

No. 17-15470

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORRINE BROWN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 3:16-cr-00093-TJC-JRK-1

**EN BANC BRIEF OF NEBRASKA, ARKANSAS, GEORGIA,
KENTUCKY, LOUISIANA, MISSISSIPPI, SOUTH DAKOTA, AND
TEXAS AS AMICI CURIAE IN SUPPORT OF DEFENDANT-
APPELLANT AND REVERSAL**

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**Certificate of Interested Persons and
Corporate Disclosure Statement**

Under 11th Cir. R. 26.1-1 through 26.1-3, undersigned counsel certifies that the Certificate of Interested Persons filed by Defendant-Appellant on January 30, 2020, is complete with the following exceptions:

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Statement of the Issues

1. Whether the district court committed reversible error when it dismissed Juror 13.

2. Whether the district court's decision will exclude from jury service, and risk other adverse effects on, religious people who believe that God communicates with them.

Interest of Amici Curiae

Amici Curiae States of Nebraska, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Dakota, and Texas file this brief in support of Defendant-Appellant seeking reversal of the district court's decision to disqualify Juror 13. Amici file this brief under Fed. R. App. P. 29(a)(2) and 11th Cir. R. 35-8, both of which authorize States to file amicus briefs "without the consent of the parties or leave of court." Amici States have an interest in ensuring that no classes of their citizens, including people of faith who believe that God communicates with them, are illegitimately excluded from jury service. Because the district court's decision threatens to unfairly exclude these religious individuals, Amici States urge this Court to reverse.

Introduction and Summary of the Argument

Juror 13 is a man of faith who believes that God communicates with him. When another juror made Juror 13's faith an issue during deliberations, Juror 13 repeatedly affirmed that he was relying on the evidence and following the court's instructions. In fact, he said that his religious beliefs compel him to do that. Juror 13's undisputed actions also confirmed that he was following the court's instructions. He deliberated with his fellow jurors for multiple days, did not mention his religion after day one, and did not obstruct the deliberative process.

Despite all this, the district court removed Juror 13 because he prayed for guidance during deliberations and said that he believed the Holy Spirit told him that the defendant was not guilty. The district court held that this comment was *per se* disqualifying, declaring that it alone established *beyond a reasonable doubt* that there was *no possibility* Juror 13 was relying on the evidence. That is reversible error because ample undisputed facts demonstrate that Juror 13 was indeed following the court's instructions and relying on the evidence.

If affirmed on appeal, the district court's holding poses significant concerns for religious people who believe that God communicates with

them. It exposes them to adverse treatment during jury service and deliberations. Secular jurors may announce that their “gut” tells them the defendant is telling the truth and is not guilty. But religious jurors may not say that they believe the inner voice they attribute to the divine told them the same thing. The district court’s decision is thus founded on an inherent mistrust of, and suspicion toward, people of faith. This Court should not perpetuate that error on appeal.

Affirming the district court would result in the widespread exclusion from jury service of religious people who believe that God communicates with them. Under the district court’s logic, attorneys selecting jurors can ask about religious issues—like whether prospective jurors believe that God communicates with them and whether they plan to seek divine guidance when deciding the case—and remove jurors for cause based on their answers. Then during deliberations, disgruntled jurors can use religious jurors’ mention of divine guidance to seek their disqualification. This risk of mid-deliberation removals will lead jurors with sincere religious beliefs to silence themselves and avoid mentioning their faith. The potential for mischief will even extend post-judgment because, under the district court’s reasoning, religious references like Juror 13’s

are evidence of an improper “outside” influence that threatens to overturn a final judgment.

This Court can avoid these all adverse consequences by reversing the district court’s clearly erroneous application of the governing beyond-a-reasonable-doubt standard. Doing so will ensure that people of faith who believe that God communicates with them are not unfairly excluded from jury service—that they remain equal participants in this vital democratic exercise entrusted to the American people.

Argument

I. The district court committed reversible error because the facts did not establish beyond a reasonable doubt that Juror 13 was ignoring the evidence.

Federal courts of appeals, including this circuit, have adopted an exceedingly demanding standard for removing a juror during deliberations. Relying on its sister circuits, this Court has established that “a juror should be excused only when no ‘substantial possibility’ exists that she is basing her decision on the sufficiency of the evidence.” *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (citing *United States v. Thomas*, 116 F.3d 606, 621–22 (2d Cir. 1997), and *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). Clarifying this language,

this Court explained that the words “substantial possibility” are “interchangeable” with the phrases “any possibility” or “tangible possibility,” 271 F.3d at 1302 n.14, and that this “tough legal standard” is “basically a ‘beyond reasonable doubt’ standard,” *id.* at 1302; *see also Brown*, 823 F.2d at 597 (disqualification not appropriate “when the record evidence discloses a possibility that the juror” is basing his views on the evidence). While this Court reviews a removal decision for clear error, that analysis must be viewed “in the light of a beyond a reasonable doubt standard.” *Abbell*, 271 F.3d at 1304.

Under these principles, the district court could not have removed Juror 13 unless the facts established *beyond a reasonable doubt* that there was not *any* possibility he was basing his decision on the evidence. The facts here did not come close to satisfying that stringent standard, and the district court clearly erred in saying that they did.

Juror 13 repeatedly affirmed his reliance on the law, evidence, and instructions. Before trial began, he “swore to ‘render a true verdict, according to the law, evidence, and instructions of this court, so help [him] God.’” Panel Slip Op. at 6 (alteration in original). And when summoned from deliberations for a colloquy with the judge, Juror 13

confirmed no less than four times that he was following the court's instructions and relying on the evidence. Doc. 182 at 40 ("I've been following and listening to what has been presented and making a determination from that, as to what I think and believe."); *id.* at 40–41 ("I told [the other jurors] that in all of this, in listening to all the information, taking it all down, I listen for the truth"); *id.* at 42 (answering affirmatively when asked if he had been basing his "decision only on the evidence presented during the trial and follow[ing] the law as [the court] explained it"); *id.* (unequivocally affirming that his "obvious sincere religious beliefs" were not "at all . . . impeding [his] ability to base [his] decision solely on the evidence in the case" or to "follow[] the law").

The pinnacle of these assurances was Juror 13's declaration that his religious beliefs *actually compel* him to listen to the evidence and decide the case based on it: "My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." Doc. 182 at 42. If there were any doubt whether what Juror 13 believed the Holy Spirit told him conflicted with his obligation to follow the evidence, this statement erased it. As the panel

dissent said, “it is hard to imagine what kind of evidence could prove more convincingly that a deeply religious juror should not be dismissed.” Panel Slip Op. at 74.

And it is not just Juror 13’s words but also his actions that confirm his willingness and ability to follow the court’s instructions. He mentioned the guidance that he believed came from the Holy Spirit on the first day of deliberations, but all indications are that he was continuing to deliberate with his fellow jurors throughout the first two days and did not mention religion at all during the second day. According to the panel majority, even the complaining juror—Juror 8—told the district court that “it appeared [Juror 13] had been deliberating” and that he was not “interfering with her own ability to deliberate in compliance with court’s instructions.” Panel Slip Op. at 9–10.

Despite this undisputed evidence confirming that Juror 13 was following the court’s instructions and relying on the evidence, the district court nonetheless excluded him simply because of his comment about the Holy Spirit. Doc. 182 at 59 (district court referring to it as a “disqualifying statement”). The court viewed that statement as inherently “inconsistent

with the instructions . . . that this case be decided solely on the law . . . and the evidence in the case.” *Id.* The court was mistaken.

Only once did the district court allow Juror 13 to give any context to his reference to the Holy Spirit, and here is what he said: “I told—I told [the other jurors] that—that I prayed about this, *I have looked at the information*, and that I received information [from the Holy Spirit] as to what I was told to do *in relation to what I heard here . . . this past two weeks.*” Doc. 182 at 41 (emphasis added). Twice in this sentence—when (1) he said that he “looked at the information” in the case and (2) he confirmed that the divine guidance was “in relation to what [he] heard” during the past two weeks of trial—Juror 13 explicitly tied what he believed he heard from the Holy Spirit to the evidence in the case. This is consistent with Juror 13’s many explicit assurances (recounted above) that he was following the court’s instructions and relying on the evidence.

Even the panel majority conceded that “one reasonable construction” of the above-quoted sentence is that Juror 13 said “he was basing his verdict on the evidence.” Panel Slip Op. at 30. This concession fatally undermines the panel’s decision. Since it was admittedly reasonable to conclude that Juror 13 was affirming his reliance on the evidence, it was

impossible to conclude beyond a reasonable doubt, as the district court must to disqualify him, that there was no chance he was relying on the evidence.

Under this reasonable interpretation of what Juror 13 told the district court, the divine guidance that he believed he received was not independent of—or in spite of—the evidence but rather was based on it. And as both the district court and the panel majority affirmed, there is nothing improper about jurors praying for and thinking they receive guidance in evaluating the evidence. Doc. 182 at 60; Panel Slip Op. at 42. The district court thus committed reversible error in dismissing Juror 13. *See Brown*, 823 F.2d at 597 (reversing the district court’s decision to dismiss a juror because the “ambiguous record” left open “the possibility” that the juror was relying on the evidence).

To be clear, Amicus States are not suggesting that trial courts must allow religious people to serve on a jury if they insist on following what they believe they hear from God “irrespective of the evidence” (to use the panel majority’s favorite phrase, *see* Panel Slip Op. at 2, 4, 27, 31, 31 n.3, 32, 33 n.4, 38, 43), or worse yet, contrary to the evidence. A trial court is well within its authority to remove jurors who say they will do that. But

neither the government nor the district court established beyond a reasonable doubt that Juror 13 fell into that camp. In fact, the record points decidedly in the other direction. It shows Juror 13 to be a conscientious and religiously devout juror whose faith compelled him to rely on—not disregard—the evidence presented at trial.

The district court tried one final tactic—questioning Juror 13’s candor and demeanor—to justify its decision to disqualify him. In one place, the district court faulted Juror 13 for his alleged “hesit[ance] at first to explain . . . how his religious views ha[d] come to the fore during deliberations.” Doc. 182 at 60. Assuming Juror 13 really did hesitate, which is far from clear on the record, this criticism ignores that before the district court asked Juror 13 about any religious comment he made, the judge cut him off when responding to a prior question and admonished him: “I don’t want to hear anything about the deliberation.” *Id.* at 39–40. It is the height of unfairness—and constitutes clear clear—to criticize a juror who was told not to disclose “anything about the deliberation” because he was supposedly reluctant to recite an exact statement that he made during deliberations.

Later, in denying the defendant's motion for a new trial, the district court added that it was not convinced by Juror 13's assurances that he was following the court's instructions. Panel Slip Op. at 19 (summarizing the district court's decision). This justification is also difficult to credit because it ignores three critical facts. First, Juror 13's assurances went beyond generic affirmations; he unequivocally stated that his religious beliefs compel him to rely on the evidence. Second, the complaining juror said that Juror 13 was deliberating with the group, that he did not mention his religion after the first day, and that he was not obstructing the deliberative process. Third, the district court never asked Juror 13 pointblank whether he would follow the guidance that he believes came from the Holy Spirit *even if the evidence did not support it*. The district court's failure to ask this obvious clarifying question makes it unreasonable to doubt Juror 13's assurances.

In the end, the record contains far too much evidence that Juror 13 was relying on the evidence to sustain the district court's conclusion that he unquestionably was not. This Court should reverse.

II. Affirming the district court’s decision would exclude from jury service, and risk other adverse effects on, religious people who believe that God communicates with them.

Affirming the district court’s decision will be detrimental to many people of faith—namely, those who believe that God communicates with them. The lower court’s reasoning subjects them to adverse treatment and communicates skepticism and mistrust of their faith. If affirmed, it will drive them from jury service, chill their speech during deliberations, and risk using their sincere faith to undermine settled judgments.

A. The district court’s decision subjects many people of faith to adverse treatment.

The district court’s reasoning adversely affects people of faith by treating Juror 13’s Holy Spirit comment as per se disqualifying. Doc. 182 at 59 (“[T]his statement . . . is a disqualifying statement.”); *id.* at 60 (identifying that statement as not “consistent with jury service as we know it”). That comment was so problematic, according to the district court, that it established beyond a reasonable doubt that Juror 13 was ignoring the evidence. And it did so despite Juror 13’s repeated assurances that he was relying on the evidence and his explicit affirmation that his religious beliefs require him to do exactly that.

This sends a number of disparaging messages about people of faith who believe that God communicates with them. For one, it indicates that what they believe they hear from God in the context of jury service is *necessarily* inconsistent with facts, evidence, or reason. For another, it suggests that courts cannot trust religious believers' solemn promises to comply with court directives but rather must assume that they are unable to follow through on those assurances.

A simple example illustrates that the district court's ruling subjects people of faith to disparate treatment. Suppose that a hypothetical juror, instead of saying that he believed the Holy Spirit told him that the defendant was not guilty, announced that his "gut" told him that. If that juror had reiterated his willingness and ability to rely on the evidence, he surely would not have been disqualified.

Jurors, after all, are free to rely on their instincts and "common sense" in deciding what to accept and what to reject. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (authorizing jurors to "undertake[] deliberations that are honest . . . and based on common sense"); Panel Slip Op. at 7 (instructing jurors to consider "reason and common sense"). But the district court's ruling makes clear that jurors sorting through the

issues cannot openly reference the inner voice that they attribute to the divine. Such remarks, in the district court’s words, are a “bridge too far.” Doc. 182 at 60. Yet courts have no business jumping to adverse conclusions about religious jurors who speak in the language of their faith. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (noting that adjudicators cannot base a ruling “on a negative normative evaluation of the particular [religious] justification” for a decision) (cleaned up). This is particularly true when courts will allow jurors to express similar sentiments in secular terms. *See id.* at 1730–31 (denouncing disparate treatment between a religious decision and a secular one).

Because the district court’s rationale rests on skepticism toward religion, affirming it will adversely affect people of faith.

B. Affirming the district court’s decision will lead to the exclusion and silencing of many religious jurors.

“Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). “[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench

of judicial authority [and] invests [them] with the direction of society.” *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (quoting Alexis de Tocqueville, 1 *Democracy in America* 334–37 (Schocken 1st ed. 1961)). Jury service “affords ordinary citizens a valuable opportunity to participate” in a key “process of government.” *Id.*

Yet affirming the district court’s decision will exclude many religious believers from jury service, depriving them of this valuable opportunity to participate in their government. The exclusion will occur throughout the legal process—beginning during jury selection and reaching, as in this case, to jury deliberations. In addition, the district court’s logic poses post-judgment concerns, opening the door for courts and litigants to use religious jurors’ comments to overturn final verdicts.

1. At the juror-selection stage, attorneys would have a new playbook for removing religious believers for cause. Lawyers may do so once they learn that a juror plans to pray for divine guidance and listen to the guidance that she thinks she receives, even if that juror promises to base her decision on the law and evidence. Indeed, as the panel dissent observed, under the district court’s decision, “it would be an abuse of discretion for the trial court *not* to strike these potential jurors for cause.”

Panel Slip Op. at 114–15. That necessarily follows from enshrining in this Court’s jurisprudence the rule that Juror 13’s reference to what he believes he heard from the Holy Spirit “establishes beyond a reasonable doubt that he is unfit to serve.” *Id.* at 115.

This pretrial exclusion of religious jurors will happen irrespective of any protection that *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny afford people of faith. *See State v. Hodge*, 726 A.2d 531, 552–53 (Conn. 1999) (concluding that “the equal protection clause of the fourteenth amendment to the United States constitution prohibits the exercise of a peremptory challenge to excuse a venireperson because of his or her religious affiliation”). *But see State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to peremptory challenges based on religion). After all, the district court’s ruling justifies removing certain believers for cause, making it unnecessary to use peremptory challenges against them. In effect, that decision “creates an end-run around the protections of *Batson*.” Panel Slip Op. at 114 (dissenting opinion).

2. This exclusion of religious jurors will not be confined to attorneys seeking to remove them before trial. It will also reach post-trial deliberations, as the facts here demonstrate. If deliberating jurors reference

divine guidance that they think they received, they risk having the district court remove them. All that needs to happen is for a fellow juror who dislikes a religious reference—indeed, one juror is all that came forward here—to bring the issue to the judge. *See Abbell*, 271 F.3d at 1302 (recognizing the risk that jurors might illegitimately seek to disqualify “one or two holdouts”).

Additionally, one juror might seek to disqualify another by eliciting comments about divine guidance. If the second juror takes the bait, she is doomed once the first juror presents her comments to the judge. Under the district court’s reasoning, even persistent assurances that the religious juror is relying on the evidence—and that her religion *requires* her to do so—will not be enough to save her.

To avoid these disqualification risks, people of faith will be chilled in their deliberations in ways that secular jurors are not. As mentioned above, secular jurors may appeal to their “gut” during deliberations, but religious jurors cannot mention guidance that they believe came from God. Of course, fellow jurors are free to disregard a mention of the divine, just as they may dismiss secular jurors’ appeal to their innate sense. But deliberations are supposed to be “honest, candid, [and] robust,” *Peña-*

Rodriguez, 137 S. Ct. at 861, and jurors “are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives,” *id.* at 874 (Alito, J., dissenting). Religious believers’ participation in this great exercise of democracy should not be more circumscribed than their secular counterparts.

3. Also concerning is that the district court’s logic will risk allowing attorneys to use religious jurors’ comments to overturn settled judgments. The Federal Rules of Evidence generally prohibit jurors, in a proceeding inquiring “into the validity of a verdict,” from testifying about (1) “any statement made or incident that occurred during the jury’s deliberations,” (2) “the effect of anything on [their] vote,” or (3) their “mental processes concerning the verdict.” Fed. R. Evid. 606(b)(1). But an exception allows jurors to testify about whether “an *outside influence* was improperly brought to bear on any juror.” Fed. R. Evid. 606(b)(2)(B) (emphasis added).

Because the district court characterized the divine guidance that Juror 13 believes he received as “an outside force,” Doc. 182 at 60, its decision threatens to reopen verdicts in cases where a juror prayed for divine guidance and discussed it during deliberations. The risk that

attorneys will exploit religious believers and their comments to overturn judgments is unsettling. And it will prompt lawyers seeking finality for their clients to eliminate these people of faith during jury selection.

4. The panel majority said that its opinion would not result in the exclusion of religious jurors who believe that God communicates with them because its holding is “a very narrow one, based on the particular facts of this record.” Panel Slip Op. at 41. On the contrary, affirming the district court’s ruling would establish a sweeping rule: that juror references to what they believe to be divine guidance are per se disqualifying, even when the juror repeatedly affirms his willingness and ability to follow the law and evidence, and even when he insists that his faith actually compels him to rely on the evidence. Thus, the majority’s attempt to assuage these concerns was unpersuasive—cold comfort to people of faith who face unfair exclusion from jury service under the district court’s ruling.

Conclusion

For the foregoing reasons, Amici States urge this Court to reverse the district court’s decision.

Respectfully submitted this 23rd day of November, 2020.

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Certificate of Compliance

I hereby certify (1) that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 3,905 words, excluding the items exempted by Fed. R. App. P. 32(f), and (2) that this brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it uses a 14-point proportionally spaced typeface (Century Schoolbook).

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Certificate of Service

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

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