

## COMMENTS

### WHERE DID FLORIDA GO WRONG? WHY RELIGION-BASED PEREMPTORY CHALLENGES WITHSTAND CONSTITUTIONAL SCRUTINY

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#### INTRODUCTION

A trial court in Florida is hearing a case concerning an alleged assault and battery.<sup>1</sup> A pro-life activist, Lisa Swanson, is suing Cynthia Matthews for causing her severe head injuries. The incident that gave rise to the conflict took place during Lisa's campaign at a local mall. After Lisa approached Cynthia and handed her a pro-life flyer, the two women engaged in conversation. Cynthia eventually revealed that she had once had an abortion. When Lisa became abrasive and started shouting insults in Cynthia's face, Cynthia pushed Lisa away. As Lisa fell, her head struck a hard object and she lost consciousness. At the hospital, she received sixteen stitches to the back of her head and currently is undergoing physical therapy to regain full motor skills. Cynthia claims she never meant to injure Lisa; she was simply trying to get Lisa to give her some space.

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1. The following hypothetical fact pattern is not based on any actual occurrences or people.

Jury selection begins on the first day of the trial.<sup>2</sup> John Smith has been summoned to the state courthouse to serve jury duty. He notifies his boss that he must have the day off from work and additional time off if he is chosen as a juror. In the courtroom, the judge and lawyers ask John numerous questions. They ask about his line of work, hobbies, military experience, and children or lack thereof. A middle-aged Caucasian, John replies that he is married with two children and is a data-management consultant. He enjoys water-skiing and biking. The defendant's lawyer asks John about the cross he wears around his neck. John reveals that he has been a member of the Catholic Church his entire life and is a very devout Catholic. Other questions relate to his view on abortion and a woman's right to choose an abortion. He responds, "I wouldn't let my wife do it," but upon further probing from the judge, claims that he could put his feelings on abortion aside and fairly hear a case concerning this issue.

Cynthia's lawyer attempts to strike John from the jury pool<sup>3</sup> due to what he terms "strong convictions to the tenets of Catholicism."<sup>4</sup> He claims that John's religious affiliation indicates that

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2. The concept of juries may be traced back to Greek and Norse Mythology. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809, 813 n. 13 (1997). Juries were used in the process of dispute resolution "in Ancient Egypt, Mycenae, Druid England, Greece, Rome, Viking Scandinavia, the Holy Roman Empire, and even Saracen Jerusalem before the Crusades." *Id.* at 813-814. The process of jury selection begins when many potential jurors are called to the courthouse. Anna M. Scruggs, *J.E.B. v. Alabama ex rel. T.B.: Strike Two for the Peremptory Challenge*, 26 Loy. U. Chi. L.J. 549, 551 (1995). They make up the jury "venire." *Id.* During the procedure called "voir dire," the judge and attorneys ask the jury venire questions. *Id.* If the judge finds that a juror should be removed for a specific reason, such as partiality, then the judge may exercise a "challenge for cause," which will exclude that juror from the venire. *Id.* Alternatively, peremptory challenges are available to attorneys. *Id.* An attorney may use a peremptory challenge to strike jurors from a venire "for any reason and without explanation." *Id.* Once both sides have exercised their peremptory challenges, the jurors who are left make up the "petit jury," which serves and decides the case. *Id.* at 551-552.

3. Rules prohibiting the discriminatory use of peremptory challenges apply consistently to litigants in civil cases and to the prosecution and the defendant in criminal cases. *Compare Ga. v. McCollum*, 505 U.S. 42, 55 (1992) (finding that a criminal defendant's discriminatory use of peremptory challenges violates equal protection), with *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 618-631 (1991) (holding that civil litigants are prohibited from exercising racially discriminatory peremptory challenges); *Batson v. Ky.*, 476 U.S. 79, 96 (1986) (outlining the standards by which the prosecution's use of race-based peremptory challenges may be deemed unconstitutional). Therefore, for the purposes of this Comment, the terms "litigant," "defendant," and "prosecution" generally are used interchangeably.

4. The Catholic Church has an active stance against abortion. See Sup. Pontiff John Paul II, *Encyclical Letter Addressed by the Supreme Pontiff John Paul II to the Bishops*,

John shares anti-abortion sentiments with the Catholic Church. He says that all the devout Catholics he has ever known believe that abortion is morally wrong and could never find that it is justified, even if a woman is raped. The lawyer explains that John would likely be biased against his client because of his religion.<sup>5</sup>

The trial judge probably would not grant the lawyer's request.<sup>6</sup> While the Florida Supreme Court has not ruled directly on the issue of religion-based peremptory challenges, it has found that peremptory challenges may not be used to discriminate based on race,<sup>7</sup> gender,<sup>8</sup> or ethnicity.<sup>9</sup> The Court has left questions of discrimination based on religion to be determined as the questions arise.<sup>10</sup> The Third District Court of Appeal has taken the Florida Supreme Court's position a step further and has attempted to resolve Florida's debate on religion-based peremptory challenges.<sup>11</sup> It has set forth the rule by which to measure the

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*Priests, and Deacons* <[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc25031995_evangelium-vitae_en.html)> (accessed Sept. 9, 2001) (declaring that "[w]hatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or willful self-destruction . . . all these things and others like them are infamies indeed. They poison human society, and they do more harm to those who practi[c]le them than to those who suffer from the injury. Moreover, they are a supreme dishonour to the Creator." (emphasis added).

5. This jury-selection scenario is loosely based on a compilation of case law. *See generally* *U.S. v. Greer*, 939 F.2d 1076, 1084–1086 (5th Cir. 1991) (finding that a white-supremacy group accused of tormenting black, Hispanic, and Jewish citizens was not permitted to exclude such citizens from the venire because *Batson* limits peremptory challenges based on race, religion, and national origin); *Joseph v. State*, 636 S.2d 777, 781 (Fla. Dist. App. 3d 1994) (holding that peremptory challenges exercised against Jews violated Florida's state constitution); *Alen v. State*, 596 S.2d 1083, 1085 (Fla. Dist. App. 3d 1992), *aff'd*, 616 S.2d 452, 454 (Fla. 1993) (finding that because Hispanics are a cognizable ethnic group, peremptory challenges may not be used to discriminate against them); *McKinnon v. State*, 547 S.2d 1254, 1257 (Fla. Dist. App. 4th 1989) (noting the proper exercise of a peremptory challenge in excusing a black evangelistic minister); *State v. Clark*, 990 P.2d 793, 803 (N.M. 1999) (finding that a juror was properly struck because his religious ideologies prevented him from being able to apply the death penalty).

6. *See Fernandez v. State*, 639 S.2d 658, 660 (Fla. Dist. App. 3d 1994) (establishing the rule precluding religion-based peremptory challenges); *Joseph*, 636 S.2d at 781 (holding that peremptory challenges exercised against Jews violated the state constitution).

7. *State v. Neil*, 457 S.2d 481, 482, 486–487 (Fla. 1984).

8. *Abshire v. State*, 642 S.2d 542, 543–544 (Fla. 1994).

9. *Joseph*, 636 S.2d at 779–780.

10. *See id.* at 779 (stating that the use of peremptory challenges against cognizable groups other than racial groups could be prohibited); *Neil*, 457 S.2d at 487 (limiting the decision to "peremptory challenges of distinctive racial groups," and stating that whether membership to other cognizable groups may be the basis of a valid peremptory challenge will be determined as the cases arise).

11. *Fernandez*, 639 S.2d at 658–660.

constitutionality of religion-based peremptory challenges in Florida.<sup>12</sup>

In *Fernandez v. State*,<sup>13</sup> the defendant appealed her robbery conviction, arguing, among other claims, that the trial court improperly denied a peremptory challenge.<sup>14</sup> At trial, defense counsel exercised a peremptory challenge against a juror.<sup>15</sup> Although the defense counsel articulated a race-neutral reason for the challenge, the court found that the exercise of the peremptory challenge was racially motivated because the defense counsel had stricken every black person from the venire.<sup>16</sup> The court found that the party objecting to the use of a peremptory challenge has a two-fold burden.<sup>17</sup> First, the party must demonstrate “that the venire person challenged is a member of a distinct racial, ethnic, *religious* or gender group.”<sup>18</sup> Second, the objecting party must establish “that there is a strong likelihood that the peremptory challenge is solely based upon membership in that distinct group.”<sup>19</sup> If the objecting party can establish both elements, then the exercise of that peremptory challenge violates the Florida Constitution.<sup>20</sup> Even though religion-based peremptory challenges were not used in *Fernandez*, the Third District Court of Appeal established a rule that would affect the subsequent use of religion-based peremptory challenges.<sup>21</sup>

Under the Third District’s position, Cynthia Williams would have no recourse. Her lawyer would not be allowed to strike John for the reason that he asserted.<sup>22</sup> Unless he can find some other race-neutral, gender-neutral, ethnicity-neutral, or religion-neutral reason to strike John, it is likely that John would be cho-

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12. *Id.* at 660.

13. 639 S.2d 658.

14. *Id.* at 658–659.

15. *Id.*

16. *Id.* See *supra* note 2 for discussion and definition of “venire.”

17. *Fernandez*, 639 S.2d at 660.

18. *Id.* (emphasis added).

19. *Id.*

20. *Id.*

21. *Id.* (stating that the party “objecting to use of a peremptory challenge [must prove] that the venire person challenged is a member of a distinct . . . religious . . . group”). Although the Third District’s rule is dicta, Florida courts may rely on the Third District’s rule in future cases because the rule states the constitutional standard that applies to religion-based peremptory challenges.

22. See *id.* (establishing the rule that precludes religion-based peremptory challenges).

sen to serve on the jury.<sup>23</sup> Although Cynthia's pecuniary interest is at stake,<sup>24</sup> she will go into the trial with a probable handicap. She will be tried by a jury that she perceives will be influenced by a man already biased against her.

While the precedent established by the Third District Court of Appeal is based on an equal-protection analysis, religion-based peremptory challenges also may be evaluated under a free-exercise analysis.<sup>25</sup> A free-exercise cause of action could arise in the following manner: assume the court permits Cynthia's lawyer to use a peremptory strike on John for religious reasons. Lisa wants to keep John on the jury because she believes John is sympathetic to her anti-abortion views. Assuming the jury finds in favor of Cynthia, Lisa appeals,<sup>26</sup> arguing that the State has interfered with John's free-exercise rights. Lisa claims that the

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23. It is unlikely that John would be struck by a challenge for cause because he has not admitted that his Catholicism will influence his ability to apply the law in a fair and just manner. Notes 197–203, *infra*, and accompanying text further address this issue.

24. Because this is a civil trial, Lisa would request punitive and compensatory damages for the alleged assault and battery. See e.g. *Floyd v. Baxter*, 508 S.2d 549, 550–551 (Fla. Dist. App. 1st 1987) (noting that the plaintiff brought an assault and battery claim and requested \$5,000 in punitive and compensatory damages). Therefore, if Cynthia is sued for assault and battery, she would be liable for the amount the jury determines is reasonable.

25. Traditionally, the constitutionality of peremptory challenges has been addressed under the Equal Protection Clause of the United States Constitution. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128 (1994) (holding that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges); *Batson*, 476 U.S. at 82 (concluding that the Equal Protection Clause prohibits prosecutors from using race-based peremptory challenges in criminal trials). Only recently have courts and commentators considered that a venire person's religious-freedom rights may warrant protection. See *Casarez v. State*, 913 S.W.2d 468, 494 (Tex. Crim. App. 1994) (noting that although there is a plausible "freedom of religion complaint" under the First Amendment, the constitutional analysis would be equivalent to that under the Fourteenth Amendment); Benjamin Hoorn Barton, Student Author, *Religion-Based Peremptory Challenges after Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis*, 94 Mich. L. Rev. 191, 207 (1996) (evaluating the constitutionality of religion-based peremptory challenges under the Free Exercise Clause). In Florida, the free exercise of religion is protected by Florida's Religious Freedom Restoration Act (RFRA). Fla. Stat. §§ 761.01–761.05 (2001). The Free Speech Clause of the First Amendment to the United States Constitution prohibits governmental interference with an individual's right to freely exercise his or her religion. U.S. Const. amend. I. Therefore, when potential jurors are struck from the jury pool solely because of their religion, they may argue that their right to religious freedom has been violated. Gary C. Furst, Student Author, *Will the Religious Freedom Restoration Act Be Struck Three Against Peremptory Challenges?* 30 Val. U. L. Rev. 703–704 (1996) (arguing that a juror has a possible free-exercise claim under an RFPA).

26. A litigant may argue that a juror was discriminated against and struck in violation of the Equal Protection Clause. *J.E.B.*, 511 U.S. at 128; *Batson*, 476 U.S. at 82. Case law does not indicate that there would be any procedural difference with a free exercise claim. See *People v. Fields*, 673 P.2d 680, 695–698 (Cal. 1983) (finding that defendant had

ferred with John's free-exercise rights. Lisa claims that the State has discriminated against John in its jury-selection process because it refuses to allow him to sit on a jury solely based on his religion.<sup>27</sup> Under this fact pattern, Lisa's free-exercise cause of action should fail because she cannot meet the first prong of Florida's Religious Freedom Restoration Act.<sup>28</sup> Under the Third District's reasoning, it is impossible to establish that John's inability to serve as a juror in this case "substantially burdens" his ability to practice Catholicism.<sup>29</sup> Therefore, religion-based peremptory challenges should also survive a free-exercise cause of action.

This Comment argues that Florida's Third District Court of Appeal has wrongly extended prohibitions on race-based and gender-based peremptory challenges to those based on religion.<sup>30</sup> The Florida Supreme Court should not adopt this extension,<sup>31</sup> but instead should uphold religion-based peremptory challenges under both an equal-protection and a free-exercise analysis. Part I of this Comment briefly describes the history of the present conflict and the present state of religion-based peremptory challenges in Florida.<sup>32</sup> Part II addresses an Equal Protection Clause analysis and presents the argument that case law prohibiting race-based and gender-based peremptory challenges should not extend to prohibit religion-based peremptory challenges because religion-based strikes are fundamentally distinguishable from race-based and gender-based strikes.<sup>33</sup> Further, the state has a compelling governmental interest in providing litigants with an impartial jury, and peremptory challenges historically have played a vital

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standing to challenge alleged religious-freedom violations on behalf of struck venire persons); *Clark*, 990 P.2d at 802–803 (holding that it was proper to strike for cause potential jurors because jurors' religious beliefs biased jurors, making it impossible for jurors to be impartial); *infra* nn. 234–235 and accompanying text (discussing a litigant's standing to sue on a juror's behalf).

27. *See infra* nn. 232–243 and accompanying text (addressing the juror's free-exercise cause of action).

28. Fla. Stat. § 761.03.

29. *See infra* nn. 248–258 and accompanying text (applying the Third District's reasoning in *Church of Perrine v. Miami-Dade County*, 768 S.2d 1114 (Fla. Dist. App. 3d 2000), to the present fact pattern).

30. *Fernandez*, 639 S.2d at 660.

31. *Id.* at 658. Although *Fernandez* is not on appeal before the Florida Supreme Court, this Comment speaks to future cases with similar facts.

32. *Infra* nn. 38–73 and accompanying text.

33. *Infra* nn. 74–162 and accompanying text.

role in ensuring litigants this guarantee.<sup>34</sup> Finally, while the Florida Supreme Court has alluded to the adoption of a pure challenge-for-cause system in the future, abolishing the peremptory challenge system will interfere wrongly with litigants' interests in being tried by an impartial jury.<sup>35</sup> Part III evaluates the constitutionality of religion-based peremptory challenges under the Free Exercise Clause, demonstrating that religion-based peremptory challenges should be upheld under Florida's Religion Freedom Restoration Act (RFRA) because permitting religion-based peremptory challenges results in no "substantial burden" on religion.<sup>36</sup> In conclusion, this Comment urges the Florida Supreme Court not to adopt the Third District's position, which has deemed religion-based peremptory challenges unconstitutional. Rather, it should find that religion-based peremptory challenges are constitutional under both the Equal Protection and Free Exercise Clauses of the Florida Constitution.<sup>37</sup>

### I. RELIGION-BASED PEREMPTORY CHALLENGES: THE PAST AND THE PRESENT

#### A. Historical Background of Peremptory Challenges

The use of peremptory challenges can be traced to England, more than seven centuries ago.<sup>38</sup> At common law, the English Crown initially had sole authority to use peremptory challenges.<sup>39</sup> The Crown chose all prospective jurors, had no limit on how many peremptory challenges it could exercise, and was not required to state a reason for the strike.<sup>40</sup> Eventually, English common law guaranteed the defendant the power to exercise thirty-five peremptory challenges, which functioned as protection against the Crown's many advantages.<sup>41</sup> Congress used the established law in

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34. *Infra* nn. 163–197 and accompanying text.

35. *Infra* nn. 183–189 and accompanying text.

36. Fla. Stat. §§ 761.01–761.05; *infra* nn. 215–257 and accompanying text.

37. Because the peremptory challenge issue is broad, the analysis in this Comment is limited to the present constitutionality of religion-based peremptory challenges in Florida. However, due to the substantial history of peremptory-challenge case law, occasionally it is necessary to explain the federal courts' positions for background purposes.

38. Hoffman, *supra* n. 2, at 819.

39. *Id.*

40. *Id.* at 819, 846.

41. *Id.* 819–820.

England<sup>42</sup> as a model for American statutes regulating the exercise of peremptory challenges.<sup>43</sup>

In the United States, the history and purposes of peremptory challenges have been very different.<sup>44</sup> Traditionally, American lawyers have believed that peremptory challenges are necessary to secure a fair and impartial trial for clients.<sup>45</sup> The legal community generally adopted the position that a proper jury trial required peremptory challenges on both sides.<sup>46</sup> Although a litigant has no constitutional right to a peremptory challenge, it is considered to be “one of the most important rights secured to the accused.”<sup>47</sup> Peremptory challenges remove extreme partiality on both sides and help to ensure that the jury will not decide the case on issues other than the evidence.<sup>48</sup> For decades, it was an accepted notion of American jurisprudence that peremptory challenges could be exercised on bases “irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.”<sup>49</sup> Parties could permissibly exercise peremptory challenges on the “sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.”<sup>50</sup>

Over the years, courts have restricted the use of peremptory challenges under the Equal Protection Clause of the United States Constitution.<sup>51</sup> In *Batson v. Kentucky*,<sup>52</sup> the United States

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42. *Id.* In England, the peremptory challenge fell into disuse as the Crown’s power in handpicking the jury grew less direct. *Id.* at 848.

43. *Id.* at 825.

44. *Id.* at 823.

45. See *Swain v. Ala.*, 380 U.S. 202, 222 (1965) (presuming that the prosecution uses peremptory challenges “to obtain a fair and impartial jury”).

46. *Id.* at 220.

47. *Id.* at 219.

48. *Id.* at 220; see *Edmonson*, 500 U.S. at 616 (extending the prohibition of race-based peremptory challenges from criminal to civil cases).

49. *Swain*, 380 U.S. at 220; see William J. Bryan, Jr., *The Chosen Ones* 49–74 (Vintage Press 1971) (describing how factors ranging from age to occupation predict a potential juror’s views on issues).

50. *Swain*, 380 U.S. at 219 (quoting *Pointer v. U.S.*, 151 U.S. 306, 408 (1894)).

51. See e.g. *J.E.B.*, 511 U.S. at 130–131 (holding that gender-based peremptory challenges violate jurors’ equal protection rights); *McCullum*, 505 U.S. at 59 (finding that a criminal defendant’s discriminatory use of peremptory challenges violates equal protection); *Edmonson*, 500 U.S. at 616 (holding that civil litigants are prohibited from exercising racially discriminatory peremptory challenges); *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (finding that a criminal defendant may raise an equal-protection claim when a juror is struck based on race); *Batson*, 476 U.S. at 86 (finding that a prosecutor’s discriminatory use of peremptory challenges to exclude blacks violated the black defendant’s right to



Supreme Court held that the Equal Protection Clause prohibits using race as a reason for the exercise of a peremptory challenge.<sup>53</sup> Under the *Batson* rule, a defendant alleging an equal-protection violation from a race-based peremptory challenge must prove three things.<sup>54</sup> First, the defendant must establish that he or she is “a member of a cognizable racial group.”<sup>55</sup> Second, he or she must show that the opposing party has struck other prospective jurors who are of the same race as the defendant.<sup>56</sup> Third, the defendant must bring forth any relevant facts by which the court may infer that the peremptory challenges were exercised on the basis of race.<sup>57</sup> The rule prohibiting the racially discriminatory use of peremptory challenges applies both to the prosecution<sup>58</sup> and defense<sup>59</sup> in criminal cases, and to both parties in civil cases.<sup>60</sup> The most significant expansion of the *Batson* rule so far is its application to gender-based peremptory challenges.<sup>61</sup> In response to this expansion, Supreme Court Justices and members of the legal community have expressed their concern about the demise of the peremptory challenge and the confusion surrounding the peremptory challenge’s future application.<sup>62</sup>

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equal protection); *Strauder v. W. Va.*, 100 U.S. 303, 310 (1879) (finding that a statute limiting jury service to white males violated equal protection).

52. 476 U.S. 79.

53. *Id.* at 86.

54. *Id.* at 96.

55. *Id.*

56. *Id.*

57. *Id.* For example, the defendant could show that all other jurors of the same race were struck by the use of peremptory challenges. *Id.* at 97.

58. *Id.* at 96.

59. *McCullum*, 505 U.S. at 55, 59.

60. *Edmonson*, 500 U.S. at 616.

61. *J.E.B.*, 511 U.S. at 130–131.

62. In *J.E.B.*, Justice Sandra Day O’Connor stated in her concurring opinion that “[i]n further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event.” *Id.* at 147 (O’Connor, J., concurring). She continued, stating that “[b]ecause I believe the peremptory remains an important litigator’s tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.” *Id.* at 148. Justice O’Connor emphasized that “[l]imiting the accused’s use of the peremptory is ‘a serious misordering of our priorities,’ for it means ‘we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.’” *Id.* at 150 (quoting *McCullum*, 505 U.S. at 61–62 (Thomas, J., concurring)); see *id.* at 162 (Scalia, J., dissenting) (arguing that the extension of *Batson* to gender and beyond will lead to “extensive collateral litigation” and the “lengthening of the voir dire process that already burdens trial courts”). Other commentators have criticized the *J.E.B.* ruling because of its effectiveness in undermining the

The next logical question is whether the limitations on race-based and gender-based peremptory challenges should extend to prohibit religion-based peremptory challenges. The United States Supreme Court has declined the opportunity to resolve this issue.<sup>63</sup> In the meantime, lower courts are in a state of confusion regarding this matter.<sup>64</sup>

### B. Present State of Religion-Based Peremptory Challenges in Florida

While the United States Supreme Court has not addressed the constitutionality of religion-based peremptory challenges,<sup>65</sup> states resolving this issue generally have done so under their respective state constitutions or statutes, and under the United States Constitution or federal case law.<sup>66</sup> As previously mentioned, the Florida Supreme Court has not addressed a case that directly challenged the constitutionality of religion-based peremptory challenges.<sup>67</sup> However, in considering the scope of limits on peremptory challenges, the Third District has expressly refused to consider federal constitutional issues or federal case law and has deemed cases from other jurisdictions “unenlightening.”<sup>68</sup> The Florida Supreme Court has held that peremptory challenges may

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use of peremptory challenges. *E.g.* Marianne E. Kreisher, *Religion: The Cognizable Difference in Peremptory Challenges*, 5 Widener J. Pub. L. 131, 151 (1995) (quoting three commentators and citing two cases that exemplify the confusion courts face in determining the limits of peremptory challenges after *J.E.B.*).

63. *U.S. v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994). Both *Clemmons* and *Davis* held that religion-based peremptory challenges are constitutional. *Clemmons*, 892 F.2d at 1157; *Davis*, 504 N.W. 2d at 771.

64. *See generally Clemmons*, 892 F.2d at 1157 (finding that a religion-based peremptory challenge did not violate Equal Protection); *Greer*, 939 F.2d at 1086 n. 9 (reading *Batson* to limit peremptory challenges based on race, religion, and national origin); *Davis*, 504 N.W.2d at 771 (finding that *Batson* did not extend to prohibit religion-based peremptory challenges); *Casarez*, 857 S.W.2d at 784 (finding that *Batson* is limited to instances of racial discrimination and that religion-based peremptory challenges violate the Equal Protection Clause).

65. Although the Supreme Court has had several opportunities to resolve the issue of whether religion-based peremptory challenges are constitutional, it has declined to do so. *Supra* n. 63 and accompanying text.

66. *Clemmons*, 892 F.2d at 1157 (upholding religion-based peremptory challenges as constitutional); *Joseph*, 636 S.2d at 781; *Davis*, 504 N.W.2d at 771 (resolving *Batson* challenge under the Minnesota Constitution and the United States Constitution).

67. *Supra* nn. 7–10 and accompanying text.

68. *Joseph*, 636 S.2d at 781.

not be used to discriminate based on race,<sup>69</sup> gender,<sup>70</sup> or ethnicity;<sup>71</sup> however, it has determined that questions of discrimination based on religion should be decided on a case-by-case basis.<sup>72</sup> The Third District took the next step and determined that religion-based peremptory challenges are subject to the same standard of scrutiny as race-based, gender-based, and ethnicity-based peremptory challenges.<sup>73</sup>

## II. RELIGION-BASED PEREMPTORY CHALLENGES SHOULD WITHSTAND AN EQUAL PROTECTION CLAUSE ANALYSIS

The Florida Supreme Court should not adopt the Third District Court of Appeal's position for several reasons. First, unlike race and gender, religion more accurately predicts a prospective juror's belief system.<sup>74</sup> Second, the Court does not need to protect prospective jurors from being discriminated against based on their religion because there is no history of religious discrimination in jury selection that is comparable to the history of race-based and gender-based discrimination in jury selection.<sup>75</sup> Third, religious groups do not constitute a cognizable class.<sup>76</sup> Finally, the alternative — a system that would eventually become a pure challenge-for-cause system — is undesirable because it protects lying jurors, gives judges too much discretion, and interferes with the attorney's duty to zealously represent his client within the bounds of the law.<sup>77</sup>

### A. Religion Is an Accurate Predictor of Belief Systems

A potential juror's belief system plays a vital role in predicting how he or she will interpret the evidence presented during trial.<sup>78</sup> Courts concluding that religion-based peremptory chal-

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69. *Neil*, 457 S.2d at 482.

70. *Abshire*, 642 S.2d at 544.

71. *Joseph*, 636 S.2d at 779–780.

72. *Neil*, 457 S.2d at 487; *Joseph*, 636 S.2d at 779.

73. *Fernandez*, 639 S.2d at 660.

74. *Infra* nn. 81–98 and accompanying text.

75. *Infra* nn. 99–131 and accompanying text.

76. *Infra* nn. 132–170 and accompanying text.

77. *Infra* nn. 172–214 and accompanying text.

78. See generally Donald E. Vinson & David S. Davis, *Jury Persuasion: Psychological Strategies & Trial Techniques* 17 (Glasser LegalWorks 1996) (describing how attitudes shape a person's reaction inside the courtroom).

lenges are unconstitutional generally assume that a venire person's religious beliefs are an inaccurate indicator of a venire person's belief system.<sup>79</sup> Courts use this presumption to justify their conclusions that religion-based peremptory challenges are as illogical as race-based and gender-based peremptory challenges, and thus may be constitutionally prohibited under the *Batson* and *J.E.B.* rationale.<sup>80</sup> However, one's religion more accurately predicts one's belief system and biases than does one's race or gender.<sup>81</sup>

Studies show that members of a religion tend to share similar ideological views on various issues.<sup>82</sup> For example, in a study called "Religiousness, Religious Orientation, and Attitudes Towards Gays and Lesbians," members of the jury pool in Orlando, Florida, were surveyed to compile information for an upcoming trial.<sup>83</sup> In the case presented to the jury pool, the sheriff's office fired a deputy, the plaintiff, because of his admitted homosexuality.<sup>84</sup> Surveyors asked members of the jury pool whether they believed the plaintiff and whether the plaintiff deserved damages.<sup>85</sup> The study results showed

a strong correlation between religious preference and antigay attitudes: Baptists and fundamentalist Christians showed high levels of antigay attitudes, Catholics and Presbyterians showed low to moderate levels, and Jews showed the lowest levels. Furthermore, antigay attitudes correlated with a tendency to disbelieve the homosexual plaintiff.<sup>86</sup>

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79. *See Greer*, 939 F.2d at 1086 (reasoning that a litigant's suspicions of a prospective juror's biases should be pursued "in a rational way," rather than by classifications based on race, religion, and national origin); *State v. Purcell*, 18 P.3d 113, 121 (Ariz. 2001) (finding that it would be over-inclusive to strike a prospective juror because religious affiliation does not determine one's ability to serve on a jury); *State v. Hodge*, 726 A.2d 531, 553 (Conn. 1999) (reasoning that one's religious affiliation does not indicate his or her ability to serve on a jury).

80. *See supra* n. 79 and accompanying text.

81. *See infra* nn. 87–88 (citing studies that show a correlation between religious and other beliefs).

82. *Id.*

83. Amy B. Gendleman, Student Author, *The Equal Protection Clause, the Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U. Chi. L. Rev. 1639, 1661–1662 (1996).

84. *Id.* at 1662 (citing Randy D. Fisher et al., *Religiousness, Religious Orientation, and Attitudes Towards Gays and Lesbians*, 24 J. Applied Soc. Psychol. 614, 619 (1994)).

85. *Id.*

86. *Id.*

Similarly, studies also illustrate that members of a religious group are more likely to share the same political positions,<sup>87</sup> and that members of Judeo-Christian religions tend to have less environmental concern than other religious groups.<sup>88</sup>

Further, “the extent and intensity of a juror’s involvement and commitment to his [or her] particular religion [is] helpful in predicting his [or her] position” or beliefs regarding various topics.<sup>89</sup> For example, a study that evaluated the relationship between religion and one’s position on the death penalty found that the extent of one’s religiousness had a strong link to one’s stance against the death penalty.<sup>90</sup> The previously mentioned Orlando study also noted that the more frequently an individual attended religious services, the more likely he or she would exhibit greater prejudice against homosexuals.<sup>91</sup>

The correlation between an individual’s religious involvement and beliefs is reasonable considering that while race and gender are qualities that are impossible to change, one’s religion and belief systems are conscious decisions that can be changed.<sup>92</sup> In addition, beliefs are defined in accordance with individual, organized religious institutions. The dictionary definition of “religion” is telling:

1. a. *Belief* in and reverence for a supernatural power or powers regarded as creator and governor of the universe. b. A per-

87. Jeffrey T. Fredrick, *The Psychology of the American Jury* 12–15 (Michie Co. 1987); Donald E. Vinson, *Jury Trials: The Psychology of Winning Strategy* 12–15 (Michie Co. 1986); Gallup Organization, *Preferences in Three-Way Trials*, 3 Am. Enter. 92, 92 (Sept.–Oct. 1992); Jay Schulman et al., *Recipe for a Jury*, Psych. Today 37, 37–44 (May 1973); Voter Research & Surveys, *Ethnocultural Patterns*, 4 Am. Enter. 92, 92–96 (Jan.–Feb. 1993); but see Margaret M. Bierly, *Prejudice Toward Contemporary Outgroups as a Generalized Attitude*, 15 J. Applied Soc. Psych. 189, 193 (1985) (stating that the beliefs of Catholics, Protestants, and those with no religious affiliation did not affect their opinions regarding homosexuals or women). The aforementioned cites were found in Gendleman, *supra* n. 83, at 1661, nn. 110, 113.

88. Gendleman, *supra* n. 83, at 1661, n. 113 (citing Douglas Lee Eckberg & T. Jean Blocker, *Varieties of Religious Involvement and Environmental Concerns: Testing the Lynn White Thesis*, 28 J. Sci. Stud. Religion 509 (1989)).

89. *Id.* at 1665.

90. *Id.* (summarizing Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. Sci. Stud. Religion 76, 77 (1992)).

91. *Id.* In this Comment’s hypothetical, John’s concession that he is a “devout Catholic” gives Cynthia’s attorney a reasonable basis to conclude that he probably is biased against abortion, even though John probably has not demonstrated sufficient bias to warrant a challenge for cause. See *supra* nn. 87–92 and accompanying text.

92. Kreisher, *supra* n. 62, at 167.

sonal or institutionalized system grounded in such *belief* and worship. 2. The life or condition of a person in a religious order. 3. A set of *beliefs*, values, and practices based on the teachings of a spiritual leader. 4. A cause, a principle, or an activity pursued with zeal or conscientious devotion.<sup>93</sup>

This definition illustrates that “religion” is bound up with a belief system. In fact, religious institutions generally subscribe to a particular writing or creed that specifically defines their belief systems.<sup>94</sup> Arguably, the very nature of “religion” denotes some type of belief system.

While a member of a particular religious organization may not subscribe to every tenet of that organization’s belief system, the major tenets of that particular religious institution are unlikely to be in severe conflict with the member’s own belief system.<sup>95</sup> For example, a major tenet of the Seventh-Day Adventist Church is that Saturday is the Sabbath and thus a day of rest.<sup>96</sup> While some Seventh-Day Adventists may work on Saturdays, such an act is likely to be an exception, not the norm.

In sum, it is reasonable to conclude that subscribers to a particular religion generally are bound together by shared convictions and belief systems.<sup>97</sup> Such beliefs can cut across racial, ethnic, and gender lines.<sup>98</sup> For these reasons, the venire person’s re-

93. *The American Heritage Dictionary of the English Language* 1525 (Anna H. Soukhanov ed., 3d ed., Houghton Mifflin Co. 1992) (emphasis added).

94. Adherents.com, *Major Scriptures, Religious Texts and Influential Books* <[http://www.adherents.com/adh\\_influbooks.html](http://www.adherents.com/adh_influbooks.html)> (last updated Feb. 5, 2001). Various Christian churches subscribe to the scriptures of the Holy Bible. *Id.* Muslims follow the Qur’an. *Id.* Some denominations, such as the Church of Latter-Day Saints, Catholics, and Baptists, have their own sets of documented religious beliefs. *Id.*

95. It may be too sweeping to conclude that simply because a juror belongs to a particular religious denomination, the “moral, social, political and philosophical beliefs characteristic of the faith may fairly be attributed” to him or her. See Scot Leaders, Student Author, *Unresolved Differences: Constitutionality of Religion-Based Peremptory Strikes, the Need for Supreme Court Adjudication*, 3 Tex. Forum Civ. Liberties & Civ. Rights 99, 107–108 (1997) (arguing that such a conclusion is “fundamentally flawed” and noting that although the “Catholic Church condemns the use of contraceptives, . . . 84% of the members of the Catholic Church oppose this view”).

96. See e.g. *Sherbert v. Verner*, 374 U.S. 398, 402 n. 1, 409–410 (1963) (finding that a state statute that denied unemployment compensation benefits to a Seventh-Day Adventist because she would not accept employment requiring work on Saturdays violated her free-exercise rights).

97. E.g. *Joseph*, 636 S.2d at 780 (finding Jews to be a cognizable class, and therefore, an ethnic group protected from ethnicity-based peremptory challenges).

98. See e.g. *Galations* 3:26–28 (stating that “[y]ou are all sons of God through faith in Jesus Christ . . . There is neither Jew nor Greek, slave nor free, male nor female, for you

ligion is much more indicative of that person's belief system and values than is his or her race or gender. Therefore, religion-based peremptory challenges have a valid purpose during voir dire.

#### B. There Is No History of Religious Discrimination in Jury Selection

Courts have struck down race-based and gender-based peremptory challenges because the United States has a pervasive history of race-based and gender-based discrimination in the jury selection process.<sup>99</sup> However, because the United States does not have an analogous history of religious discrimination in jury selection, that reasoning does not apply to religion-based peremptory challenges.<sup>100</sup>

The history of racial discrimination in jury selection is epitomized by *Dred Scott v. Sandford*,<sup>101</sup> which held that privileges and rights in the United States Constitution did not apply to African Americans.<sup>102</sup> The Supreme Court reasoned that African Americans were property and not citizens.<sup>103</sup> After the Fourteenth Amendment was added to the Constitution and the *Slaughter-House* cases overturned *Dred Scott*, African Americans were deemed citizens.<sup>104</sup> Despite this progress, the struggle for civil rights continued.<sup>105</sup> In 1879, the Supreme Court invalidated a state statute that permitted only white men to act as jurors.<sup>106</sup> "The Court reasoned that forcing individuals to be tried by a group from which members of their race are explicitly banned violated the very idea of a jury of peers."<sup>107</sup> Despite this holding, states instituted their own methods to prevent African Americans from serving on juries.<sup>108</sup> By 1965, very few African Americans had ever served on a petit jury.<sup>109</sup> Despite this fact, the Supreme

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are all one in Jesus Christ.").

99. *J.E.B.*, 511 U.S. at 131; *Batson*, 476 U.S. at 94–96.

100. Kreisher, *supra* n. 62, at 169–170.

101. 60 U.S. 393 (1856).

102. Scruggs, *supra* n. 2, at 552 (citing *Dred Scott v. Sandford*, 60 U.S. 393, 412 (1856)).

103. *Id.*

104. *Id.*; see *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) (finding that all those who are born or naturalized in the United States are citizens, regardless of color).

105. Scruggs, *supra* n. 2, at 552.

106. *Id.* (citing *Strauder*, 100 U.S. at 306–310).

107. *Id.*

108. *Id.*

109. See *id.* at 554 (citing *Swain*, 380 U.S. at 205) (stating that "no negro has actually

Court held that there was no systemic discrimination against African Americans.<sup>110</sup> African Americans had true access to serve as jurors only after the Supreme Court decided *Batson*.<sup>111</sup>

Similarly, women historically have been denied access to serving on a jury.<sup>112</sup> The Court's rationale in prohibiting women from serving was that there were societal expectations of what constituted the "natural roles" for women in contrast with those for men.<sup>113</sup> Even in the seminal *Strauder*<sup>114</sup> decision, the Court specifically permitted the exclusion of women from the jury.<sup>115</sup> The Supreme Court rendered a landmark decision for women's rights in 1946.<sup>116</sup> In *Ballard v. United States*,<sup>117</sup> the Court invalidated a law that effectively resulted in the "purposeful and systemic exclusion of women from the jury venire."<sup>118</sup> However, discrimination against women on juries continued through states' "explicit . . . or . . . structural conditions" on jury selections.<sup>119</sup> As late as 1947, sixteen states explicitly denied women the right to serve on a jury.<sup>120</sup> Alabama was the last state to subscribe to such a law, and only in 1966 did it finally give women the right to serve on a jury.<sup>121</sup> However, states enacted other laws to prevent women from serving on juries.<sup>122</sup> For example, state laws would "exempt . . . [women] from jury [participation] unless they volunteered to serve."<sup>123</sup> The United States Supreme Court upheld such state laws based on the position that women were "the center of home and family life."<sup>124</sup> In 1975, the Supreme Court held that state laws excluding women were unconstitutional "if [they] resulted in almost entirely male jury venires."<sup>125</sup> During this time, progress

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served on a petit jury in Talladaga County, Alabama since about 1950").

110. *Id.* at 555.

111. *Id.* at 556.

112. *Id.*

113. *Id.*

114. 100 U.S. 303.

115. *Strauder*, 100 U.S. at 310; *Scruggs*, *supra* n. 2, at 556.

116. *Scruggs*, *supra* n. 2, at 557 (citing *Ballard v. U.S.*, 329 U.S. 187 (1946)).

117. 329 U.S. 187.

118. *Id.*

119. *Id.* at 557.

120. *Id.*

121. *Id.*

122. *Id.* (citing *Hoyt v. Fla.*, 368 U.S. 57, 60–62 (1961)).

123. *Id.* at 557–558 (citing *Fay v. N.Y.*, 332 U.S. 261, 270 (1947)).

124. *Id.* at 558 (quoting *Hoyt*, 368 U.S. at 62).

125. *Id.* (citing *Taylor v. La.*, 419 U.S. 522, 537 (1975)).



also was made when the Supreme Court required that gender-based distinctions be subject to heightened scrutiny.<sup>126</sup>

The history of religious discrimination in this country has been cited as a reason for prohibiting religion-based peremptory challenges.<sup>127</sup> However, while religious intolerance undoubtedly has existed in American society,<sup>128</sup> it does not support the conclusion that a history of discrimination in jury selection exists. There is “[n]o such [history] documented in appellate court decisions.”<sup>129</sup> There is no case that establishes a level of discrimination in jury selection that is comparable to the flagrant race and gender discrimination that occurred in American legal history.<sup>130</sup> Because there is no history of religion-based peremptory challenge misuse, the Court should not extend the prohibition on race-based and gender-based peremptory challenges to religion.<sup>131</sup>

### C. Most Religions Do Not Constitute a “Cognizable Class”

A “cognizable class” is a “relatively large and well defined [group] in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern.”<sup>132</sup> Examples of cognizable classes include African Americans and Hispanics.<sup>133</sup> With a few exceptions,<sup>134</sup> it is difficult to categorize any religious groups in the United States as a cognizable class.

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126. *Id.* at 559.

127. See *Casarez*, 913 S.W.2d at 476 (noting that “[o]ur democratic government arose from a period of severe religious discrimination[ ]” before holding that religion-based peremptory challenges are unconstitutional).

128. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422–1426 (1990) (outlining the intolerance early-American colonists had for different religions).

129. *Davis*, 504 N.W.2d at 771 n. 3 (noting that while courts have “barred the use of peremptories based on group bias for race, sex, religion, or national origin[ ]. . . [these cases] dealt specifically with racial bias and no evidence of group bias with respect to religious affiliation in jury selection was presented or suggested”); *but see Schougurow v. State*, 213 A.2d 475, 482 (Md. 1965) (finding that a state law requiring a citizen to believe in God as a prerequisite to serving on a jury violates the Fourteenth Amendment).

130. Kreisher, *supra* n. 62, at 160 (quoting the dissent’s reasoning in *Casarez*, 913 S.W.2d at 481–483 (McCormick, J., dissenting)).

131. See *Casarez*, 913 S.W.2d at 483 (McCormick, J., dissenting) (reasoning that the defendant is entitled to an objectively and subjectively fair jury, and, therefore, religion-based peremptory challenges should not trigger a *Batson* analysis).

132. *Fields*, 673 P.2d at 691–692.

133. *Joseph*, 636 S.2d at 780 n. 2.

134. An argument can be made that Jews are a “cognizable class” because they usually

Most religions do not meet the Florida Supreme Court's requirement of a cognizable class, which the Court has used in its peremptory-challenge analysis.<sup>135</sup> In *Joseph v. State*,<sup>136</sup> the Florida Supreme Court addressed the issue of whether a peremptory strike on a Jewish venire person because of his religion violated the Florida Constitution.<sup>137</sup> Under Florida case law, a group must be a cognizable class to be protected under the Equal Protection Clause.<sup>138</sup> A cognizable class must be "objectively discernible from the rest of the community."<sup>139</sup> There are two factors to consider in determining whether a group is objectively discernible.<sup>140</sup> First, the court should consider whether the group's population is "large enough that the general community recognizes it as an identifiable group in the community."<sup>141</sup> The Court found that because there were about 202,000 Jews in Dade County, Florida, making up about ten percent of the local population, Jews met the first prong.<sup>142</sup> Second, the court should consider whether the group is "distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society."<sup>143</sup> The Court noted religion as "one [shared] characteristic of an ethnic group."<sup>144</sup> It reasoned that Jews shared common religious beliefs because they celebrate Sabbath on Saturday instead of Sunday, they do not celebrate Christmas, and they have their own religious holidays.<sup>145</sup> The Court also noted that Jews had other distinguishing traits that made them objectively discernible: their common history of persecution, recognizable surnames, and dis-

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share the same ethnicity and history of oppression. *Id.* at 780. Also, Jews make up an "identifiable group" in society. *Id.* A similar argument can be made regarding Catholics; however, it is a weaker argument because whether a person is Catholic generally is not apparent by one's surname, ethnicity, or attire. *See id.* (using these factors to conclude that Jews are a cognizable class).

135. *E.g. id.*; *Alen*, 616 S.2d at 454; *Neil*, 457 S.2d at 486-487.

136. 636 S.2d 777.

137. *Id.* at 779. In addressing this issue, the court considered Jews as an ethnic, not religious, group. *Id.* at 780.

138. *Joseph*, 636 S.2d at 779; *Alen*, 616 S.2d at 454.

139. *Joseph*, 636 S.2d at 779 (quoting *Alen*, 616 S.2d at 454).

140. *Id.*

141. *Id.*

142. *Id.* at 780.

143. *Id.* at 779-780.

144. *Id.* at 780.

145. *Id.*

tinctive religious attire.<sup>146</sup> In conclusion, the Court held that Jews were a cognizable class, and, therefore, peremptory challenges exercised against Jewish venire persons violated the constitution.<sup>147</sup>

The problem with other courts adopting the *Joseph* Court's cognizable-class standard is that the Court's outcome will vary depending on the area of the country where that court is located. In some areas, like Dade County, Florida, Jews may clearly constitute a cognizable class, while in others, they may not. These conflicting conclusions interfere with the principle of *stare decisis* and should be avoided to prevent inconsistency in court decisions. Therefore, the cognizable-class standard should be applied only on a national level.

The United States Census Bureau lists almost eighty religious groups with which the U.S. population has aligned itself.<sup>148</sup> This list is diverse, naming a variety of religious bodies, from the African Methodist Episcopal Church to the Old Order Amish Church.<sup>149</sup> Few, if any, of these religions are large enough for the general community to recognize them as identifiable groups in the community. For example, in 1998, there were about 1.5 million members of the African Methodist Episcopal Church nationwide, thus making up about only 0.005% of the population.<sup>150</sup> While only 0.005% of the population are members of the African Methodist Episcopal Church, as many as 2.3% of the national population is Jewish.<sup>151</sup> Even with a membership of approximately 1.5 million, it is illogical to conclude that the general community recognizes members of the African Methodist Episcopal Church as an identifiable group in the community.

The second prong required for a cognizable class may be easier for religious organizations to meet. There is a persuasive argument that members of the African Methodist Episcopal Church are distinguished from the larger community by an "internal cohesiveness of attitudes, ideas, or experiences that may not be

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146. *Id.*

147. *Id.* at 780–781.

148. U.S. Census Bureau, *Statistical Abstract of the United States: The National Book 2000*, at 61 (120th ed., 2000).

149. *Id.*

150. *See id.* at 8 (citing the 1998 population as 269,118,000).

151. *See id.* at 62 (citing the Jewish population to be 6,041,000, which is approximately 2.3% of the nation's total population).

adequately represented by other segments of society.”<sup>152</sup> The *Joseph* Court noted certain religious beliefs that Jews had in common with each other.<sup>153</sup> It also observed that Jews had other distinguishing traits that made them objectively discernible, including their common history of persecution.<sup>154</sup> Similarly, one may conclude that African Methodist Episcopal Church members also possess an internal cohesion of “attitudes, ideas, or experiences”<sup>155</sup> because they subscribe to the beliefs of the Methodist Church,<sup>156</sup> which are summarized in the Twenty-Five Articles of Religion.<sup>157</sup> These include the belief that man is justified before God by faith and not by works,<sup>158</sup> that speaking in tongues that people cannot understand is repugnant to God,<sup>159</sup> and that the doctrine of Purgatory is not grounded in Scripture.<sup>160</sup> The Church’s history also is unique because it was formed by slaves from Philadelphia who split from the Methodist Church because of racial discrimination and intolerance.<sup>161</sup> This church’s history is not “adequately represented” by other religious groups in society.<sup>162</sup>

Despite the fact that most religious denominations are formed because of a shared “internal cohesion of attitudes, ideas, or experiences,”<sup>163</sup> most religions do not fulfill Florida’s cognizable-class requirement because few religions possess a historical background that is analogous to that of Judaism.<sup>164</sup> It would be illogical to equate the relatively recent history of many Protestant denominations with the long and significant history of Judaism.<sup>165</sup>

152. *Joseph*, 636 S.2d at 779–780.

153. *Id.* at 780.

154. *Id.*

155. *Id.*; African Methodist Episcopal Church, *The Doctrines and Disciplines of the African Methodist Episcopal Church* <<http://docsouth.unc.edu/church/ame/menu.html>> (last updated June 7, 2001).

156. Articles of Religion, *ABC’s of the A.M.E.C.: Our Major Beliefs* <<http://www.ame-today.com/abcsofame/majorbeliefs.shtml>> (accessed Aug. 20, 2002).

157. Articles of Religion, *ABC’s of the A.M.E.C.: The Articles of Religion* <<http://www.ame-today.com/abcsofame/articlesrelig.shtml>> (accessed Aug. 26, 2002).

158. *Id.* at art. 9.

159. *Id.* at art. 15.

160. *Id.* at art. 14.

161. African Methodist Episcopal Church, *History of the A.M.E. Church* <<http://www.ame-today.com/history/index.shtml>> (accessed Aug. 26, 2002).

162. *Joseph*, 636 S.2d at 780–781.

163. *Id.* at 780.

164. *See infra* n. 169 and accompanying text (stating that Judaism is one of the oldest religions).

165. While it may be tempting to combine all categories of “Christian” churches and

For example, the African Methodist Episcopal Church was formed in 1816.<sup>166</sup> Similarly, the Seventh-Day Adventist Church was not officially organized until May 21, 1863,<sup>167</sup> and the Church of Jesus Christ of Latter-Day Saints was founded on April 6, 1830.<sup>168</sup> These dates are relatively recent in comparison to Judaism, one of the world's oldest religions, which dates back to as early as 3,000 BCE.<sup>169</sup> Comparisons to the history of Judaism are especially misguided when they involve contemporary religions.

Finally, it is important to consider the fact that the U.S. Census Report includes only religious bodies with members of 60,000 or more.<sup>170</sup> Therefore, there may be thousands of other religious sects in the United States that also fail to meet the Florida Supreme Court's cognizable-class requirements.

#### D. A Pure Challenge-for-Cause System Is an Undesirable Alternative

Florida courts appear eager to abolish peremptory challenges as a whole. In *Alen v. State*,<sup>171</sup> the Third District found that Hispanics constituted a "cognizable class," and Judge Phillip A. Hubbart authored a telling concurring opinion.<sup>172</sup> He stated, "I think [this decision] marks the beginning of the end for the unfettered use of the peremptory challenge in this state."<sup>173</sup> He predicted that

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deem them a "cognizable class" because of their roots in Judeo-Christian history, doing so would undermine the belief systems of the individual religions and display ignorance of those religious bodies. See e.g. *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999) (noting that it would be "complete ignorance" to expect Protestants not to be bothered by the presence of a Catholic's rosary). Religious differences also exist among various denominations of Protestant Christians. B.A. Robinson, Ontario Consultants on Religious Tolerance, *Divisions within Protestant Christianity* <[http://www.religioustolerance.org/chr\\_divi3.htm](http://www.religioustolerance.org/chr_divi3.htm)> (last updated Nov. 4, 2002).

166. African Methodist Episcopal Church, *supra* n. 155.

167. Seventh-Day Adventist Church, *Our History* <<http://www.adventist.org/history/>> (accessed Aug. 26, 2002).

168. The Church of Jesus Christ of Latter-Day Saints, *History of the Church* <<http://www.mormon.org/learn/0,8672,956-1,00.html>> (accessed Aug. 26, 2002).

169. U. of Cal. at Davis, *Historical Chart: Timeline for the History of Judaism* <<http://philo.ucdavis.edu/zope/home/bruce/RST23/chart.html>> (accessed Sept. 20, 2002). "BCE" stands for "before the common era," which is equivalent to what Christians refer to as "BC" or "Before Christ." *Id.*

170. U.S. Census Bureau, *supra* n. 148, at 61.

171. 596 S.2d 1083.

172. *Id.* at 1086–1091.

173. *Id.* at 1086.

the *Neil* decision,<sup>174</sup> which forbids discriminatory peremptory strikes against African Americans because of their race, will eventually extend to prohibit all forms of peremptory challenges, “whether based on race, ethnic origin, nationality, gender, religion, wealth, or age.”<sup>175</sup> Judge Hubbard stated, “it seems obvious that the peremptory challenge system, as we know it, is totally doomed.”<sup>176</sup> The Florida Supreme Court acknowledged in dicta that the *Joseph* decision “may be characterized by some as another nail in the coffin of the peremptory challenge system.”<sup>177</sup> The Court went on to quote Judge Hubbard’s concurring opinion in *Alen*<sup>178</sup> and described it as “eloquent[ ] foreshadow[ing].”<sup>179</sup> The Court reasoned that the appearance of discrimination in court procedure is reprehensible because “it is the complete antithesis of the court’s reason for being—to insure equality of treatment and evenhanded justice.”<sup>180</sup> Finally, the Court stated that it was ready to condemn discrimination in the jury selection of any cognizable class.<sup>181</sup> Because of the Florida judiciary’s statements, it is reasonable to conclude that the Florida Supreme Court supports the eventual abolishment of the peremptory challenge system.<sup>182</sup> However, the alternative, a pure challenge-for-cause system, is problematic.

A pure challenge-for-cause system is undesirable for various reasons. First, peremptory challenges play a vital role in securing the litigants’ right to an impartial jury.<sup>183</sup> For decades, the peremptory challenge has been regarded as a significant means of safeguarding this right.<sup>184</sup> “The right of challenge is almost essen-

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174. *Neil*, 457 S.2d at 481–489.

175. *Alen*, 596 S.2d at 1086. The Third District found that Hispanics were a cognizable ethnic group that could not be discriminated against by the exercise of a peremptory challenge. *Id.* at 1085.

176. *Id.* at 1087.

177. *Joseph*, 636 S.2d at 781.

178. 596 S.2d at 1086–1091.

179. *Joseph*, 636 S.2d at 781.

180. *Id.* at 782 (quoting *State v. Slappy*, 552 S.2d 18, 20 (Fla. 1998)).

181. *Id.*

182. See John W. Perloff, *State v. Neil: Approaching the Desired Balance between Peremptory Challenges and Racial Equality in Jury Selection*, 39 U. Miami L. Rev. 777, 806 (1985) (noting that “[i]t is probable that in time the courts will extend *Neil* to cover these areas [such as sex, religion, and national origin] also”).

183. *Swain*, 380 U.S. at 222.

184. J. Suzanne Bell Chambers, Student Author, *Applying the Break: Religion and the Peremptory Challenge*, 70 Ind. L.J. 569, 574 (1995).

tial for the purpose of securing perfect fairness and impartiality in a trial.”<sup>185</sup> Peremptory challenges permit litigants to empanel an impartial jury by allowing the litigants “to eliminate extremes of partiality on both sides.”<sup>186</sup>

Straying from the traditional peremptory challenge system interferes with the advocate’s duty “to represent his client zealously within the bounds of the law.”<sup>187</sup> Part of that duty arises when an attorney has a concern about a venire person’s ability to be fair and impartial because of his or her religion.<sup>188</sup> Under such circumstances, the attorney has the duty to exercise a religion-based peremptory challenge, even if there is not enough evidence to establish a challenge for cause.<sup>189</sup> For example, referring to the previous hypothetical, because Cynthia’s attorney believes that John is a very devout Catholic, the attorney would be violating his professional duty to Cynthia by not exercising one of her peremptory challenges on John.

Second, the peremptory challenge system “encourages [litigants] to have more confidence in and respect for the process which they have chosen to resolve their dispute.”<sup>190</sup> The existence of a peremptory challenge system shows litigants “that their right to an impartial jury is [a reality] and does not lie beyond their control.”<sup>191</sup> Peremptory challenges permit “the litigant to dismiss ‘those he fears or hates the most, so that he is left with a good opinion of the jury[.]’”<sup>192</sup> The United States Supreme Court also has noted that the peremptory challenge plays a role in satisfying the “appearance of justice.”<sup>193</sup> For example, the use of a religion-based peremptory challenge on John would leave Cynthia with a

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185. *Id.* (quoting William Forsyth, *History of Trial by Jury* 145 (James Cockcroft & Co. 1875)).

186. *Id.*

187. ABA Model Code Prof. Resp. EC 7-1 (1980); see Roberta K. Flowers, *Does It Cost Too Much? A “Difference” Look at J.E.B. v. Alabama*, 64 *Fordham L. Rev.* 491, 527–528 (1995) (citing this rule in arguing for the constitutionality of gender-based peremptory challenges).

188. ABA Model Code Prof. Resp. EC 7-1.

189. See Flowers, *supra* n. 187, at 527 (noting that an attorney should be able to consider differences between men and women in the context of gender-based strikes for the purpose of “zealously represent[ing] the client”).

190. Chambers, *supra* n. 184, at 575.

191. *Id.* at 575–576.

192. *Id.* at 576 (quoting Barbara A. Babcock, *Voir Dire: Preserving ‘Its Wonderful Power,’* 27 *Stan. L. Rev.* 545, 552 (1975)).

193. *Id.* (quoting *Swain*, 380 U.S. at 219).

positive view of her case. Likewise, Lisa would be permitted to strike an agnostic or atheist from the jury pool based on the assumption that the individual would be pro-choice. If the court forbade either peremptory challenge, both parties likely would consider the right to an impartial jury a “hollow guarantee.”<sup>194</sup> Lowering public confidence in the court system would lead individuals to “resort to self-help or extra-legal remedies, rather than lawsuits.”<sup>195</sup> “[Parties are] also less [likely] to obey the orders of a biased court.”<sup>196</sup>

Third, a pure challenge-for-cause system is detrimental to the truth-seeking process because whether a venire person is struck turns solely on his or her representation of his or her personal bias. For example, religion-based peremptory challenges generally become an issue in death-penalty cases in which the venire person refuses to consider the death penalty as a punishment due to his or her religious beliefs.<sup>197</sup> When the venire person’s religious beliefs become an issue in death-penalty cases, the United States Supreme Court has held that the venire person’s opposition to the death penalty is sufficient to warrant a challenge for cause.<sup>198</sup> In *State v. Purcell*,<sup>199</sup> a case arising under Arizona law, the court noted that

[a] trial court must dismiss a juror for cause when ‘there is reasonable ground to believe that a juror cannot render a fair and impartial verdict.’ . . . Cause exists if the juror expresses serious misgivings about the ability to be unbiased, [citations omitted] . . . but, if the juror ultimately assures the court that he or she can be fair and impartial, the juror need not be excused.<sup>200</sup>

Under a pure challenge-for-cause analysis, religion-based peremptory challenges probably would be rendered unnecessary. For example, if John from the hypothetical admits that he be-

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194. *Id.*

195. Brian Galle, Student Author, *Free Exercise Rights of Capital Jurors*, 101 Colum. L. Rev. 569, 601 (2001).

196. *Id.*

197. See *State v. Purcell*, 18 P.3d 113, 118 (Ariz. 2001) (noting that a Catholic juror did not believe in the death penalty).

198. *Morgan v. Ill.*, 504 U.S. 719, 739 (1992); *Purcell*, 18 P.3d at 122–123 (listing Arizona state cases with same holding).

199. 18 P.3d 113.

200. *Id.* at 117 (citations omitted).



believes abortion is morally wrong, and Cynthia was wrong for having one, then he probably will be struck appropriately from the venire via a challenge for cause. If he admits that he simply cannot be fair and impartial because of this religious belief, then Cynthia's striking of John is even more warranted. Alternatively, if John assures Cynthia's lawyer that he can put his feelings about abortion aside and hear the case fairly and impartially, then the trial court probably will not grant Cynthia a challenge for cause. However, a peremptory challenge would not be permitted because it is religion-based. Meanwhile, John could be lying or simply unable to discern the extent to which his religious beliefs will affect his decision-making ability.

Potential jurors do not feel comfortable disclosing their personal biases in a room full of strangers sitting in a foreign courtroom.<sup>201</sup> Instead, people generally want to portray themselves as "open-minded[,] . . . 'fair[,] and 'impartial individuals.'"<sup>202</sup> Further, potential jurors are likely to be nervous and embarrassed when lawyers are questioning them regarding such issues.<sup>203</sup> They tend to become increasingly frustrated as voir dire grows longer, and as time goes on, it is more difficult for lawyers to get potential jurors to reveal biases that are significant to the case.<sup>204</sup>

In sum, as long as the venire person admits that his or her religion will interfere with his or her ability to apply the law objectively, the attorney may strike the venire person with a challenge for cause. In the more likely scenario, in which the venire person does not admit that his or her religious views will interfere with his or her ability to apply the law, the person probably will remain on the panel. The result of this dilemma is that an untruthful juror may not be stricken, but a juror who tells the truth may be removed by a challenge for cause. In effect, prohibiting religion-based peremptory challenges is a system that rewards the venire person's untruthfulness.

Fourth, a pure challenge-for-cause system also would leave litigants with no control over who sits on their juries. Rather, the

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201. Vinson & Davis, *supra* n. 78, at 148.

202. Bryan, *supra* n. 49, at 78; Vinson & Davis, *supra* n. 78, at 148. The only instance when a potential juror would admit bias is if he or she desired to be excused from the trial. Donald E. Vinson, *Jury Trials: The Psychology of Winning Strategy* 89 (Michie Co. 1986).

203. Vinson & Davis, *supra* n. 78, at 148.

204. *Id.*

trial judge would be left with a great deal of discretion.<sup>205</sup> This is an undesirable outcome because the trial judge handles a large caseload every week.<sup>206</sup> He or she does not have the time or duty to be familiar with a particular litigant's case in the same way that the parties' attorneys are.<sup>207</sup> Further, voir dire sometimes requires lawyers to ask the venire persons personal questions.<sup>208</sup> In doing so, lawyers can inadvertently isolate or offend a venire person.<sup>209</sup> That same venire person may not demonstrate enough of a bias for the judge to strike the venire person for cause, and without a peremptory strike, that venire person easily can be seated on the jury.<sup>210</sup> In sum, a pure challenge-for-cause system gives the trial judge unbridled discretion that is better left in the hands of the litigating parties.

In conclusion, the Florida Supreme Court should not adopt the Third District's position because doing so would wade into an area that is wholly distinguishable from race and gender. First, religion is more indicative of a potential juror's belief system than is race or gender.<sup>211</sup> Second, there is no history of religious discrimination in jury selection that necessitates a prohibition on religion-based peremptory challenges.<sup>212</sup> Third, most religions do not constitute a cognizable class.<sup>213</sup> Fourth, the pure challenge-for-

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205. Interview with Roberta Flowers, Prof. & Dir. of Ctr. for Excellence in Advoc. at Stetson U. College of L. (June 14, 2000); see Flowers, *supra* n. 187, at 530 (noting that "by eliminating the peremptory challenge, the Court is slowly seizing the power of jury selection from the litigants" and concluding that "[i]ts elimination will place jury selection in the hands of a trial judge applying sometimes vague or broad definitions of 'challenge for cause.' The parties will lose and so will the public.").

206. Interview, *supra* n. 205.

207. *Id.* On the other hand, lawyers have a duty "to represent their clients zealously within the bounds of the law." ABA Model Code Prof. Resp. EC 7-1. Lawyers are prevented from zealously representing their clients when only judges can exercise challenges for cause. See Flowers, *supra* n. 187, at 528-529, 530 (stating that litigants lose the protection of unbiased jury when peremptory challenges are eliminated).

208. See Vinson & Davis, *supra* n. 78, at 148 (stating that jurors can be uncomfortable revealing intimate facts about themselves to unknown people).

209. *Lewis*, 146 U.S. 370, 376 (noting that an attorney should exclude a juror who has been offended or alienated by questions during jury selection); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. Mich. J.L. Reform 981, 987 (1996) (citing *Swain*, 380 U.S. at 219-220 (noting that it is possible for an attorney to alienate a potential juror when questioning about his or her bias)).

210. *Swain*, 380 U.S. at 219-220.

211. *Supra* nn. 78-98 and accompanying text.

212. *Supra* nn. 99-131 and accompanying text.

213. *Supra* nn. 132-170 and accompanying text.

cause system is undesirable because it interferes with the guarantee of an impartial jury, deflates public confidence in the court system, rewards the lying juror, and leaves too much discretion in the hands of a trial judge.<sup>214</sup>

### III. RELIGION-BASED PEREMPTORY CHALLENGES SHOULD WITHSTAND A FREE EXERCISE CLAUSE ANALYSIS

#### A. Historical Background of Religious Free Exercise

Traditionally, the strict-scrutiny test applies to laws that allegedly limit freedom of religion.<sup>215</sup> Under strict scrutiny, the party that alleges a free-exercise violation has to demonstrate (1) a sincerely held religious belief and (2) burden by some governmental action.<sup>216</sup> Once the party establishes these two elements, the burden then shifts to the government to demonstrate (1) that there is a compelling governmental interest why it must burden this religious belief and (2) that the regulation is the least-restrictive means of achieving this interest.<sup>217</sup>

However, the strict-scrutiny test does not apply to “generally applicable” laws.<sup>218</sup> Under the United States Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>219</sup> generally applicable, religion-neutral laws need not be justified by a compelling governmental interest, even if the laws have the effect of burdening a particular religious practice.<sup>220</sup> The *Employment Division* Court held that an individual’s free-exercise right will be protected if his or her claim meets one of the following requirements: (1) the law impacting religious

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214. *Supra* nn. 170–209 and accompanying text.

215. See *Wis. v. Yoder*, 406 U.S. 205, 220–221 (1972) (finding that the state’s interest in universal education was not sufficiently compelling to outweigh the religious tradition of the Amish); *Sherbert v. Verner*, 374 U.S. 398, 402–403 (1963) (finding that the compelling state interest did not justify denial of unemployment benefits to Seventh-Day Adventist who refused to work on Saturdays).

216. *E.g.* *Yoder*, 406 U.S. at 220–221; *Sherbert*, 374 U.S. at 402–403.

217. *Yoder*, 406 U.S. at 220–221; *Sherbert*, 374 U.S. at 402–403.

218. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 878 (1990).

219. 494 U.S. 872.

220. *Id.* at 879. In *Employment Division*, a private drug rehabilitation organization fired two members of a Native American church “because they ingested peyote for sacramental purposes at a [religious] ceremony.” *Id.* at 874. The State denied the individuals’ unemployment benefits “because they had been discharged for work-related ‘misconduct.’” *Id.*

practice is not a neutral law of general applicability but is one that specifically targets religion,<sup>221</sup> or (2) the free-exercise right is combined with some other implicit or explicit constitutional right.<sup>222</sup> The *Employment Division* standard could effectively function as a “rational basis” test that arguably permits greater regulation of religious practice.<sup>223</sup> In 1993, Congress passed the Religious Freedom Restoration Act<sup>224</sup> in response to *Employment Division*. The Act’s purpose was “to restore the compelling interest test” and “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”<sup>225</sup> Ultimately, RFRA was intended to recreate the standard that existed before *Employment Division*.<sup>226</sup> However, the Supreme Court later deemed RFRA inapplicable to the states.<sup>227</sup> In response to the striking down of RFRA, Florida enacted its own Religious Freedom Restoration Act.<sup>228</sup>

Few cases explicitly address a juror’s free-exercise cause of action.<sup>229</sup> Some cases have implied that the juror’s free-exercise rights warrant constitutional protection.<sup>230</sup> However, no case draws a significant link between free-exercise claims and religion-based peremptory challenges.<sup>231</sup> Should this issue arise in the Florida courts, it would be a case of first impression.

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221. *Id.* at 885.

222. *Id.* at 878–879. Under *Employment Division*, the free exercise claim cannot stand alone in a court of law. The appellant must combine his or her free-exercise violation with a second, implicit or explicit constitutional right, for example, that of free speech, in order to be granted protection. *Id.* at 881.

223. 42 U.S.C. § 2000bb (2000).

224. *Id.*

225. *Id.*

226. *See id.* (stating that its goal was to restore the rule of *Yoder*, 406 U.S. 205, and *Sherbert*, 374 U.S. 398).

227. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997).

228. Fla. Stat. §§ 761.01–761.05.

229. *See e.g. Purcell*, 18 P.3d at 121 (noting that allowing religion-based peremptory challenges “would condition the [juror’s] right to free exercise of religion upon a relinquishment of the right to jury service”); *State v. Fisher*, 686 P.2d 750, 772 (Ariz. 1984) (rejecting the defendant’s claim that jurors’ free-exercise rights were violated when excused due to religious convictions because jurors admitted they could not remain impartial); *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 645–646 (Ark. 1965) (finding “no immediate, grave, or present danger” that justified infringement of free exercise of religion when the school-age appellants failed to be vaccinated against small pox).

230. *See e.g. Purcell*, 18 P.3d at 121; *Fisher*, 686 P.2d at 772; *Wright*, 385 S.W.2d at 646.

231. *But see Casarez*, 913 S.W.2d at 494 (noting that free-exercise rights and equal-protection rights are “virtually indistinguishable”; therefore, the same standard should be applied to both claims). Most scholars have approached this subject from an Equal Protec-

### B. Juror's Free-Exercise Cause of Action

Whenever a litigant exercises a religion-based peremptory challenge against a juror, the juror has a possible cause of action under the Free Exercise Clause.<sup>232</sup> To have a valid free-exercise claim, the juror must meet several requirements.<sup>233</sup> First, the litigant must establish that he or she has standing to bring the claim on behalf of the juror.<sup>234</sup> It is well settled that litigants have standing to raise an equal-protection claim on a juror's behalf; therefore, courts would probably accept the argument that the same rule would apply when the juror's free-exercise rights allegedly have been violated.<sup>235</sup> "Second, the government[al] action must substantially interfere with the juror's free exercise rights."<sup>236</sup> Both criminal and civil litigants qualify as state actors and are prohibited from exercising race-based peremptory challenges.<sup>237</sup> Also, Congress has defined "government and government action" in a broad way.<sup>238</sup> Therefore, whenever a litigant exercises a peremptory challenge, this constitutes state action.<sup>239</sup> Under this Comment's hypothetical, Lisa has standing to bring a free-exercise cause of action on behalf of John if John is struck from the jury pool because he is Catholic.

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tion Clause perspective. *See generally* Chambers, *supra* n. 177, at 570 (claiming that *Batson* and *J.E.B.* should not be extended to prohibit religion-based peremptory challenges based on an Equal Protection analysis); Dave Harbeck, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 Minn. L. Rev. 689, 689 (1993) (evaluating peremptory challenges under the Equal Protection Clause); Kreisher, *supra* n. 60, at 131 (arguing that because religion is different from race and gender, the equal-protection analysis should not apply to religion, and dismissing the applicability of the Free Exercise Clause); Christopher J. Scanlan, *Casarez v. State: Texas Draws a Line in the Sand and Refuses to Extend Batson to Religion-Based Peremptory Challenges*, 49 Baylor L. Rev. 233, 235 (1997) (arguing that religion-based peremptory challenges violate the Equal Protection Clause); Melissa Roth Triedman, Student Author, *Extending Batson v. Kentucky to Religion-Based Peremptory Challenges*, 4 S. Cal. Interdisc. L.J. 99, 133 (1995) (concluding that religion-based peremptory challenges are unconstitutional under equal protection); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 Colum. L. Rev. 725, 727 (1992) (analyzing jurors' rights in an equal-protection context).

232. Furst, *supra* n. 21, at 732.

233. *Id.* at 730.

234. *Id.*

235. *Id.* at 731.

236. *Id.*

237. *Id.* at 732.

238. *Id.*

239. *Id.*

Once the juror establishes a valid free-exercise claim, the court may use one of two possible standards of review. First, the court may use the rule of “general applicability” set forth in *Employment Division*.<sup>240</sup> Second, the court may apply the strict-scrutiny standard under Florida’s Religious Freedom Restoration Act.<sup>241</sup> In states that do not have their own version of RFRA, the *Employment Division* rule may apply.<sup>242</sup> However, because Florida’s RFRA specifically protects against any violation of free exercise, even if there is a generally applicable law, the *Employment Division* rule will not be a viable argument. While RFRA demands stricter scrutiny,<sup>243</sup> the court may still find that religion-based peremptory challenges are constitutional.

### C. Florida’s RFRA

Florida’s RFRA states that the government should not substantially burden the free exercise of religion without compelling justification.<sup>244</sup> Even under the Florida RFRA, religion-based peremptory challenges withstand a free-exercise challenge because laws permitting peremptory challenges do not substantially burden the juror’s ability to freely exercise his or her religion.<sup>245</sup>

The Florida Rules of Civil Procedure permit the use of peremptory challenges. The Rule states in relevant part:

Each party is entitled to [three] peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis

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240. *Employment Division*, 494 U.S. at 878–880; *supra* nn. 220–222 and accompanying text.

241. Fla. Stat. §§ 761.01–761.05.

242. Under *Employment Division*, the juror’s free-exercise claim should fail. When a juror brings a free-exercise claim, the juror is effectively alleging that his or her free-exercise rights have been violated by state action. The state legislation that permits the use of peremptory challenges is the ultimate “state actor” because it permits the striking of that juror during the voir dire process. The *Employment Division* rule permits any law that is content neutral and of general applicability to be upheld as long as it does not violate an individual’s free-exercise rights. *Employment Division*, 494 U.S. at 879–881.

243. Not all states have enacted an RFRA. Because Florida has an RFRA, it likely would supercede the *Employment Division* rational basis test.

244. Fla. Stat. § 761.03.

245. See *supra* nn. 257–258 and accompanying text.

of [three] peremptory challenges to each party on the side with the greater number of parties.<sup>246</sup>

This type of statute is typical of those in other states.<sup>247</sup> To meet the substantial-burden requirement, the litigant bringing a free-exercise claim on behalf of the venire person must establish that the law that permits striking that venire person substantially interferes with the venire person's religious freedom. Under our hypothetical fact pattern, Lisa would have to demonstrate that John's inability to serve on a jury substantially burdens his exercise of tenets in the Catholic faith.

It is unlikely that a venire person of any religion would be able to meet the substantial-burden requirement.<sup>248</sup> In *First Baptist Church of Perrine*, the church sued the county, alleging that the county's zoning ordinances, which prohibited the church from expanding its church-related school, restricted the church's religious freedom.<sup>249</sup> The church argued that having a religion-based school was central to its ministry, and expanding the school was important.<sup>250</sup> In determining whether the ordinance violated the church's free exercise of religion under the U.S. Constitution's Free Exercise Clause and the Florida RFRA, the court first noted that "the ordinance must regulate religious conduct, not belief[s]."<sup>251</sup> The court reasoned that the county's zoning ordinances were completely "secular in purpose and effect."<sup>252</sup> There was no evidence that the ordinances were "aimed at impeding religion," were "based on disagreement with religious beliefs or practices," or had "negatively influence[d] the pursuit of religious activity or [the] expression of religious belief."<sup>253</sup> The court also found that the zoning ordinances would not prevent or seriously inhibit the Church's ability to provide a religious education, even if its religion required it to provide religious education.<sup>254</sup> Further, the Court reasoned that the county "clearly has a compelling interest in en-

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246. Fla. R. Civ. P. 1.431 (2002).

247. *E.g.* Cal. R. Civ. P. § 170.6 (2002); Ill. R. Civ. P. 1001.5 (2002).

248. *E.g.* *First Baptist Church of Perrine*, 768 S.2d at 1116–1117.

249. *Id.* at 1115–1116.

250. *Id.* at 1115. The Church intended to expand the kindergarten-through-sixth-grade school to include seventh and eighth grades. *Id.*

251. *Id.* at 1117.

252. *Id.*

253. *Id.*

254. *Id.*

acting and enforcing fair and reasonable zoning regulations.”<sup>255</sup> In conclusion, the Court found that the zoning board’s decision to refuse the Church’s application for an exception did not violate the Florida RFRA.<sup>256</sup>

Like the zoning ordinance in the *First Baptist Church of Perrine*, laws permitting peremptory strikes are completely secular in purpose and effect. No evidence indicates that the legislature promulgated the statutes to impede any religious practice.<sup>257</sup> Indeed, there are no religious practices that require participation in jury selection as a tenet of the religion. John would certainly not be able to show that the Catholic Church requires participation in jury selection.<sup>258</sup> Because Lisa will not be able to establish this first requirement of a Florida RFRA claim, the court should not consider the merits of the case.

#### IV. CONCLUSION

This Comment has illustrated that religion-based peremptory challenges withstand constitutional scrutiny under both the Equal Protection and Free Exercise Clauses. Due to Florida’s current trend toward eroding peremptory challenges, it appears that the Florida Supreme Court is ready to deem religion-based peremptory challenges unconstitutional. However, religion-based peremptory challenges should be allowed because they are distinguishable from those based on race and gender. First, while race and gender are immutable qualities, religion is a choice; therefore, it is more indicative of a person’s belief system and values.<sup>259</sup>

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255. *Id.* at 1118.

256. *Id.*

257. A related issue is whether laws permitting peremptory challenges violate the Establishment Clause. The Establishment Clause requires “that government should not prefer one religion to another, or religion to irreligion.” *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994). Laws permitting the use of peremptory challenges have a secular purpose. They operate to remove extremes of impartiality from both sides of a case. *Swain*, 380 U.S. at 221–222. Both litigants are allowed an equal number of peremptory challenges to strike jurors for any reason whatsoever. *Scruggs*, *supra* n. 2, at 551. While some jurors may be struck based upon their religiousness or irreligiousness, this does not constitute government preference of religiousness over irreligiousness. The same peremptory strikes could be used to eliminate jurors based on age or wealth. *Id.* Therefore, the Establishment Clause should not prevent the Florida Supreme Court from upholding religion-based peremptory challenges.

258. Nothing in the Catholic Church teachings require jury participation. *See e.g.* Sup. Pontiff John Paul II, *supra* n. 4 (making no mention of jury participation).

259. *Kreisher*, *supra* n. 62, at 167–169.



Second, this country does not have a history of religious discrimination in the jury-selection process that is analogous to its history of racial or gender discrimination in jury selection.<sup>260</sup> Third, the alternative, challenge-for-cause system would interfere with providing litigants an impartial jury, diminish public confidence in the court system, enable lying jurors to manipulate the voir dire process, and leave too much discretion in the hands of the court as opposed to the litigants.<sup>261</sup> Fourth, many religions do not meet the Florida Supreme Court's requirement of a "cognizable class," which the Court has used in its previous peremptory-challenge analysis.<sup>262</sup>

Alternatively, a free-exercise analysis could apply to religion-based peremptory challenges. Under the *Employment Division* test, religion-based peremptory challenges should survive because they are executed based on generally applicable, religion-neutral laws. Although free-exercise claims are subject to greater scrutiny under Florida's RFRA,<sup>263</sup> a litigant cannot establish that a religion-based peremptory challenge substantially interferes with his or her free-exercise right to sit on a jury.

In conclusion, the Florida Supreme Court should not extend precedent that renders race-based, gender-based, and ethnicity-based peremptory challenges unconstitutional to prohibit religion-based peremptory challenges.

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260. *Id.* at 169–170.

261. *Supra* nn. 171–210 and accompanying text.

262. *Joseph*, 636 S.2d at 779; *supra* nn. 171–210 and accompanying text.

263. Fla. Stat. §§ 761.01–761.05.