Case No. 17-15470

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CORRINE BROWN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 3:16-CR-00093-TJC-JRK-1

***EN BANC* BRIEF OF *AMICUS CURIAE* THE AMERICAN CENTER FOR LAWAND JUSTICE IN SUPPORT OF DEFENDANT-APPELLANT**

Rehearing *En Banc*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that *amicus curiae*, American Center for Law and Justice, has no parent corporations and issues no stock. Adding to the list provided by the Defendant-Appellant in her Opening Brief, the undersigned lists the following as additional persons who may have an interest in the outcome of this case:

1. American Center for Law and Justice ("ACLJ"), amicus curiae
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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty and freedom of speech. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246 (2020). The proper resolution of this case – and the protection of religious freedom – is a matter of utmost concern to the ACLJ.

SUMMARY OF THE ARGUMENT

A panel of this Court has rendered a ruling that would have fundamentally destabilized First Amendment jurisprudence. The panel upheld a lower court's decision to dismiss a juror as unqualified for jury duty because of his sincerely held religious belief in the power of prayer. The panel's holding is deeply inconsistent with settled First Amendment law as expressed in Supreme Court precedent. Moreover, the panel's decision effectively creates a flawed and even dangerous precedent that may lead to the disenfranchisement and exclusion of millions of citizens from a monumentally important institution in the United States' system of government – and the carefully protected checks on that government – the jury. This Court should correct this error and restore First Amendment safeguards.

ARGUMENT

James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."[1] Furthermore, our nation's Founders based a national philosophy on a belief in Deity. The Declaration of Independence and the Bill of Rights locate the source of

[1] *Property* (March 29, 1792), in THE FOUNDERS' CONSTITUTION, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987).

inalienable rights in a Creator rather than in government precisely so that such rights cannot be stripped away by government. The First Amendment to the Constitution forbids the creation of a state religion, but protects the people's right to freely exercise their religious beliefs. While the Founders certainly opposed state compulsion of religious observance, they had "no objection to official acknowledgment of God." *ACLJ v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (en banc).

The protections afforded religious belief and the exercise thereof by the First Amendment certainly extend to a juror exercising his religious belief in the power of prayer for wisdom and insight while fulfilling his civic duty and right as juror.

I. Background

A grand jury indicted Corrine Brown on charges of mail and wire fraud, filing false tax returns, and misappropriation of government funds arising from her solicitation of funds for One Door for Education, an education assistance charity. Slip op. at 4–5. Leading up to trial, potential jurors confirmed "that they had no 'political, religious, or moral beliefs that would preclude [them] from serving as a fair, impartial juror' in the case [or] . . . 'religious or moral beliefs' that would preclude them from 'sitting in judgment of another person'" and those selected

swore "to 'render a true verdict, according to the law, evidence, and instructions of this court, *so help [them] God*.'" *Id.* at 6 (emphasis added).

The jury began deliberations on May 8, 2017, *id.* at 6–7, and on the evening of May 9, Juror 8 informed the court deputy that she and several unidentified jurors were "concern[ed]" about statements made at the beginning of deliberations by Juror 13, "speaking about 'Higher Beings' in connection with Brown's name." *Id.* at 7. The deputy reported "the problem" to the district judge, who contacted counsel for both parties. *Id.* at 7–8. The next morning, the court held a hearing at which the defendant and counsel for both sides were present. *Id.* at 8. Despite the court's initial hesitancy to investigate the "concerns," the court agreed to question Juror 8. *Id.*

After warning Juror 8 not to discuss any details of the jury's deliberations, the court asked her to elaborate upon her prior statement, at which point Juror 8 produced a written letter stating that "[Juror 13] said, 'A Higher Being told me Corrine Brown was Not Guilty on all charges.' He later went on to say he 'trusted the Holy Ghost'." *Id.* at 9. In answering the court's subsequent questions, Juror 8 explained that although Juror 13 had made no further comments aside from those two made hours apart on the first day of deliberations and seemed to be deliberating along with the rest of the jury, she and other jurors she did not identify worried that Juror 13 was not properly following the court's deliberation

instructions. *Id.* at 9–10. Juror 8 also confirmed that Juror 13's statements and behavior had not impeded her own deliberations and that she, Juror 8, had not coordinated her statement to the court with other concerned jurors. *Id.* at 10. Following Juror 8's testimony and the government's argument that the jury foreperson should be consulted, the court acknowledged that Juror 13 was allowed to "pray for guidance" but if his religious beliefs "prevent[ed] him from ever determining . . . that Ms. Brown was guilty on charges, that would be problematic." *Id.* The court decided to question Juror 13 on the specific nature and implications of his statements. *Id.* at 11.

Juror 13 confirmed that his statement prior to selection for the jury, that he had no religious or moral beliefs that would prevent him from rendering a proper verdict, remained true. *Id.* The court specifically asked, "Are you having any difficulties with any religious or moral beliefs that are, at this point, bearing on or interfering with your ability to decide the case on the facts presented and on the law as I gave it to you in the instructions?", to which Juror 13 answered, "no." *Id.* When Juror 13 started to give a specific answer to the court's next question about the jury's deliberation method, the court warned him not to discuss details of the deliberation. *Id.* at 11–12.

In explaining his deliberative process, Juror 13 provided, "I've been following and listening to what has been presented and making a determination from that, as to what I think and believe." *Id.* at 12. The court then asked,

> Have you expressed to any of your fellow jurors any religious sentiment, to the effect that a higher being is telling you how—is guiding you on these—on these decisions, or that you are trusting in your religion to—to base your decisions on? Have you made any—can you think of any kind of statements that you may have made to any of your fellow jurors along those lines?

Id.

Juror 13 answered yes, and elaborated, "I told them that in all of this, in listening to all the information, taking it all down, I listen for the truth, and I know the truth when the truth is spoken. So I expressed that to them, and how I came to that conclusion." *Id.* Referencing a higher power, Juror 13 explained, "I told [the other jurors] that—that I prayed about this, I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today—or this past two weeks." *Id.* at 13. The court asked specifically, "But are you saying that you have prayed about this and that you have received guidance from the Father in Heaven about how you should proceed?" *Id.* Juror 13 responded, "Since we've been here, [S]ir." *Id.* When the court asked again,

> Do you feel that there's any religious tension, or is your religion and your obvious sincere religious beliefs—do you believe it at all to be interfering or impeding your ability to base your decision solely on the evidence in the case and following the law that I've explained to you?

Id. at 14. Juror 13 answered, "No, [S]ir. I followed all the things that you presented. My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." *Id.*

The court subsequently asked Juror 13 to step out and then conferred with counsel. *Id.* The government asked the court to remove and replace Juror 13 based on its perception that he was unable to abide by the court's deliberation instructions; the defense acknowledged the court's worry "with the statement about receiving guidance" but emphasized Juror 13's assertion that he was abiding by the deliberation instructions. *Id.* The court recalled Juror 13 to ask specifically, "Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?" *Id.* at 15. Juror 13 answered, "No. I said the Holy Spirit told me that." *Id.* After this exchange, Juror 13 was returned to the jury room, and the government asked the court to replace him. *Id.* Defense counsel objected, "argu[ing] the court should interpret Juror 13's statement as that of a person of deep faith 'saying that something he believed beforehand had been reaffirmed by the evidence that he saw.'" *Id.* at 15–16.

Despite the court's explanation that "the fact that somebody prays for guidance or is seeking guidance from whatever religious tradition they come from

is perfectly appropriate and not a grounds [sic] to dismiss a juror, necessarily," the court dismissed Juror 13, finding,

> 'beyond a reasonable doubt' that there was 'no substantial possibility' that Juror 13 would be 'able to base his decision only on the evidence and the law as the court gave it to him in the instructions' and that Juror 13 was instead 'using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath.'

Id. at 18. The court reasoned:

> Because, by definition, it's not that the person is praying for guidance so that the person can be enlightened, it's that the higher being—or the Holy Spirit is directing or telling the person what disposition of the charges should be made.

Id. at 16–18.

Juror 13 was replaced, and the jury started over with its deliberation, ultimately finding Ms. Brown guilty on all charges except four counts of fraud. *Id.* at 18–19.

II. THE PANEL MAJORITY AND LOWER COURT'S DECISIONS WERE CLEARLY ERRONEOUS AS A MATTER OF LAW AND UNDERMINE THE TOUGH LEGAL STANDARD REQUIRED TO DISMISS A JUROR FROM DELIBERATIONS.

The law of the Eleventh Circuit is undisputedly clear that a court should apply a "tough legal standard" to mitigate the risk of mistakenly dismissing a properly dissenting juror. *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir.

2001). Accordingly, "a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Id.* at 1302. This standard is equivalent to the highest burden of proof in American law—"beyond a reasonable doubt." *Id.* A juror should be removed only in the clearest of cases. *See id.* at 1303-04 (affirming dismissal of juror who told other jurors she was not going to follow the law).

An appellate court reviews the factual finding that a juror was not following instructions for clear error, reversing if "left with a definite and firm conviction that a mistake has been committed." *United States v. Augustin*, 661 F.3d 1105, 1134 (11th Cir. 2011) (quotation omitted). In applying this standard, appellate courts must account for the applicable burden of proof. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622–23 (1993) (defining standards of review, including clear error, as describing the standard employed to determine whether "a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof"); slip op. at 62 (Pryor, C.J., dissenting); *see, e.g.*, *Abbell*, 271 F.3d at 1304 (determining whether decision was clearly erroneous "in the light of a beyond a reasonable doubt standard"). In this case, the appellate panel was required to reverse if Juror 13's statements were clearly capable of a reasonable interpretation consistent with an evidence-based decision. *See United States v. Thomas*, 116 F.3d

606, 608–09 (2d Cir. 1997) (reversing a juror dismissal "where the record evidence raised the possibility that the juror's view on the merits of the case was motivated by doubts about the defendants' guilt").

The lower court's error here could not be clearer, and the panel should have reversed the decision for the very reasons summarized by the panel opinion:

> Beginning with his own words, Juror 13 stated that he "received information [from his "Father in Heaven"] as to what [he] was told to do in relation to what [he] heard here . . . this past two weeks"—specifically to find Brown not guilty of all 24 charges. The Dissent makes much of the second part of the quotation—"in relation to what [he] heard here . . . this past two weeks." *See* Dissent at 69-71. *It construes this phrase to mean that Juror 13 was expressing that he was* ***basing his verdict on the evidence****. And, in a vacuum,* ***that is certainly one reasonable construction****. But it's not the only reasonable one.* The second part of the quotation could alternatively mean that Juror 13 "received information [from his "Father in Heaven"] as to what [he] was told to do in relation to" the trial, generally.

United States v. Brown, 947 F.3d 655, 674 (11th Cir. 2020) (emphasis added).

Proper application of the "beyond reasonable doubt" standard means that if Juror 13's statements can be "reconcile[d] . . . with any *reasonable hypothesis* consistent with" proper jury service, then reasonable doubt existed, and the district court was required to accept that understanding. *Hopt v. Utah*, 120 U.S. 430, 441 (1887) (emphasis added). The Eleventh Circuit panel opinion, by its own terms, concedes that the removal of Juror 13 did not meet that standard because a reasonable contrary interpretation was available.

According to the undisputed record, even the juror who originally raised concerns about this issue testified that Juror 13 *did* actually "appear[] to be deliberating," *Brown*, 947 F.3d at 671; and, that Juror 13 himself stated he (in the district court's own estimation, *sincerely*, *id.* at 667) believed that he *was* deliberating in accordance with the court's instructions—thus, in line with the very construction that the panel agrees was "one reasonable construction," *id.* at 674.

As stated above, when asked about his deliberative process, Juror 13 responded, "I followed all the things that you presented. My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." *Id.* at 666. Juror 13 "unambiguously denied that his religious beliefs prevented him from [deciding based on the law and facts]. To the contrary, he repeatedly and specifically affirmed . . . that he was basing his decision on the evidence." *Id.* at 696 (Pryor, C.J., dissenting).

The removal of Juror 13 did not meet the "beyond a reasonable doubt" standard. The lower court and the panel majority ignored not only Juror 13's own testimony that he was abiding by the court's jury instructions, but also the reasonable construction that flows from Juror 13's statements. For this reason alone, the lower court's decision must be reversed.

However, the panel's decision is also at odds with the Eleventh Circuit's requirement that in order for a juror to be dismissed the juror must be engaging in a purposeful misconduct and refusal to follow the law. *See United States v. Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017) (citing *Abbell*, 271 F.3d at 1302; *United States v. Thomas*, 116 F.3d at 613). "Good cause exists to dismiss a juror 'when that juror *refuses* to apply the law or to follow the court's instructions.'" *Oscar*, 877 F.3d at 1287 (emphasis added); *Abbell*, 271 F.3d at 1302-03 ("[W]hether a juror is *purposely not following the law* is a finding of fact that we will review for clear error." (emphasis added)).

While the panel majority held that purposeful misconduct and refusal is not necessary to dismiss a juror, it cited a case involving an entirely different set of facts. *Brown*, 947 F.3d at 677. Among other things, in the cited case, the dismissed juror had been late to the proceedings, and periodically left them abruptly. *United States v. Wilson*, 894 F.2d 1245, 1249-51 (11th Cir. 1990). Juror absence and illness are completely different categories of "just cause" issues than those present in this case. So, too, are cases where a juror's religious beliefs are in substantive conflict with the juror's obligations. *See United States v. Geffrard*, 87 F.3d 448, 452 (11th Cir. 1996) ("The juror, because of religious beliefs at odds with the factual situation and the law applicable to this case, made it plain she could not follow the court's instructions."). To the extent that purposeful misconduct and

refusal may not be necessary in some cases to dismiss a juror, given the undisputed facts here this is *not* one of those cases.

In this case, the juror believed and testified, and the district court agreed, that he was doing his best and trying to follow the law. *Brown*, 947 F.3d at 693 (Pryor, C.J., dissenting) (Juror 13 "unambiguously denied that his religious beliefs prevented him from [deciding based on the law and facts]. On the contrary, he repeatedly and specifically affirmed . . . that he was basing his decision on the evidence."). In fact, the district court made findings that undercut any notion of purposeful misconduct. *See id.* at 668 (finding "not a willful violation by Juror N[umber] 13, but a violation of the court's instructions to base the decision only on the law and the facts that were adduced at trial, and in accordance with the court's instructions"). For this reason as well the panel majority was wrong and the lower court's decision should be reversed.

It is also improper and impermissible for a court to inquire into the juror's deliberative mental process, which is exactly what the lower court did in its extensive questioning of Juror 13. Rule 606(b) of the Federal Rules of Evidence clearly prohibits the kind of inquiry that was conducted on Juror 13, and prohibits the district court from considering and relying upon the results of that inquiry in discharging the juror. When the court asked, "But are you saying that you have prayed about this and that you have received guidance from the Father in Heaven

about how you should proceed?" *Brown*, 947 F.3d at 666, 690, the court was inquiring about the juror's deliberate mental process.

Finally, even if the Eleventh's Circuit's alternative interpretation of Juror 13's responses were correct, that would not suffice to disqualify him. As the panel noted, Juror 13 could be viewed as saying he "'received information [from his "Father in Heaven"] as to what [he] was told to do in relation to' the trial, generally." A juror is permitted to pray for guidance regarding the verdict; it follows that the juror is also entitled to act upon what he perceives as the answer to those prayers.

In fairness, it must be acknowledged that if a juror admitted intent to render a vote based on some preconceived position – whether rooted in Divine revelation, firm secular ideology, or sheer prejudice – *regardless* of the evidence and juror instructions, that would present a very different question. But here the government made no effort to unearth such a rigid predisposition. Juror 13's statements are perfectly consistent with his approaching the verdict based on the evidence and instructions. That is all that is needed to require reversal here.

III. THE PANEL MAJORITY AND LOWER COURT FURTHER A MISLEADING AND SELECTIVELY PEJORATIVE UNDERSTANDING OF RELIGION.

A decision like this, one with these kinds of far-reaching implications, cannot and must not be taken lightly, or made in a vacuum. It tears at the

foundation of our society and feeds the divisiveness of our times. The idea that receiving an answer to prayer could disqualify a person from civic duty flies in the very face of the ideas and principles our Founders enshrined in our Nation's founding documents. The idea that *actually* believing in the God in Whom we all proclaim to trust is deeply problematic and fundamentally un-American.

To the contrary, our Founders did not, and the vast majority of people today do not, believe that it is disqualifying when politicians or other public figures invoke God's guidance. For example, the Rev. Martin Luther King, Jr., once told an audience that "It seemed at that moment, I could hear an inner voice saying to me, 'Martin Luther, stand up for righteousness. Stand up for justice. Stand up for truth. And lo, I will be with you, even until the end of the world.' I heard the voice of Jesus saying still to fight on. He promised never to leave me, never to leave me alone." John Dear, *The God at Dr. King's Kitchen Table*, National Catholic Reporter (Jan. 16, 2017). *Amicus Curiae* finds it hard to believe that in this case, in which MLK said something substantially similar about his communications to *and from* the Divine, he would have been subjected to this same scrutiny and dismissed as somehow less able to participate in his civic duties.

It is also worth noting that to take a position that the Holy Spirit operates solely as an *external* force is to take a theological position, and a highly questionable one at that. *See, for example*, 1 Corinthians 3:16 ("Do you not know

that you are a temple of God and that the Spirit of God dwells in you?"); *see also* 1 Corinthians 6:19, 2 Corinthians 6:16, 2 Timothy 1:14, Acts 6:5, Ephesians 5:18, Romans 8:11, Galatians 4:6.

But this appeal should not be decided on theological grounds - to do so would be forbidden by the First Amendment - and that is why it was improper for the district court to dismiss Juror 13 on the basis of a "fact finding" that is theological in nature. Juror 13 sought the very guidance and assistance that the court rightly requires all witnesses and jurors to assent to, namely, that the witness testify truthfully *with the help of God* and that the juror do his duty as a juror *with the help of God*. That such juror's personal belief that the Holy Spirit has indeed helped him reach a conclusion simply cannot be the sort of improper external influence that taints a jury. Moreover, it is not the sort of external influence that results in any presumption of prejudice, nor the sort of external influence that constitutes just or good cause, under Rule 23, Fed. R. Crim. P., to dismiss the juror. On the contrary, such jurors should be commended for doing their duty as they have sworn to so do.

The panel majority reasoned that "[e]nsuring that jurors in criminal cases are able to follow the law and apply the facts in an impartial way is surely a compelling governmental interest," *id.* at 681 (quotation omitted), "[a]nd excluding jurors who are unable to impartially follow the law and apply the facts of a case—

even if it is on account of their constitutionally protected religious beliefs—is the 'least restrictive means to achieve that end.'" *Id.* (quotation omitted). To the panel majority, "when a juror's protected religious beliefs conflict with the ability of the jury system to function and with due process at trial, it is incumbent upon the judge presiding over the trial to separate the juror from the proceeding." *Id.*

However, this is all based on a flawed and offensive premise: That Juror 13's religious beliefs on the interactive communication of prayer conflicted with the ability of the jury system to function and with due process at trial. The panel majority declared that, "[b]y protecting the jury system and due process, of course, the trial judge does not limit the juror's religious freedoms." *Id.* Of course it did! It limited Juror 13's religious freedom in serving the vital role in which the United States government asked him to serve.

This analysis underscores precisely what is wrong with the panel majority and lower court's treatment of Juror 13's religious views on prayer. Given the undisputed statements Juror 13 made (and the statements he undisputedly did *not* make), the panel majority and lower court's misunderstanding of prayer and concomitant misapplication of the law, no matter how well-intentioned, amounts to nothing more than a judicial license to dismiss sincerely religious jurors – a license that, if left unchecked, will undoubtedly be used again.

Amicus Curiae does not contend that *any* religious belief, or *any* juror or prospective juror's statements describing such beliefs, that, beyond a reasonable doubt, would make a juror unable to consider the evidence, should be immune from challenge or judicial supervision. Instead, *Amicus Curaie* contends only that *this* juror, Juror 13, should not have been dismissed, and that unless corrected by this Court, the lower court's decision and treatment of Juror 13 will facilitate discrimination against and exclusion of an innumerable portion of the American population from jury service because of their religious beliefs.

Americans pray. And Americans believe God answers their prayers. *Amicus Curiae* respectfully urge this Court not to exclude those Americans from serving on our juries.

IV. THE PANEL MAJORITY AND LOWER COURT'S DECISIONS BELITTLE THE IDEA OF PRAYER AND EFFECTIVELY DISQUALIFY FROM JURY SERVICE MILLIONS OF AMERICANS WHO BELIEVE IN DIVINE GUIDANCE.

While the misapplication of the reasonable doubt standard merits reversal on its own, especially compounded as it is by the undisputed lack of purposeful misconduct and refusal, there is another significant error that *Amicus Curiae* urges this Court to correct. The lower court decision sets a flawed and even dangerous precedent that may lead to the disenfranchisement and exclusion of millions of citizens from a monumentally important institution in the United States' system of

government – and the carefully protected checks on that government – the jury. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017) ("The jury is a central foundation of our justice system and our democracy.").

i. Sincere Religious Prayer is a Common Practice and Should Not Be Disqualifying.

While it is true that our constitutional jurisprudence has grown to recognize that there may be instances of ceremonial prayer that are really more about solemnification than the invoking of the Deity, *see Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014),[2] this is far from reflective of the way in which prayer is viewed and used by millions of Americans. In fact, what the panel majority and lower court did in this instance is take the idea of "ceremonial prayer" to an absolutely absurd and unsupportable conclusion – namely, by insisting that the *only* kind of prayer that could conceivably be consistent with constitutional requirements is ceremonial prayer, and that actual *genuine* prayer is somehow strange, dangerous, and even contrary to our cherished notions of due process. *Brown*, 947 F.3d at 681 ("[W]hen a juror's protected religious beliefs conflict with the ability of the jury system to function and with due process at trial, it is

[2] "The prayer opportunity in this [Establishment Clause] case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions."

incumbent upon the judge presiding over the trial to separate the juror from the proceeding.").

However, millions of American citizens are religious and take their faith, and their prayer, seriously. Over 70% of the total adult population of the United States identifies as Christian, while 5.9% hold a non-Christian faith, such as Judaism and Islam. *Religious Landscape Study*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/ (last visited Nov. 23, 2020). Adherents in all those religions both believe and engage in prayer. The research is clear that a majority of Americans believe that God actually responds to their prayers. According to Scott Schieman, professor of sociology at the University of Toronto, "Many people describe their relationship with God not in abstract terms but in the way they would describe a real personal friend . . . .'' Tara Parker-Pope, *Most Believe God Gets Involved*, NY TIMES (Mar. 10, 2010). Research from two national surveys, the Baylor Religion Survey, and the Work, Stress and Health Survey, found that 82 percent of respondents said they "depend on God for help and guidance in making decisions." *Id.* And a USA Today/Gallup Poll found that 83% of Americans believe that God answers prayers. Cathy Lynn Grossman, *Poll" 83% Say God Answers Prayers, 57% Favor National Day of Prayer*, USA TODAY, https://usatoday30.usatoday.com/news/religion/2010-05-05-prayer05_ST_N.htm (last visited Nov. 23, 2020). According to the panel majority, if that majority of

people were honest about their religious beliefs, they would automatically be excluded from a jury *anytime they thought their prayers about the case were answered*.

It is obvious that American citizens bring their faith with them when they enter a jury box, just as they do when they enter a ballot box. It is also true that we *want* them to do just that. As Chief Judge Pryor points out in his panel dissent, the point of the juror's oath, as of all official oaths, is "to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience" against misuse of his office. *Brown*, 947 F.3d at 693 (Pryor, C.J., dissenting) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 31 (1866) (David Dudley Field on the side of the petitioner).

Against this backdrop, consider just exactly what happened in this case:

(1) The jurors swore an oath to bind their conscience and in doing so they invoked God's name.

(2) The panel majority agreed that "[t]here is certainly nothing wrong with jurors choosing to pray for wisdom and guidance in adjudging the evidence." *Brown*, 947 F.3d at 679.

(3) The district court made repeated findings of fact that Juror 13 earnestly and sincerely believed he was following the court's instruction and rendering proper jury service, and Juror 13 testified that his decisions *were made based on*

the evidence and consistent with all instructions. *Id.* at 666. The juror tried hard to follow instructions and for all intents and purposes appeared to be doing just that.

None of this is disputed.

Yet to the panel majority, there *was* a problem, which may be boiled down to this: Having prayed for guidance, Juror 13 believed that he had in fact been given guidance. Thus, according to the panel majority and the lower court, a juror may ask for Divine help in deciding upon a verdict so long as he does not believe he actually receives it. As Chief Judge Pryor noted in his dissent, this decision effectively "ordains district courts with broad discretion to dismiss any juror who confesses receiving guidance from God." *Id.* at 684 (Pryor, C.J., dissenting). In other words, while everyone is free to pray for God to help him or her reach the right decision, if a person believes that God answers these prayers then they are no longer fit to serve.

The standard applied by the lower court and the panel majority makes a mockery of prayer and *Amicus Curiae* urges this *en banc* Court to correct it.

ii. The Lower Court and Panel Majority's Stance on Prayer is Likely Unconstitutional.

The panel majority and lower court's position is not only offensive it is also unconstitutional. Asking a juror to certify that he or she does not believe that the juror's prayer seeking guidance was actually answered (and removing jurors who

believe it was) creates a religious test for serving on a jury. As the Supreme Court of Utah noted in a similar situation:

> If we were to accept defendant's argument that supposed responses to prayer are within the meaning of the term "outside influence" in [federal] rule 606(b), we would implicitly be holding that it is improper for a juror to rely upon prayer, or supposed responses to prayer, during deliberations. ***Such a conclusion could well infringe upon the religious liberties of the jurors by imposing a religious test for service on a jury***. *See* Utah Const. art. I, § 4.3 A juror is fit to serve if he or she can impartially weigh the evidence and apply the law to the facts as he or she finds them. *State v. Lafferty*, 749 P.2d 1239 (Utah 1988).

State v. DeMille, 756 P.2d 81, 84 (Utah 1988) (emphasis added).[3]

Both the panel majority and the dissent are aware that such a religious test presents an end-run around the open question of whether *Batson* challenges, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), should be allowed to peremptorily strike a juror based on their religious affiliation. *See Brown*, 947 F.3d at 681-82 (acknowledging Appellant's *Batson* argument, but concluding "here, the

[3] Even if Rule 606(b) does not apply here because, as the panel majority concluded, "[b]y its own terms, nothing in Rule 606(b) applies to mid-deliberation inquiries into alleged juror improprieties," *United States v. Brown*, 947 F.3d 655, 680 (11th Cir. 2020), the *DeMille* Court's analysis is still pertinent as the lower court effectively applied the outside influence analysis to Juror 13 and even used that term in explaining what was wrong with Juror 13. *See id.* at 668 ("the juror is actually saying that an outside force, that is, a higher being, a Holy Spirit, told him that Ms. Brown was not guilty."); *id*. ("Juror 13 was instead 'using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath.'"). It was Juror 13's statements about the Holy Spirit's guidance, after all, that bothered the panel majority and lower court so much that they held Juror 13 must be dismissed.

district court did not dismiss Juror 13 because of Juror 13's religion. Rather, it dismissed him because it found him incapable of rendering a verdict rooted in the evidence"); *id.* at 710 (Pryor, C.J., dissenting) ("In effect, the majority's decision requires a trial court to remove those jurors *for cause* and so creates an end-run around the protections of *Batson*.").

What the panel majority misunderstood on this point was that when the district court dismissed Juror 13, the reason it found him incapable of rendering a verdict based in the evidence (no matter what he said or did) was *his sincere religion*, i.e., because he believes that the prayers he offered were real and were answered.

No matter how it is couched, what the lower court and the panel majority attempted to do is, to borrow the district court's phrase, "a bridge too far." For the record, while the law is unsettled in the Eleventh Circuit, *Amicus Curiae* believes that, to quote the late Justice Ginsburg, inquiring about religious affiliation on voir dire is "irrelevant and prejudicial." *Davis v. Minnesota*, 511 U.S. 1115, ——, 114 S. Ct. 2120, 2120 (1993) (Ginsburg, J., concurring in denial of certiorari).

The Court here made exactly the same mistake underlying the problem with *Batson* challenges generally. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case

against a black defendant." *Batson v. Kentucky* (1986) 476 U.S. 79, 89. The Court here makes a similar assumption, i.e. that a person who believes they have received guidance will no longer be able to consider the evidence. The Court clearly had an underlying assumption about the meaning of Juror 13's beliefs, and did not accept Juror 13's undisputed statement that he was following the court's jury instructions, was fully engaged in the deliberative process, and was capable of rendering a verdict rooted in evidence. *Amicus Curiae* do not even dispute that if a juror's religious beliefs "prevent[ed] him from ever determining . . . that Ms. Brown was guilty on charges, that would be problematic," Slip op. at 10. The issue is that Juror 13 never said anything like that. This assumption on the part of both the court and the panel majority is the very reason why it is dangerous to allow religious *Batson* challenges, and all the more so why it is dangerous to exclude people based on religious beliefs without fully understanding what those religious beliefs might be.

Moreover, federal law precludes the exclusion of persons of a particular religion from a venire on the basis of that faith. Jury Selection and Service Act, 28 U.S.C. § 1862 (1988). As Supreme Court Justices have explained, there is an important distinction between excluding a cognizable group from a venire pool and peremptorily striking group members; while the former "bespeaks *a priori* across-the-board total unfitness," the latter "merely suggests potential partiality in a

particular isolated case." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2272 (2019) (Thomas, J., dissenting) (citations omitted).

Although it was the juror's First Amendment right to serve on the jury without disqualification for his religious beliefs or practice, Congresswoman Brown also had a right to a jury that was empaneled without such invidious discrimination. Under *Batson*, when the prosecution improperly strikes a juror based on the juror's race, and thereby deprives the juror of his right to serve on the jury based on a ground that is constitutionally prohibited, the *defendant* in the trial has the right to a jury chosen without invidious discrimination, and when the juror is struck in violation of the juror's constitutionally protected status, the *defendant* receives a new trial.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this en banc Court to reverse the district court's decision.

Respectfully submitted November 23, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 32(a) because the brief contains 6,446 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, a copy of the foregoing brief was filed electronically using the Court's CM/ECF system, which will serve all counsel of record.

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