliefs. The detectives handling Finley's case did not denigrate his beliefs, *see* J.A. 44, but rather elicited a statement to record "his side of the story accurately," J.A. 40. The officials did not "pass[] judgment upon" Finley's beliefs. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1722 (2018) (finding refusal to grant exemption was based upon adjudicators' overt hostility to religious beliefs). The Commonwealth treated Finley the same as they would any other suspect.

b. Section 60 is generally applicable.

Generally applicable laws apply to "conduct with a religious motivation" to the same extent as they apply to non-religious conduct. *Lukumi*, 508 U.S. at 543. Section 60 does not enact the type of "religious gerrymander" that has invalidated laws on general applicability grounds. *Id.* at 535. There is no indication that § 60 has been enforced only or primarily against religiously-motivated suicide incitement.

Section 60's single exception for medical advice provided by a licensed physician does not undermine the statute's general applicability, because it is consistent with the statute's purpose to preserve and protect life. *See* § 60(b); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 14 (Iowa 2012) (explaining that laws may be generally

applicable even with exceptions when the exceptions "are consistent with the law's asserted general purpose"). The medical exception protects discussions about end-of-life decisions between a patient and their doctor, who is bound to "preserve[] life when there is hope of doing so." *Baze v. Rees*, 553 U.S. 35, 64 (2008) (Alito, J., concurring) (quoting American Medical Association policy). Despite Finley's attempt to liken himself to a doctor, J.A. 43, the exemption he asks for is in no way equivalent to the licensed physician exception: Finley is not licensed, his conversation with Malone did not occur in a clinical environment, and there is no evidence that Malone was at the end of his natural life. The Free Exercise Clause does not insulate Finley from prosecution.

3. The "hybrid rights" theory does not save Finley's free exercise claim.

Instead of analyzing § 60 under the long-governing *Smith* standard, Appellant argues his conviction is subject to strict scrutiny because it implicates a "hybrid right." *See* Appellant's Br. 22. The "hybrid rights" doctrine stems from language in *Smith* distinguishing prior successful free exercise claims by pointing out that those claims "involved . . . other constitutional protections." 494 U.S. at 881. This doctrine is unsettled, unworkable, and irrelevant in this case. Even if this Court were to apply the most permissive "hybrid rights" test, Appellant's combined claims do not merit strict scrutiny.

The "hybrid rights" doctrine is unsettled at best. In the thirty years since *Smith*, the Supreme Court has not articulated any framework for analyzing hybrid claims, *see Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246–47 (3d Cir. 2008), and has questioned their validity, *see Lukumi*, 508 U.S. at 567 (Souter, J., concurring) ("[T]he distinction *Smith* draws [between hybrid and non-hybrid claims] strikes me as ultimately untenable."). Multiple courts of appeals have rejected the theory's legitimacy. *See, e.g.*, *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993). Others require an independently viable companion claim. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996). The *most* permissive formulation, articulated by the Ninth and Tenth Circuits, still requires a "colorable" companion challenge—i.e., the claim must demonstrate a "likelihood[] of success." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). However, the Ninth Circuit has recently retreated from *any* adherence to the "hybrid rights" doctrine. *See Parents for Privacy v. Barr*, No. 18-35708, 2020 WL 701730, at *18 (9th Cir. Feb. 12, 2020) ("[N]o weight can be given . . . for the suggestion that the hybrid rights exception has been established in our Circuit.").

The "colorable" claim approach that Appellant proposes raises practical and constitutional concerns. *See* Appellant's Br. 22. This approach derives from the preliminary injunction standard, *see Axson-*

Flynn, 356 F.3d at 1295, and courts generally apply it before a record is fully developed, *see, e.g.*, *id.* at 1283 (summary judgment); *Miller v. Reed*, 176 F.3d 1202, 1202 (9th Cir. 1999) (motion to dismiss). Once the record is fully developed, the only way for a court to hold that a "colorable," but not "independently viable," companion claim triggers strict scrutiny would be to ignore the insufficiency of the companion claim—in essence, treating religious claimants better than non-religious claimants, thus raising additional Establishment and Equal Protection Clause concerns. *See* David Hudson, Jr. & Emily Harvey, *Dissecting the Hybrid Rights Exception: Should It Be Expanded or Rejected?*, 38 U. Ark. Little Rock L. Rev. 449, 464 (2016). Unsurprisingly, courts that apply the "colorable" approach tend to do so only when the companion claim is independently viable anyway. *See, e.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019) (acknowledging that "it is not at all clear that the hybrid-rights doctrine will make any real difference in the end," because case rested on a free speech challenge).

Regardless, Appellant's hybrid claim fails even a liberal interpretation of the "colorable" approach. Appellant asserts a free speech right to bootstrap his free exercise claim. *See* Appellant's Br. 22. Finley's speech is either protected or it is not. *See Parents for Privacy*, 2020 WL 701730, at *19 ("[M]ultiple failing constitutional claims . . . cannot be enough to invoke a hybrid rights exception."). But if Finley's

speech were protected, his claim would trigger strict scrutiny on its own, rendering a "hybrid rights" analysis moot. Since his speech is unprotected, *see supra* Section I.B, Finley has neither a valid free speech claim nor a "hybrid right." Appellant's last-ditch effort to secure strict scrutiny therefore fails.

4. Even if a "hybrid right" were implicated, Finley is not entitled to an individualized exemption.

If Appellant had a valid "hybrid right," this Court would apply traditional strict scrutiny analysis. *City of Boerne*, 521 U.S. at 509. Yet Appellant argues that his claim warrants an even more demanding "balancing test" extrapolated from a distinct class of cases implicating "system[s] of individual exemptions." *Smith*, 494 U.S. at 883–84 (tracing test balancing "governmental actions that substantially burden a religious practice" against the "compelling governmental interest" to *Sherbert v. Verner*, 374 U.S. 398 (1963)); *see* Appellant's Br. 25.

Appellant misconstrues the law in two ways. First, criminal laws are not part of a "system of individualized exceptions," as the *Smith* Court unequivocally held: "[W]e would not apply [*Sherbert*] to require exemptions from a generally applicable criminal law." *Smith*, 494 U.S. at 884. Section 60 is exactly the type of regulation that is *not* subject to *Sherbert*. Second, even if such a test somehow applied here, Appellant has already conceded that the Commonwealth has a compelling interest in preserving life. Appellant's Br. 16. That interest overcomes any

burden on Finley's religion. Nothing in the record or the law calls for applying such an inapposite test.

D. Even if § 60 governs activity protected by the First Amendment, the statute passes strict scrutiny.

The Commonwealth can regulate conduct protected by the First Amendment if its regulation serves a compelling government interest and is narrowly drawn to serve that interest. *Brown*, 564 U.S. at 799. Section 60 satisfies strict scrutiny because the criminalization of directing, counseling, or inciting a suicidal individual to kill themselves is narrowly tailored to the Commonwealth's compelling interest in protecting human life.

1. Protecting individuals at risk of suicide from incitement to suicide is a compelling government interest.

The Commonwealth has a compelling interest in preventing vulnerable people from being incited to commit suicide—and Appellant agrees. Appellant's Br. 16. States have an "unqualified interest in the preservation of human life." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990). States particularly have an interest in preventing avoidable deaths. *Glucksberg*, 521 U.S. at 730. Because suicides can be incited by others, § 60 furthers the Commonwealth's compelling government interest in protecting life by preventing those suicides.

2. Section 60 is narrowly tailored to the Commonwealth's compelling interest.

A statute passes strict scrutiny when it is narrowly tailored to a compelling government interest; however, the statute need not be *perfectly* tailored to that interest. *Burson v. Freeman*, 504 U.S. 191, 209 (1992). A variety of factors demonstrate that § 60 is narrowly tailored. There is a "direct causal link" between § 60 and the Commonwealth's compelling interest. *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Section 60 is not overinclusive. *See United States v. Williams*, 553 U.S. 285, 292 (2008). Nor is the statute underinclusive. *See Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005). Finally, § 60 uses the "least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

a. There is a direct causal link between § 60 and preventing incitement to suicide.

The most important narrow tailoring inquiry is whether there is a "direct causal link" between a law and the government's compelling interest. *Alvarez*, 567 U.S. at 725. The link between § 60 and preventing suicides by incitement is strong.

Suicide can be reduced by preventing immediate incitement in the moments before an attempt—exactly what § 60 does. Ninety percent of people who survive suicide attempts will not later die by suicide, suggesting that suicide is very often the product of an immediate crisis.

See Kirsi Suominen, *Completed Suicide After a Suicide Attempt: A 37-Year Follow-up Study*, 161 Am. J. Psychiatry 562, 562 (2004). A recent survey of studies found that eighty-seven percent of people who attempt suicide and survive deliberate for less than a day, seventy-one percent for less than an hour, and twenty-four percent for *less than five minutes*. *Duration of Suicidal Crises*, Harvard T.H. Chan Sch. of Pub. Health, https://www.hsph.harvard.edu/means-matter/means-matter/duration/ (last visited Feb. 15, 2020).

Further, the moments before a potential suicide are particularly impressionable. Online encouragement increases the risk that an individual will act upon suicidal ideations. Sameer Hinduja & Justin Patchin*, Bullying, Cyberbullying, and Suicide*, 14 Archives of Suicide Res. 206, 209 (2010). Intervention in the moments before a suicide attempt can prevent harm, whereas explicit *incitement* to commit suicide during a crisis can make all the difference. *See* Madelyn Gould, *Follow-up with Callers to the National Suicide Prevention Lifeline: Evaluation of Callers' Perception of Care*, 48 Suicide & Life Threatening Behav. 75, 75 (2018) (stating that calling a hotline stopped seventy-nine percent of suicidal individuals from killing themselves).

Section 60 covers only speech that actually incites suicide. The statute requires that a defendant's conduct have a causal relationship with the victim's suicide or attempted suicide because it requires that a

defendant "direct[], counsel[], or incite[]" another person to commit suicide. The ordinary meanings of these terms connote causation between the defendant's actions and the victim's death. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (instructing that "words will be interpreted" using their "common meaning"). To "direct" is "[t]o inform, instruct, or guide (a person), as to the way." *Direct*, OED Online, www.oed.com/view/Entry/53294 (last visited Feb. 15, 2019). To "counsel" means "[t]o give or offer counsel or advice to (a person); to advise." *Counsel*, OED Online, www.oed.com/view/Entry/42605 (last visited Feb. 15, 2019). And to "incite" means "[t]o urge or spur on; to stir up, animate, instigate." *Incite*, OED Online, www.oed.com/view/Entry/93523 (last visited Feb. 15, 2019).

"Directing" someone (or showing them the way) connotes that the suicidal individual would not have committed suicide without that guidance and direction. Similarly, "counsel" connotes providing advice that is necessary to a course of action. Finally, "inciting" someone to commit suicide connotes a level of animation consistent with causation.

The facts of this case illustrate the causal relationship between § 60 and preventing suicide. Malone texted Finley that he was "scared," "confused," and "[didn't] know what to do." J.A. 33. After Finley directed, counseled, and incited Malone, Malone went from unsure to leaping off a bridge. J.A. 33, 31. Malone even confirmed that Finley's messages led

to his suicide in his last text, thanking Finley for showing him "the way past the edge of the bridge." J.A. 34.

b. Section 60 is not overinclusive.

Section 60 neither reaches speech that does not actually incite suicide nor chills important conversations about suicide. A statute is not overinclusive so long as it does not regulate activity outside its "plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Section 60 is not overinclusive, because it references a *specific* person and requires a knowledge element. Appellant's parade of hypotheticals supposedly demonstrating overinclusiveness would not even fall within the statute.

The statute requires that a defendant had knowledge that another individual was actually "thinking about, considering, or planning suicide," further narrowing its scope. § 60(a)(1). Because "thinking" abuts "considering" and "planning," the term implies serious contemplation about *committing* suicide, not simply thinking about the general topic. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (describing the *noscitur a sociis* canon, by which a word is "known by the company it keeps").

A law professor instructing students to "think about" suicide does not somehow acquire knowledge of any individual student's suicidality. *Contra* Appellant's Br. 17. The knowledge requirement also prevents someone from being prosecuted for encouraging another to commit

suicide who has already "drunk the hemlock" and is in the process of dying; at that point that person is no longer *considering* suicide—they have acted. *Contra* Appellant's Br. 19.

Appellant also worries § 60 might "foreclose dialogue that could stop a preventable suicide." *See* Appellant's Br. 19. But conversations about suicide are only foreclosed if they turn into intentional direction, counsel, or incitement of suicide. *See* § 60(a)(2). A friend or family member of a suicidal individual is still free to discuss suicide openly with empathy. Abstract promotions of suicide, like Finley's leaflets, are also not prohibited, because that behavior involved no specific knowledge of another person's suicidal ideations. § 60(a)(1). These requirements, delimiting the scope of § 60, ensure that Ames continues to be an open marketplace of ideas.

c. Section 60 is not underinclusive.

Section 60 is also narrowly tailored because it is not *under*inclusive: the statute "does not leave significant influences bearing on the [government] interest unregulated." *White*, 416 F.3d at 751. A statute is not invalid merely because it contains an exception; instead, it may be underinclusive only when it is so "riddled with exceptions" as to undermine the government's stated purpose. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Section 60(b)'s single medical exception does not make the statute underinclusive. *See* § 60(b). This exception protects patients'

discussions about end-of-life decisions with physicians—a type of conversation wholly inapposite to the suicide incitement that § 60 targets. *See supra* Section I.C.2.b. An exception for a well-accepted component of the physician-patient relationship hardly "diminish[es] the credibility" of the Commonwealth's interest in preserving life. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

d. Section 60 is the least restrictive means for achieving the Commonwealth's aims.

A statute is considered to be the least restrictive means available so long as there are no less restrictive ways to achieve its ends effectively. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997). The mere existence of a hypothetical alternative to mitigate the social evil of coerced suicide does not render § 60 suspect, especially when the Commonwealth has already attempted less restrictive alternatives without success. *See Williams-Yulee*, 575 U.S. at 453; J.A. 37.

While Appellant proposes a public information campaign to combat speech encouraging suicide, Appellant's Br. 20, that kind of campaign is unlikely to deter an actor like Finley, who already knows his ideas are "unpopular," J.A. 42. Also, the Commonwealth has already taken even more aggressive steps than a public information campaign to save individuals like Malone—placing "help phones" along bridges where suicides occur—that were not effective. J.A. 37. Similarly, nets and mental health services cannot prevent the kind of harm posed by

Finley because they cannot reach the intimate moments in which an individual is coerced into suicide, especially when the incitement happens over private calls and messages.

Suicide is a societal problem with many causes, and the Commonwealth's interest in protecting human life "may be implicated in varying degrees in particular contexts." *Williams-Yulee*, 575 U.S. at 453. Many suicides are not the result of incitement. But some are. And the Commonwealth's compelling interest in preventing those deaths justifies a statute directed at that incitement. This Court should affirm the Superior Court's decision and reject Appellant's First Amendment challenges.

II. THE STRIKE OF JUROR ONE DID NOT VIOLATE *BATSON*, SO THE TRIAL COURT'S DECISION UPHOLDING THE STRIKE WAS NOT CLEARLY ERRONEOUS.

This Court should affirm the Superior Court's decision that the Commonwealth's use of a peremptory strike against Juror One did not violate *Batson*. *See* J.A. 13–14. *Batson* protection—forbidding peremptory strikes on the basis of race—does not extend to religion. *See Batson*, 476 U.S. at 89; *J.E.B.*, 511 U.S. at 130–31 (extending *Batson* protection to gender); *Davis v. Minnesota*, 511 U.S. 1115, 1115 (1994) (denying certiorari on that question). Even if this Court does extend *Batson* protection to religion, this Court should *still* affirm the decision below, because the Superior Court did not clearly err: Juror One was

struck because of her evident inability to impartially judge the case, not because of her faith. *See* J.A. 13–14.

A. *Batson* does not apply to peremptory strikes exercised on the basis of religion.

Peremptory challenges, which allow a litigant to strike a potential juror for any reason, *see Batson*, 476 U.S. at 89, are a critical tool for ensuring a fair and unbiased jury, *Holland v. Illinois*, 493 U.S. 474, 484 (1990). In *Batson*, the Supreme Court articulated one exception to this general rule: peremptory strikes made on the basis of *race* violate the Fourteenth Amendment's equal protection principles. 476 U.S. at 89. The Supreme Court has never applied *Batson* protection to strikes on the basis of religion. *See Davis*, 511 U.S. at 1115.

This Court would be unwise to extend *Batson* protection to religion in this case. In examining peremptory strikes based on religion, courts have distinguished between strikes based on religious *affiliation*, e.g., identifying as a Catholic, and expressed religious *beliefs*, e.g., a stated belief, based on one's Catholicism, that it is improper to judge others. *See United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (noting this distinction). *Batson* protection does not apply to either.

Justice Thomas once sought a "principled reason" for "declining to apply *Batson*" to religion. *Davis*, 511 U.S. at 1117 (Thomas, J., dissenting from denial of certiorari); Appellant's Br. 38. Such a principled reason readily appears from a close examination of race,

gender, and religion in the context of jury selection and peremptory strikes. First, strict scrutiny does not govern this inquiry. Moreover, neither precedent nor the equal protection principles underlying *Batson* justify its extension to either religious affiliation or to expressed religious beliefs. Finally, extending *Batson* to these categories would undesirably undermine litigants' ability to exercise peremptory strikes.

1. Strict scrutiny is not the correct framework for determining whether* Batson *extends to religion.

When analyzing whether *Batson* extends to religion under the Equal Protection Clause, courts should not apply strict scrutiny. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2273 (2019) (Thomas, J., dissenting) (noting that Court's precedents do not apply "strict scrutiny" in *Batson* cases); *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting) (noting that *Batson* Court did not apply "conventional equal protection analysis"). *Contra* Appellant's Br. 29, 37. Indeed, the strict scrutiny framework is inapt for assessing peremptory strikes because they are exercised based on "hunches and educated guesses," not according to a statute or policy. *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring).

Nor does the Free Exercise Clause demand that religion-based peremptory strikes be subject to strict scrutiny. Peremptory strikes do not exist to "infringe upon or restrict practices *because of* their religious motivation," *Lukumi*, 508 U.S. at 533 (emphasis added); rather, peremptories exist to ensure fair trials, *Holland*, 493 U.S. at 484.

Moreover, peremptory strikes do not "impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty,* 435 U.S. 618, 626 (1978)). Unlike in *McDaniel*, where the invalidated law only restricted clergymen, 435 U.S. at 626, peremptory strikes affect religious and non-religious jurors alike.

Therefore, Appellant's analysis of religion-based peremptory strikes under either a First or Fourteenth Amendment strict scrutiny framework is mistaken.

2.* Batson *does not extend to religious affiliation.

Neither Supreme Court precedent nor the equal protection principles underlying *Batson* support extending *Batson* to peremptory strikes exercised on the basis of religious affiliation. *See J.E.B.*, 511 U.S. at 145 (explaining that basis of decision was "well-established equal protection principles").

a. This Court is not bound by precedent to extend Batson *to religious affiliation.*

The Supreme Court has not extended *Batson* to strikes exercised on the basis of religious affiliation. *See Davis*, 511 U.S. at 1115. To the contrary, the Court has suggested that peremptory strikes based on religious affiliation trigger no constitutional concerns. *See Foster v. Chatman*, 136 S. Ct. 1737, 1753 (2016) (implying that religious affiliation is a legitimate basis for strikes); *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (declining to include religious

affiliation in list of impermissible bases for peremptories). And the Supreme Court has declined review in every case since *J.E.B.* when this issue was presented. *See, e.g.*, *Stafford*, 136 F.3d 1109, *cert. denied*, 525 U.S. 849 (1998); *State v. Hodge*, 726 A.2d 531 (Conn. 1999), *cert. denied*, 528 U.S. 969 (1999). Furthermore, state courts have held that strikes based on religious affiliation are constitutional. *See Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc); *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993). With no clear guidance from the Supreme Court, and lower courts upholding such strikes, this Court need not extend *Batson* to religious affiliation.

b. The equal protection principles underlying Batson *do not justify extending protections to peremptory strikes based on religious affiliation.*

The general rule that peremptory strikes are presumptively valid, for any reason or for no reason whatsoever, should be overridden only for the "strongest constitutional reasons." *United States v. Maxwell*, 160 F.3d 1071, 1076 (6th Cir. 1998). The compelling constitutional reasons forbidding race- and gender-based strikes, *Batson*, 476 U.S. at 89; *J.E.B.*, 511 U.S. at 130–31, do not support extending protection to strikes based on religious affiliation for three reasons.

First, strikes based on a prospective juror's religious affiliation are not motivated by invidious stereotypes, because religious affiliation is often relevant to juror performance; thus it does not implicate the same equal protection concerns. *See J.E.B.*, 511 U.S. at 128 (articulating

Batson's equal protection right as one to jury selection "free from state-sponsored *group stereotypes*") (emphasis added). Religious affiliation connotes a shared adherence to "certain principles, doctrines, or rules" which can inform a potential juror's biases. *Casarez*, 913 S.W.2d at 495; *see also Davis*, 504 N.W.2d at 771 (recognizing that a veniremember's religion can "translate into judgments on the merits of the cause to be judged"). In contrast, race or gender do *not* provide an "accurate predictor of [a] juror's attitudes," so peremptory strikes exercised on those bases *would* "contravene[] well-established equal protection principles." *J.E.B.*, 511 U.S. at 139, 145. A peremptory challenge on the basis of religious affiliation does not perpetuate any "pernicious religious bias" or stereotype. *Davis*, 504 N.W.2d at 771. Instead, such a challenge is a recognition that beliefs and values are inherent to religion, and that those beliefs and values may sometimes affect a person's ability to impartially judge the case.

Second, religious affiliation is not immutable in the same way that race and gender are, so the unfairness animating *Batson* protection does not apply. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (acknowledging that religious affiliation can change). The Equal Protection Clause forbids excluding groups from jury service "on the basis of some immutable characteristic such as race [or] gender" because such an exclusion is presumptively unfair, as these

immutable characteristics are unrelated to one's ability to serve on a jury. *Lockhart v. McCree*, 476 U.S. 162, 175 (1986); *see also Dennis v. Mitchell*, 354 F.3d 511, 525 (6th Cir. 2003) ("[P]eremptory challenges may be used *for any reason* so long as they are not based on *immutable characteristics* like race and sex.") (emphasis added). Despite being an important part of many peoples' identities, religious affiliation is a voluntary association implicating a defined set of beliefs that may impact impartiality on a jury. *See Casarez*, 913 S.W.2d at 495; *see also Hodge*, 726 A.2d at 563 (McDonald, J., concurring) (distinguishing religion from race and gender as a "chosen affiliation" over which "each person has free will"). Thus, the immutability rationale that motivated protections for race and gender does not justify extending *Batson* to religious affiliation.

Finally, there is no history of wholly excluding certain religious groups from jury service by law or practice. Explaining its decision to expand *Batson* protection to gender, the *J.E.B.* Court emphasized historic parallels between race and gender exclusion from jury service: "African-Americans and women share a history of total exclusion" from the jury box. *J.E.B.*, 511 U.S. at 136; *see also id.* at 131–32 (discussing statutes prohibiting women from serving on juries). But there is no such history of total exclusion from jury service on the basis of religious affiliation. J. Suzanne Bell Chambers, Note, *Applying the Break:*

Religion and the Peremptory Challenge, 70 Ind. L.J. 569, 597–99 (1995) (noting that, while the use of peremptory challenges "rampantly and abusively" prevented "racial minorities and women" from jury service, the same is not true for religious affiliation). Therefore, a key rationale that justified extending *Batson* to gender in *J.E.B.* does not justify such an extension to religious affiliation. *See Davis*, 504 N.W.2d at 771. The principles animating the equal protection concerns that led to *Batson* do not justify extension to religious affiliation.

c. Even if strict scrutiny applied, peremptory strikes based on religious affiliation would pass this test.

The Supreme Court has never explicitly held that classifications based on religious affiliation trigger strict scrutiny under the Equal Protection Clause. *Hassan v. City of New York*, 804 F.3d 277, 299 (3d Cir. 2015). Regardless, peremptory strikes based on religious affiliation survive strict scrutiny analysis. There is a compelling state interest in ensuring an impartial jury and fair trial. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) (noting the Sixth Amendment guarantees "trial, by an impartial jury"). Peremptory challenges on the basis of religious affiliation *do* further that interest because religious affiliations are relevant to potential partiality. *See Ramos v. State*, 934 S.W.2d 358, 368 (Tex. Crim. App. 1996); *supra* Section II.A.2.b. Moreover, for-cause strikes are not a suitable less restrictive alternative. For-cause and peremptory strikes serve entirely different purposes: peremptory strikes

allow a litigant to strike a juror, even without a reason that "rise[s] to the level of a 'for cause' challenge." *J.E.B.*, 511 U.S. at 145; *see also infra* Section II.A.4.c. *Batson* should not automatically apply to religion merely because it is a protected class under the Fourteenth Amendment. *Contra* Appellant's Br. 29.

3. **Batson *does not extend to expressed religious beliefs.***

Striking potential jurors on the basis of expressed religious beliefs is permissible when those beliefs may impact their ability to be impartial in the case at hand. *See Stafford*, 136 F.3d at 1114 (reasoning that a "religious outlook that might make the prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant" would be a permissible basis for a peremptory strike). Given *Batson*'s purpose, this is logical. Peremptory strikes based on expressed religious beliefs indicating potential inability to serve impartially "assur[e] the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91.

Federal and state courts overwhelmingly hold that *Batson* does not extend to peremptory strikes exercised on the basis of expressed religious beliefs that indicate potential bias. *See, e.g.*, *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003); *Stafford*, 136 F.3d at 1114; *United States v. Blackman*, 66 F.3d 1572, 1575 (11th Cir. 1995); *Hodge*, 726 A.2d at 553; *Card v. United States*, 776 A.2d 581, 586 n.2 (D.C.

2001); *Bryant v. State*, 708 S.E.2d 362, 374 (Ga. 2011); *Highler v. State*, 854 N.E.2d 823, 826 (Ind. 2006); *Davis*, 504 N.W.2d at 771; *State v. Wofford*, 904 N.W.2d 649, 661 (Neb. 2017); *State v. Fuller*, 862 A.2d 1130, 1146–47 (N.J. 2004); *State v. Clark*, 990 P.2d 793, 802 (N.M. 1999); *State v. Eason*, 445 S.E.2d 917, 922–23 (N.C. 1994); *Casarez*, 913 S.W.2d at 495. This great weight of authority demonstrates that peremptory strikes may be exercised on the basis of expressed religious beliefs.

4. Extending* Batson *to religious affiliation or expressed religious beliefs would undermine fairness and impartiality in juries.

Just as legal principles demand that *Batson* does not extend to religion, so too do important policy aims. First, extending *Batson* to religious affiliation would require courts to engage in intrusive and complicated questioning during voir dire. Second, to rule on *Batson* claims, courts would need to determine what constitutes religion or religious belief—a difficult and unsavory task. Finally, if this Court held that expressed religious beliefs deserved *Batson* protection, the entire regime of peremptory strikes would fall—there would be no reason to prevent the same protections from extending to other deeply-held beliefs that are nonetheless indicative of potential bias.

a. Extending Batson *to religious affiliation would result in an intrusive voir dire process.*

If *Batson* were extended to religious affiliation, attorneys would need to determine each veniremember's affiliation to show a pattern of

disparate strikes to establish a prima facie case under *Batson*. *See Flowers*, 139 S. Ct. at 2243. Because religion is not as self-evident as race or gender, attorneys would have to ask invasive questions about veniremembers' affiliations. *See, e.g.*, *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008) (discussing the difficulty in making out a prima facie case for a religion-based *Batson* challenge because "religious affiliation is relatively hard to discern from appearances"); *Davis*, 504 N.W.2d at 771 (describing such questioning as "excessively intrusive"). Moreover, if *Batson* prohibits strikes based on religious affiliation, attorneys will be incentivized to intensively question veniremembers to elicit a statement indicating a biased *belief* to support a valid strike—an invasive and counterproductive process. *See* Lauren Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J.L. & Urb. Pol'y 287, 300 (2006) (noting that, when voir dire involves invasions of privacy, jurors fail to disclose personal information). Extending *Batson* to religious affiliation is thus unwise.

b. Extending Batson *to religion would require courts to determine what constitutes "religion."*

Further, if *Batson* were extended to religion, courts would need to separate *religious* affiliations and beliefs from *other* affiliations and beliefs, moral values, and societal views. This would be fraught with constitutional problems, time-consuming, and particularly challenging

given the "many different groups that claim 'religious' status." *Hodge*, 726 A.2d at 564 n.3 (McDonald, J., concurring); *cf.* James Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 Seton Hall Const. L.J. 23, 29–63 (1995) (summarizing legal struggle to define "religion"). This task would be challenging for courts, leading to unwieldy and unsavory voir dires. Moreover, a court determining what constitutes "religion" potentially implicates First Amendment concerns. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981). To avoid this inappropriate analysis, *Batson* should not extend to religion.

c. Extending Batson *to religion would erode the system of peremptory strikes.*

Since this country's founding, peremptory challenges have been an essential means of promoting fairness and impartiality in jury trials. *See J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring) ("The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States."); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (describing peremptories as "essential to the fairness of trial by jury").

Extending *Batson* to religion would disrupt and weaken the peremptory system that has been essential to American trials for centuries. *See Hodge*, 726 A.2d at 564 (McDonald, J., concurring) ("[E]xpansion of *Batson* to religious beliefs or affiliation would lead to its

application to . . . political affiliation and philosophy as well as other things that may distinguish potential jurors."). There is no principled distinction between religious affiliations and beliefs and *other* associations and beliefs stemming from a prospective juror's "Libertarian politics, their advocacy of communal living, or their membership in the Flat Earth Society"—any of these deeply-held affiliations or beliefs can result in juror bias. *Casarez*, 913 S.W.2d at 495. If *Batson* were extended to religion, there would be no reason for courts not to extend the *Batson* doctrine to a wide swath of other beliefs.

This continued expansion of *Batson* would gut the peremptory challenge of its power. Attorneys have two options for challenging a potential juror: while *for-cause* challenges allow for the dismissal of veniremembers on "a narrowly specified, provable and legally cognizable basis of partiality," *peremptory* challenges allow for rooting out subtler, but still impactful, partiality. *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled on other grounds by Batson*, 476 U.S. at 79. Extending *Batson* to religion, and inevitably to other belief systems, leaves less room for lawful challenges that do not rise to the level of a for-cause challenge, eroding the scope and purpose of peremptories. *See Davis*, 504 N.W.2d at 769 n.2.

Thus, extending *Batson* to religious affiliation or expressed religious beliefs will undermine a key tool for ensuring fairness and impartiality in juries, and this Court should not take that risk.

B. Even if this Court extends *Batson* to religion, the Superior Court was not clearly erroneous to deny the *Batson* challenge here.

Since Juror One was struck for a neutral reason, this Court need not even decide whether *Batson* extends to religion. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (stating that courts should "avoid reaching constitutional questions" unless necessary). Further, since the constitutional status of religion-based peremptory challenges is unsettled, the judge's denial of the *Batson* challenge at trial cannot be clearly erroneous. *Stafford*, 136 F.3d at 1114.

However, when considering a *Batson* challenge, trial courts follow a three-step, burden-shifting framework. *See Batson*, 476 U.S. at 97–98. First, the defendant must make a prima facie showing of discrimination. *Id.* at 97. If that prima facie burden is met, the burden shifts to the prosecution to offer a neutral explanation for the peremptory strike. *Id.* Finally, the court determines, based on the totality of the circumstances, whether the defendant proved "purposeful discrimination." *Id.* at 98.

Here, the question of whether the defendant met his burden of establishing a prima facie case is moot, since the prosecution offered a

neutral explanation and the judge ruled on the challenge before assessing the validity of the prima facie case. J.A. 27–29; Appellant's Br. 35; *see Hernandez*, 500 U.S. at 359. Importantly, the court agreed that the prosecution offered a sufficient neutral explanation for the peremptory strike. J.A. 14. The court did not clearly err in determining that the defendant did not meet his burden of proving discrimination in violation of *Batson*. *See* J.A. 14.

1. The prosecution's explanation was neutral.

After a prima facie case has been made, the burden shifts to the striking party to offer a neutral explanation based on something *other* than the classification at issue—here, *arguendo*, religion. *Hernandez*, 500 U.S. at 360. "Unless a discriminatory intent is inherent" in the explanation, it is neutral. *Id.* This is not an exacting requirement; the second step "does not demand an explanation that is persuasive, or even plausible," merely neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see, e.g.*, *United States v. White*, 552 F.3d 240, 251 (2d Cir. 2009) (upholding as neutral: "an angry look that [veniremember] wasn't happy to be here"); *Lockridge v. Franklin*, No. 02-CV-729-TCK-PJC, 2006 WL 2021493, at *3 (N.D. Okla. July 17, 2006) (upholding as neutral: "was sitting there with a Bible").

Vescovi was not struck "because she is Catholic," Appellant's Br. 39, but rather for her stated beliefs that indicated potential partiality in

this particular case. Indeed, the prosecution's explanation was neutral: "[S]he's unsure if she can pass judgment, especially given her views on suicide and punishment, two things integral to this case. This is a juror who cannot be fair." J.A. 28; *see also* J.A. 14 (stating Superior Court's acceptance of this neutral explanation).

Even if Vescovi's stated beliefs stemmed from her religion, the Commonwealth's explanation did not indicate discriminatory intent. *See Stafford*, 136 F.3d at 1114 ("It would be proper to strike [a prospective juror] on the basis of a belief . . . even if the belief had a religious backing."); *Blackman*, 66 F.3d at 1574–75 (finding no *Batson* violation where religious beliefs would impair ability to render fair judgment). Because the *substance* of Vescovi's beliefs, regardless of their religious inspiration, indicated that she might not be able to serve impartially in this case, the peremptory strike was exercised neutrally and without discriminatory intent.

Furthermore, the fact that Vescovi's "religion" factored into the prosecutor's neutral explanation does not change this analysis. *See* J.A. 28. An expressed affiliation that "might interfere with one's ability to be open and unbiased" can constitute a valid neutral explanation to overcome a *Batson* challenge, even if the affiliation is associated with a *Batson*-protected category. *United States v. Hinton*, 94 F.3d 396, 397 (7th Cir. 1996). In *Hinton*, for example, the court upheld striking an

African-American juror, finding in part that wearing a "Malcolm X hat" offered a sufficiently race-neutral reason for a peremptory challenge, as the prosecutor's focus was on "a perceived militant anti-government aspect of Malcolm X, not his race." *Id.*; *see also United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir. 1992) (upholding peremptory strikes against two African-American veniremembers associated with the NAACP and Black Caucus because of prosecutor's neutral explanation that associations with these groups suggested potential bias).

Vescovi's situation was analogous. She was a nun by occupation, indicating that she was more than a casual Catholic. *See* J.A. 24 ("That's my belief, my religious conviction, that's my religious training to become a nun, that's what I believe. It is who I am as a religious person."). Just as the "Malcolm X hat" in *Hinton* indicated that the prospective juror might not have been able to serve impartially because of his beliefs, so too did Vescovi's membership and leadership in the Catholic Church. *See Hinton*, 94 F.3d at 397. Thus, as the prosecution argued at trial, and the court agreed, her "religion" and her "hesitancies," J.A. 28, provided a sufficiently neutral explanation for striking her from the jury. *See Highler*, 854 N.E.2d at 830 ("[P]eremptorily striking religious leaders from juries . . . generally has been upheld as constitutional."). Since Vescovi's beliefs and affiliation with the Catholic Church as a nun indicated that she may have been unable to remain impartial in this

particular case, exercising a peremptory strike was perfectly permissible even if religion is ultimately protected under *Batson*.

2. The Superior Court was not clearly erroneous in overruling the* Batson *challenge.

At the third step of the *Batson* framework, the trial court must determine whether the defendant met his burden of proving "purposeful discrimination." *Batson*, 476 U.S. at 98. The Superior Court in this case found that the prosecution's "explanation" for striking Vescovi was not based on "her religious identity," but on her "beliefs and how [they] would impact this trial." J.A. 29. Because the trial court's determination of whether a strike was animated by discriminatory intent often involves evaluation of attorneys' and veniremembers' demeanors, an appellate court should defer "in the absence of exceptional circumstances." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (citation omitted). When, as here, the neutral explanation persuades the lower court judge, "there is no basis for reversal on appeal unless the reason given is completely outlandish." *Stafford*, 136 F.3d at 1114.

Batson requires discriminatory *intent*, not mere disparate impact. *United States v. Uwaezhoke*, 995 F.2d 388, 393 (3d Cir. 1993); *see also Batson*, 476 U.S. at 93 (stating that strikes are unconstitutional only when "traced" to a "discriminatory purpose") (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)). The trial court was not clearly erroneous in finding that, given the totality of the circumstances, Finley

did not meet his burden of proving purposeful discrimination. The neutral explanation was not pretextual: the prosecution's explanation did not mischaracterize Vescovi's vacillating answers, nor did the questioning of Vescovi or any supposed pattern of strikes across the two trials indicate purposeful discrimination. Finally, the strike caused no harm in the trial.

a. The prosecution did not mischaracterize Vescovi's answers.

The prosecutor's neutral explanation—that "she's unsure if she can pass judgment," and that "her beliefs make it impossible for her to fairly evaluate the evidence here"—did not misrepresent Vescovi's answers. *Cf. Flowers*, 139 S. Ct. at 2243. *Contra* Appellant's Br. 36, 41. While Appellant gestures to Vescovi's assurances suggesting she would try to remain impartial, *see* Appellant's Br. 36, her answers were ambiguous at best. In response to questions asking about her ability to remain impartial, she answered, "That's difficult to say." J.A. 24. She then backtracked, stating, "I think the answer is yes. It will be difficult, but not impossible for me, based on my religion and my beliefs and my views on punishment. But I can do it." J.A. 26.

Indeed, a peremptory strike is uniquely helpful in such a situation, where the prospective juror "express[ed] doubt about being able to be fair," but then seemingly "rehabilitat[ed]" and professed impartiality. *Davis*, 504 N.W.2d at 770. The judge who sat in the courtroom and heard Vescovi's hesitations, doubts, and rehabilitated

confidence ultimately sustained the prosecution's neutral explanation concerning her inability to be impartial. J.A. 29. That determination was not clearly erroneous.

b. The prosecution's line of questioning was not discriminatory.

The Commonwealth's questioning of Vescovi was not in itself discriminatory. *Contra* Appellant's Br. 36. Questions addressing a veniremember's ability to serve impartially are permissible even if the inquiry focuses on religious beliefs. *Hodge*, 726 A.2d at 554; *Davis*, 504 N.W.2d at 772; *Fuller*, 862 A.2d at 1147. When asking Vescovi about her religion and beliefs, the prosecutor explored how it would "influence" Vescovi's feelings about the case, whether it would make her "more likely or less likely to believe one side or the other," and if she could "impartially consider the evidence." J.A. 24. Each of these lines of inquiry focused on her religion only insofar as it related to whether she could serve impartially. *See* J.A. 23–25.

c. There was no pattern of striking indicating discrimination across the two trials.

There was no pattern of striking Catholics across Finley's two trials that suggests any discriminatory intent. J.A. 27; *cf. Flowers*, 139 S. Ct. at 2235 (suggesting that peremptory strikes used on African-American veniremembers across six trials established discriminatory intent). *Contra* Appellant's Br. 41. There is no way of knowing the religious beliefs or affiliations of any of the veniremembers from the first

trial. *See* J.A. 52 (listing each veniremember's name, age, education, and occupation, but not religion). Indeed, assuming someone's religion merely from a surname is reminiscent of the kind of invidious stereotyping that *Batson* and its progeny seek to prevent. *See J.E.B.*, 511 U.S. at 138–39.

d. Striking Juror One did not cause any harm to the trial.

While strikes exercised with discriminatory intent violate equal protection principles and cause harm, *see J.E.B.*, 511 U.S. at 140, there was no such harm in this case. First, rather than harming Finley, striking Vescovi ensured that Finley's constitutional right to an impartial jury was protected by removing a potentially biased juror from the proceedings. *See J.E.B.*, 511 U.S. at 136–37 (describing defendant's right to an impartial jury). Second, the strike did not violate Vescovi's "right not to be excluded [from the jury] summarily because of discriminatory and stereotypical presumptions." *Id.* at 141–42. Rather, the prosecution exercised a peremptory strike only after thoughtful questioning revealed Vescovi's hesitation and doubt. J.A. 23–26. Finally, there was no harm to the perceived credibility of the proceeding. Striking Vescovi after she revealed an inability to be impartial did not perpetuate any "invidious group stereotypes" that would engender an "inevitable loss of confidence in our judicial system." *J.E.B.*, 511 U.S. at 140. No harm was caused.

The Superior Court was correct: *Batson* protection does not extend to religious affiliation or religious beliefs. *See* J.A. 13. Simply put, religion is different than race and gender. Further, even if *Batson* did extend to religion, the Superior Court nevertheless did not clearly err in rejecting the *Batson* challenge.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court of Beverly County should be affirmed.

February 17, 2020 Respectfully submitted,

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APPENDIX

U.S. Const. amend. I

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

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Ames Gen. Laws ch. 265, § 60

(a) A person shall be incarcerated in the state prison for not more than 10 years if

> (1) he or she knows that another person is thinking about, considering, or planning suicide,
>
> (2) he or she intentionally directs, counsels, or incites the other person to commit or attempt to commit suicide, and
>
> (3) that other person does commit or attempt to commit suicide.

(b) This section shall not apply to a medical treatment lawfully administered by, or in a manner prescribed by, or to medical advice provided by a licensed physician.