No. _____

In the

Supreme Court of the United States

ALI ELMEZAYEN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether, consistent with the Sixth Amendment right to an impartial jury, a district court may refuse to inform the venire during jury selection about key emotional issues in the case, such as allegations of domestic abuse and of disabled children being murdered for profit, or otherwise do anything to meaningfully determine if the presence of such core, inflammatory allegations would make potential jurors unable to be fair and impartial, and instead rely solely on general questions about potential jurors' personal experiences.

Statement of Related Proceedings

- *United States v. Ali Elmezayen*,
  Case No. 18-cr-00809-JFW (C.D. Cal.)

- *United States v. Ali Elmezayen*,
  Case No. 21-50057 (9th Cir.)

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Petition for Writ of Certiorari

Ali Elmezayen petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the Court of Appeals is unpublished and is included in the Appendix at App. 1-10.[1] The District Court made no relevant written ruling; its oral rulings are included in the transcript excerpts in the Appendix at App. 11-29 and 56-62.

[1] "App. xx" refers to a page in the attached Appendix. "xx-ER-xx" refers to a volume and a page in the appellant's excerpts of record electronically filed in the Ninth Circuit on March 14, 2022 (Docket No. 19). "Ex. 53" refers to a video exhibit admitted at trial and submitted to the Ninth Circuit on July 25, 2002 (Docket No. 41).

Jurisdiction

The Ninth Circuit Court of Appeals entered judgment on January 19, 2023. (App. 1.) This petition is filed within 90 days of the Ninth Circuit's judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

Constitutional Provision Involved

United States Constitution, Amendment VI, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Introduction

This Court has described voir dire as playing a "critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored," and has warned that "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). And yet here the Ninth Circuit treated those crucial statements of rights as mere preface for this Court's acknowledgments that the trial court will have "ample discretion" over voir dire. *id.* at 189, holding that the district court's discretion in voir dire runs so far as to make its rulings all but unreviewable. That hands-off approach leaves defendants in emotionally-laden cases like this one with no way to vindicate our Constitution's guarantee of an impartial jury.

This case began with an indisputable tragedy: the drowning deaths of petitioner Ali Elmezayen's two developmentally disabled sons after the family car drove off a wharf. Initially, Elmezayen was not charged with any crime, and based on the conclusions of the police investigation, two life insurance companies paid benefits. But several years later, the federal government returned to the case and charged Elmezayen with mail and wire fraud, positing

that he had purchased insurance on his family and then killed his sons, and tried to kill his domestic partner, for the insurance money. The prosecution was greatly aided by Elmezayen's once-supportive domestic partner, who turned on him after his arrest, and after the government revealed to her that Elmezayen had been in a relationship with another woman. She began producing lurid stories of abuse while at the same time claiming she knew nothing about the insurance or the proceeds. Thus, Elmezayen was thrust into trial as either a devil who had committed a heinous crime, or a tragic figure, accused of perhaps the worst thing a parent could be accused of, and with an angry, frightened ex willing to say whatever was necessary to see him ruined and herself free of trouble.

Faced with these serious charges and the emotionally-laden circumstances of the case, it was incumbent on the district court to properly vet the jury about hot-button issues. But it failed in that duty, refusing to even tell the venire that there would be allegations of long-running domestic violence and severely disabled children being murdered for profit—let alone question veniremembers as to whether they could impartially evaluate such allegations. The Ninth Circuit blessed the district court's approach, pointing to the district court's broad discretion and a couple of questions it asked about veniremembers' personal experiences with autism and domestic violence

generally. But of course, people may have strong feelings about such issues without themselves having had first-hand experiences with them. And more to the point, no one told the potential jurors that it was the children who were autistic, let alone that they were on the severely disabled end of the autism spectrum, nor that there would be allegations of a years-long campaign of domestic violence.

If our system is to damn a man as Elmezayen has been damned—as a greedy killer of his own helpless children for profit—it must afford him the fair and impartial jury that our Constitution requires. To ensure that fairness, there must be a meaningful appellate review of voir dire. The Ninth Circuit's approach dispenses with such meaningful review, treating the judge's discretion as an end to itself. Certiorari is required to ensure that the defendant's constitutional right to an impartial jury remains the goal and the outcome of voir dire.

Statement of the Case

1. *Elmezayen lived in Los Angeles with his domestic partner and three children, two of whom had severe disabilities.*

In 2000, Ali Elmezayen, his then-wife Rabab Diab, and their young son Elhussein came to Los Angeles from Egypt on visitors' visas and then stayed. (4-ER-775; 5-ER-1031-32; 5-ER-1083-84.) Once here, the couple had two more sons, both of whom were severely autistic and extremely low-functioning. (5-ER-1031-33.) The family supported itself in various ways: Elmezayen exported goods to Egypt and owned rental properties; Elmezayen and Diab worked as security guards; and they received Social Security benefits for the disabled children. (3-ER-468-69; 3-ER-528; 5-ER-1139; 8-ER-1999-2000.)

In 2009, Elmezayen and Diab legally divorced. (5-ER-1038.) Shortly afterwards, Elmezayen briefly moved out, and Diab entered into a sham marriage with a homeless man for immigration purposes. (5-ER-1039; 5-ER-1052-54; 5-ER-1090-91.) After accusing that man of domestic abuse—notwithstanding that they were not in a relationship and he did not live with her—she obtained permanent residency. (5-ER-1053-54; 5-ER-1090-91; 6-ER-1275.) She and Elmezayen then resumed living together. (5-ER-1039; 5-ER-1053.)

2. After the untimely death of his brother, Elmezayen purchased life and accidental death insurance covering himself and his domestic partner, and with much less coverage, the children.

In 2010 or 2011, one of Elmezayen's brothers fell ill and died, leaving his family destitute. (5-ER-1111; 11-ER-2518.) Elmezayen stepped in to help his brother's family financially; he also reacted to his brother's death with fear that he himself would die an untimely death and leave his family in need. (5-ER-1112; 11-ER-2519.) Elmezayen began to buy insurance for himself and his family. Between 2012-13, he purchased life or accidental death policies from eight companies for himself and Diab; three of the policies also provided much smaller coverage for their children. (9-ER-2258.) In total, there was $3,650,000 in coverage on Elmezayen, $3,150,000 on Diab, $130,000 on two of their sons, and $132,500 on the last son. (3-ER-399; 3-ER-408; 3-ER-445-446; 9-ER-2258.) Consistent with there being more coverage for Elmezayen's death, the greatest portion of the family's annual premiums were for policies covering him. (*See* 9-ER-2094; 9-ER-2145; 9-ER-2156; 9-ER-2189; 9-ER-2202; 9-ER-2205; 9-ER-2214; 9-ER-2232; 9-ER-2236; 9-ER-2259.)

3. Elmezayen's two disabled children died in 2015 as a result of a car accident in which the family car drove off a wharf with Elmezayen behind the wheel.

On April 9, 2015, Elmezayen, Diab, and the two younger children ate lunch at a Chinese restaurant, and left the restaurant holding hands. (9-ER-

2048; 9-ER-2055.) Elmezayen then drove the family to the wharf in San Pedro, California to look at large ships and buy fish. (5-ER-1062; 9-ER-2048.) At Berth 73, their older two-door sedan turned into a parking space, but instead of stopping, accelerated off the edge of the wharf and into the water. (9-ER-2053.) At least one witness initially said it appeared that the driver had confused the gas with the brake. (9-ER-2051.) As the car sank, Elmezayen and then Diab were able to free themselves, swim to the surface, and scream for help. (3-ER-615; 3-ER-631; 9-ER-2049.) But in the murky and dangerous conditions, the children were stuck in the car until divers extracted them about 12 and 18 minutes later. (3-ER-621-24; 3-ER-641-43; 9-ER-2049-50.) During the rescue efforts, Elmezayen was screaming and crying, asking officers to "shoot" him, and had to be restrained by rescue workers. (3-ER-642-43; Ex. 53; 9-ER-2053; 9-ER-2056.)

Later that night, after being informed that one of their sons was dead, Elmezayen and Diab were taken to a police station and interviewed. (4-ER-679, 9-ER-2056.) Diab told police that Elmezayen had tried to park near the water but had lost control; she thought he had missed the brake. (9-ER-2053.) She denied any problems between her and Elmezayen. (9-ER-2053.) During his interview, Elmezayen was visibly upset and could not explain what had

happened, offering various possibilities including that he might have accidentally hit the gas instead of the brake. (9-ER-2053-54.)

Around 3:00 a.m., police took Diab and Elmezayen to a second hospital, where their youngest son was being treated. After speaking with the doctor and with Diab, Elmezayen went home to contact their families in Egypt, while Diab stayed at the hospital until the child passed away the next day. (2-ER-108-09; 4-ER-826; 8-ER-2000; 11-ER-2518.)

4. After an investigation, Los Angeles County declined to prosecute Elmezayen and insurance companies paid out claims for the death of the children.

After the night of the accident, the police investigation continued. Police interviewed the couple's oldest child, Elhussein, who confirmed that the family liked to go to San Pedro to see ships, and said that Elmezayen did not physically discipline the children and that Diab and Elmezayen got along. (9-ER-2055.) Police also investigated the family's life insurance policies and learned that there was insurance on the children. (9-ER-2006.)

In February 2016, the lead detective told one of the insurance companies, AIG, that there was "no evidence to suggest anything but an accident." (4-ER-792; 5-ER-931.) That led to AIG paying a $100,000 claim for each deceased child. (5-ER-933; 10-ER-2309.) Mutual of Omaha similarly paid out a $30,000 claim for each child in July 2016. (5-ER-955.) In December

2017, the Los Angeles County District Attorney's Office issued a memorandum declining to prosecute Elmezayen. (9-ER-2005-06.)

5. More than three years after the accident, federal prosecutors brought fraud charges.

In October 2018, more than three years after the accident, the federal government charged Elmezayen, alleging a scheme to defraud by buying life insurance and accidental death insurance, then intentionally driving off the wharf to kill covering Diab and his two disabled children and collect the insurance proceeds. (9-ER-2062-65; 10-ER-2453.)

On July 18, 2019, shortly before the federal trial, Los Angeles County reversed its prior decision and charged Elmezayen with two counts of murder with special circumstances. (8-ER-2010.)

6. After Elmezayen was arrested, and as his affairs with other women came to light, his domestic partner turned against him, cooperated with the prosecution, and began alleging domestic abuse; that alleged abuse became a key theme of the prosecution's case.

Diab, who by the point of trial was furious at Elmezayen over his affairs with other women, (5-ER-1102-06), and also had her properties and immigration status to protect, cooperated with the federal prosecution. She began to allege a years-long campaign of physical abuse by Elmezayen against her. For instance, at trial she alleged several specific abusive incidents, such as a 2007 argument during which Elmezayen purportedly pushed and choked

her, an undated incident in which he allegedly menaced her with a fruit-knife; and another incident in which he allegedly slapped, hit, and kicked her for making him late for work. (5-ER-1044-46.) She also claimed that during the holiday of Eid in 2014, she vomited and passed out at the mosque after drinking a beverage that Elmezayen prepared for her, and then woke up to find the family near the water in San Pedro. (5-ER-1055-59.) Diab claimed that she did not mention the allegations of abuse and about Eid to authorities after the accident, because she was worried that if she did, Elmezayen might cause trouble with her permanent residency.[2] (5-ER-1051-52.)

Diab and the government then referenced that alleged abuse to explain away otherwise difficult areas of her testimony, such as why she participated in the sham marriage that netted her permanent residency; why there were photos of her hugging Elmezayen and smiling happily with him only days after he allegedly drugged her on Eid; and why her notarized signature appeared on forms for insurance claims she testified that she knew nothing about. (AOB

[2] Notably, in the numerous recorded jail calls between Elmezayen and Diab, which continued to the eve of trial, although Diab upbraided Elmezayen for his infidelity and his "stupid mistake" with regard to insurance, she never accused him of physical abuse, drugging her on Eid, or murdering their children. (5-ER-1077-78; 5-ER-1093-1102; 6-ER-1276-77; 9-ER-2277-78; 9-ER-2282; 9-ER-2286; 10-ER-2307.)

46-47; 5-ER-1052-53; 5-ER-1072-74; 5-ER-1126-27; 7-ER-1572.) Those kinds of things were just "what happens" in abusive relationships. (See 7-ER-1572.)

Indeed, Diab's purported lack of knowledge of the insurance purchases was a key prosecution theme at trial. Despite having signed forms claiming proceeds from the death of the children, Diab claimed she hadn't known about insurance on the children; that she only learned about it in 2017, after she and Elmezayen sued the city; and that none of the money had gone to her. (5-ER-1072-77; 5-ER-1116-18; 5-ER-1121; 5-ER-1128.)[3] The government pursued this theme in its arguments, arguing that the insurance purchases were nefarious because Elmezayen had hidden the purchases and proceeds from Diab. (5-ER-1072-74; 5-ER-1127; 7-ER-1496.)

The government also used the abuse allegations to try to show Elmezayen was depraved enough to have undertaken the charged scheme. It

[3] Some of the cracks in her story were presented to the jury. For instance, Diab's mother admitted on the stand that part of a house in Egypt purchased with the insurance proceeds belonged to Diab (5-ER-1006-08)—Elmezayen himself could not travel to Egypt since he lacked any immigration status—and the defense also confronted her with a 2017 voicemail in which she threatened Elmezayen that if he did not sign over contracts on the house and an apartment in Egypt to her, "You know what I am going to do." (5-ER-1128-29; 10-ER-2437.) It demonstrated that shortly after, a $25,000 purchase contract for an apartment in Egypt was executed with her as the buyer. (5-ER-1131-32; 10-ER-2414-16.) But Elmezayen was unable to present his full defense on this point: his sister, who would have testified that Diab helped pick out the Egyptian house August 2015 and then oversaw its renovation, was unable to get a visa to come testify. (4-ER-899-900; 11-ER-2494-96.)

started its closing by telling jurors Elmezayen "hatched a plan" only "after years of abusing" Diab. (7-ER-1481.) It then went on to tell them that the abuse showed the accident was no accident and instead "was a long time coming." (7-ER-1481, 7-ER-1520-21.)

7. The deceased children's severe disabilities were also a key prosecution theme, with the government alleging Elmezayen chose to kill them because of their disabilities.

The children's severe disability was similarly a key prosecution theme. The government began its opening argument to the jury by emphasizing that the children were "highly autistic, nonverbal, and physically disabled," and claiming that Elmezayen had no "interest in raising them" and providing the "significant amount of love and care" they required. (3-ER 364.) Similarly, it began its closing by claiming that he hatched the insurance fraud plan to make his "young, disabled, autistic children" go away. (7-ER-1481.)

8. The defense sought voir dire on the deceased children's severe disabilities and the claims of domestic abuse, but the district court refused to voir dire on those issues or even inform the venire that they existed; instead it simply asked veniremembers if they had any experience with autism or domestic violence generally.

Anticipating that the abuse allegations and the severe disability of the deceased children would be key emotional themes at trial, the defense requested voir dire on these issues. It initially asked the district court to inquire into veniremembers' attitudes towards domestic violence allegations,

including whether veniremembers thought that a woman making domestic violence allegations should always or almost always be believed. (App. 43, App. 54.) Similarly, it requested that the venire be told that the children suffered from severe autism, so that veniremembers could evaluate whether that might interfere with their ability to be impartial. (App. 50.)

The district court mostly refused the requests. It rejected the defense's proposed questionnaire and conducted voir dire primarily through a fifteen-question jury questionnaire of its own devising. (App. 30-33, 57-62.) That questionnaire asked very broadly whether the venireperson or any member of their immediate family had experienced or witnessed domestic abuse, or had any experience with autism. (App. 33.) But the questionnaire did not inform the venire that there would be domestic violence allegations in the case, or that the deceased children were severely autistic and disabled. It also contained no inquiry into whether those without direct experience with domestic violence or autism might still have strong feelings that could affect their impartiality.

During voir dire, there were clear indications that the children's severe autism presented the potential to interfere with Elmezayen getting a fair and impartial jury. Only one venire-member admitted to having prior knowledge of the case. (2-ER-128, 2-ER-132-33.) At sidebar, she said that hearing on the news about autistic children drowning and about insurance being involved

immediately caused her to remember and prejudge the case, such that she could not be fair and impartial. (2-ER-136-37.) But despite this, the district court refused the defense's requests to inform other members of the venire about the children's severe autism or that the government's allegation would be Elmezayen killed them in part because of their disabilities. (App. 12, App. 15.) It said the basic, binary question asking if jurors had experiences with autism gave the defense everything it needed. (App. 12.)

The district court's position became muddier as voir dire continued. At one point, it acceded at sidebar to a defense request to inform a venireperson with an autistic sister that the deceased children in this case were severely autistic; that venireperson first said that knowledge might affect him but then said he could be impartial. (2-ER-274-75.) After that, the district court told four more members of the venire at sidebar that the children had been autistic. (2-ER-286-87; 2-ER-304; 2-ER-307-10; 2-ER-312-13.) The court even allowed the defense to question one of those four about how it might affect her to hear allegations that Elmezayen killed the children because of their autism—a "hard" question, according to her. (2-ER-304-05.) But despite some apparent realization that the information was necessary to allow venire-members to assess their own biases, the district court refused to inform the rest of the venire about the children's severe autism. (App. 25.)

The district court's approach to the domestic violence allegations against Elmezayen was uniformly prohibitive. It flatly refused defense requests to ask women who had experienced domestic violence about whether they could be impartial, saying that if the defense had concerns, it could use its peremptory challenges. (App. 13-14.) The court said Question 15 of its questionnaire—an attempted catch-all asking, "Do you know of any reason at all why you cannot be a completely fair and impartial juror in this case?"—obviated the need for such specific inquiries, and that additional questioning would be like accusing veniremembers of lying. (App. 16, App. 33.) Defense counsel reasonably countered that the venire knew little about the case, including not knowing that Diab would allege years of domestic violence by Elmezayen, so venire-members could hardly self-assess whether they could address the case fairly in light of such allegations. (App. 16-17. App. 23; *see also* 2-ER-129-30.) But the court steadfastly refused to alert any venire-members that there were going to be domestic violence allegations. (App. 17-19; 2-ER-198-200; 2-ER-319-21.)

9. The improperly vetted jury convicted Elmezayen at trial, and the district sentenced him to 212 years.

In addition to Diab's testimony, the government's presentation at trial included, *inter alia*, several bystanders and first responders describing the accident and its immediate aftermath, (3-ER-585-88; 3-ER-611-16; 3-ER-621-

24; 3-ER-627-31; 3-ER-634-39); testimony from investigators and a doctor about Elmezayen's statements after the accident, including about how the accident had occurred, and the lead detective's belief that Elmezayen showed signs of lying while he spoke about the accident, (4-ER-684-87; 9-ER-2124-25); testimony about the insurance and Elmezayen's actions during the insurance claim process, (3-ER-460-61; 3-ER-466; 3-ER-518; 3-ER-528; 3-ER-531-33; 3-ER-573; 8-ER-1741-46, 8-ER-1752-55; 8-ER-1813-20; 11-ER-2507-2513); testimony from Diab's mother and surviving son (5-ER-969-1011; 5-ER-1137-1157); and testimony about other emails and communications by Elmezayen, particularly concerning his attempts to find romance with other women, and jail calls in which he asked family members in Egypt to get Diab's family to intercede with her to calm her down and prevent her from turning his remaining son against him, (5-ER-1159-69; 6-ER-1234-35; 6-ER-1231-34; 6-ER-1236-38; 10-ER-2294-96; 10-ER-2298-99; 10-ER-2301).

The defense case consisted of the mortician who prepared the children's bodies testifying about Elmezayen's extreme grief and inconsolability (6-ER-1411-18); a defense investigator who introduced various photos and videos showing, for instance, Diab smiling happily and hugging Elmezayen only a few days after the purported poisoning incident on Eid that she alleged at trial (6-ER-1409-10; 10-ER-2443-46); two experts on Islamic law and Egyptian Arabic

to explain Elmezayen's urgency about making preparations for his sons' burials and to contextualize as normal within Egyptian idiom and culture some of Elmezayen's statements surrounding the accident, (6-ER-1325; 6-ER-1328-29; 6-ER-1331-32; 7-ER-1462-65; 7-ER-1473-75); and an expert on human performance in automotive accidents, who testified that the circumstances of the accident were consistent with a pedal error acceleration event in which Elmezayen confused the brake and the gas pedals, (6-ER-1343-68).

The jury convicted Elmezayen on all counts. (7-ER-1606-09.) The district court sentenced Elmezayen to 212 years of imprisonment. (2-ER-77; 2-ER-79; 2-ER-95.)

10. The Ninth Circuit affirmed the conviction, holding, inter alia*, that the voir dire was sufficient because of the two questions asking about potential jurors' experiences with autism and domestic violence generally.*

Elmezayen appealed the convictions, and a panel of the Ninth Circuit affirmed in an unpublished decision.

The panel concluded that the district court's limited voir dire was within its discretion. According to the panel, because of the latitude afforded to district courts, "additional questioning is usually unnecessary." (App. 3.) While it acknowledged that Ninth Circuit precedent requires additional questioning where the subject matter of the case "involves issues on which the public has 'strong feelings' that may 'skew deliberations," it suggested that

despite this broad language, the "strong feelings" exception might be limited to a narrow set of matters recognized in a set of older cases, namely child sexual abuse, narcotics sales, and the insanity defense. (App. 3, quoting *United States v. Jones*, 722 F.2d 528, 530 (9th Cir. 1983) (per curiam).) It concluded that because the district court informed the venire of the accusations that Elmezayen had intentionally killed his sons and had attempted to kill Diab, and then asked venirepersons for their experiences with autism and domestic violence, it had broadly addressed the issues of concern to the defense and so had not abused its discretion. (App. 3.)

The panel separately held that the district court made two evidentiary issues and maybe a third, but that ultimately the other evidence against Elmezayen was sufficient to render those errors harmless. (App. 4-7.)

Reasons for Granting the Writ

A. The Ninth Circuit's Approach to Voir Dire Reduces a Reviewing Court to a Rubber Stamp and Leaves the Right to an Impartial Jury Unprotected.

1. The Sixth Amendment guarantees criminal defendants an impartial jury, which can only be obtained through voir dire.

The Sixth Amendment guarantees a criminal defendant "an impartial jury," that is, a jury with a "mental attitude of appropriate indifference." U.S. Const. amend VI; *United States v. Wood*, 299 U.S. 123, 145-46 (1936). This Court has repeatedly emphasized the importance of that guarantee, and how our system relies on meaningful voir dire to enforce that guarantee. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992). "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). While jurors need not enter the box "with empty heads," they must be able to "lay aside their impressions or opinions and render a verdict based on the evidence presented in court." *Skilling v. United States*, 561 U.S. 358, 398-99 (2010) (cleaned up). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*,

451 U.S. at 188 (citation omitted). "Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges." *Id.*

2. While trial courts by necessity have a great deal of discretion over voir dire, that discretion is based on specific considerations and is not unbounded.

The trial courts are the frontline guarantors of the right to an impartial jury and the concomitant right to adequate voir dire. They are the ones engaged in the lengthy and fact-intensive process of selecting juries, and they witness in person the veniremembers and their responses to questions. Accordingly, even as it has affirmed the importance of the right to an impartial jury and effective voir dire, this Court has recognized that trial courts have ample discretion over voir dire. *See, e.g.*, *Rosales-Lopez*, 451 U.S. at 189; *Skilling*, 561 U.S. at 386–87; *Morgan*, 504 U.S. at 729–30; *Ristaino v. Ross,* 424 U.S. 589, 594 (1976); *Connors v. United States,* 158 U.S. 408, 413 (1895).

But that discretion is not a free-floating or boundless thing, discretion for its own sake. Rather it is a function of "necessity," *Ristaino,* 424 U.S. at 594, and is based on two considerations, which are broad but not unbounded. First and most importantly, the discretion is based on the real-time human interactions that arise during voir dire, particularly the non-verbal clues that jurors provide when answering questions. This Court has said that trial judge has discretion over voir dire "because a trial judge's appraisal is ordinarily

influenced by a host of factors impossible to capture fully in the record, such as a prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022) (citation and internal quotation marks omitted)). As with witness credibility, trial judges with veniremembers in front of them are in a far superior position to an appellate court working from a transcript in terms of gauging a veniremembers' reactions to questioning. *See Rosales-Lopez*, 451 U.S. at 188-89; *Skilling*, 561 U.S. at 386–87; *see also United States v. Raddatz*, 447 U.S. 667, 679 (1980). Second, this Court's cases also point to discretion over the wording and depth of questioning based on a trial judge's familiarity with the contexts in which trial is taking place, such as the case facts and the community and its local sensibilities and idiom. *See, e.g.*, *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991) (noting that the "judge of that court sits in the locale" where the crime happened and the trial is taking place, and his or her own "perceptions should be of assistance to it in deciding" what inquiries to make regarding pretrial publicity). "The Constitution, after all, does not dictate a catechism for voir dire." *Morgan*, 504 U.S. at 729.

Those two considerations create wide latitude for district courts to manage voir dire by choosing the wording of questions without undue appellate nitpicking, and to weigh the credibility of jurors as they make their responses

to the questions asked. But that latitude is not without limit: the district court must still abide by "the essential demands of fairness" that underlie the Sixth Amendment guarantee of an impartial jury. *Morgan*, 504 U.S. at 730 (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931). Or, as the Ninth Circuit put it many years ago, a trial court violates its ample discretion when its questions are "not reasonably sufficient to test the jury for bias or partiality," and fail to "create [a] reasonable assurance that prejudice would be discovered if present." *United States v. Baldwin*, 607 F.2d 1295, 1297, 1298 (9th Cir.1979)).

3. The Ninth Circuit blessed an extreme form of discretion in this case that undermines completely the efficacy of voir dire and is unrelated to the considerations that underlie trial courts' discretion over voir dire.

a. The Ninth Circuit in this case indulged a discretion not founded on the trial judge's superior ability to perceive juror demeanor and reactions or the judge's local knowledge. Rather, it identified an almost complete discretion in something that is perfectly reviewable by an appellate court: namely whether the questions asked of the venire and the information given to the venire allowed for meaningful probing on a subject requiring voir dire. Its conclusion—in essence that as long as a question touches on the subject in some way, no matter the level of generality, then voir dire was sufficient—is at odds with the "essential demands of fairness," and seemingly focuses on

vindicating the trial court's prerogative rather than obtaining an impartial jury.

The Ninth Circuit started with the assertion that because of the latitude afforded to district courts, "additional questioning is usually unnecessary," (App. 3), thus plainly laying out that the trial court's discretion, rather than the fairness of the process, was its point of departure. It then acknowledged Ninth Circuit precedent requiring additional questioning where the subject matter of the case "involves issues on which the public has 'strong feelings' that may 'skew deliberations," but tried to cabin that rule, saying that the Ninth Circuit has only ever "explicitly recognized" that exception as applying to child sexual abuse, narcotics sales, and the insanity defense. (App. 3, quoting *Jones*, 722 F.2d at 530.) The panel then reasoned that because the district court had included in its questionnaire the two questions about venirepersons' experiences with autism and domestic violence in general, it had in some manner touched upon the issues of concern to the defense and so had not abused its discretion. (App. 3.)

But that focus on the two questions about experiences with autism and domestic violence in general utterly missed the specific issues of concern in the case. Here, Elmezayen asked the district court to inform jurors about the deceased children being severely disabled and the government's allegations

that the children had been killed because of their disability, and ask whether that information might interfere with their impartiality. Similarly, he asked the district court to inform the voir dire that Diab would be making allegations of long-running domestic abuse, and to ask venirepersons if they thought women alleging abuse should always or almost always be believed, and whether they could be impartial in light of the abuse allegations. Asking the venire whether they had experiences with abuse or autism in general does not get at these specific issues in any way, especially given that the district court refused to even alert the venire that the case involved allegations of persistent domestic violence and that the deceased children were severely autistic.

In terms of the children's severe disability, treating a question about experiences with autism generally as an adequate substitute for informing the venire that the children who died were severely disabled involves at least three unsupportable assumptions. First, it assumes that the venire would have divined from the question about experience with autism that the children were the ones with autism and that it was severe. But there was nothing in the question that pointed at the children, and nothing to signal to veniremembers that *anyone* was severely disabled. Autism, after all, is a spectrum disorder with wide variations in symptoms and severity. "Some people with [autism spectrum disorder] need a lot of help in their daily lives; others can work and

live with little to no support."[4] Indeed, some of the most successful people in the world fall on the autism spectrum.[5] Second, the panel's reasoning assumes that only people with direct experience of autism could have deliberation-skewing feelings about disabled children allegedly being murdered because of their disabilities. But plainly even people without direct experiences with autism feel great sympathy for disabled children, and would experience revulsion at the government's allegations, some to such a degree that they would not be able to maintain the "appropriate indifference," *Wood*, 299 U.S. at 145-46, to engage critically with the evidence. Third, the panel's reasoning assumes that the government's allegation that Elmezayen chose his two younger sons for death because they were disabled, (*see, e.g.*, 3-ER-313, 7-ER-1481), had no potential impact requiring voir dire. But that allegation is perhaps the most emotionally-wrenching of the government's claims. The children's severe disabilities put them in a special category of vulnerability and

[4] Ctr. for Disease Control and Prev., *What is Autism Spectrum Disorder*?, https://www.cdc.gov/ncbddd/autism/facts.html (last visited Apr. 18, 2023).

[5] For instance, Elon Musk, founder of Tesla, Inc., and SpaceX, has been diagnosed with Asperger's Syndrome, which is a previously-used diagnosis for autism spectrum disorder. *See* Autism Speaks, *What is Asperger Syndrome?*, https://www.autismspeaks.org/types-autism-what-asperger-syndrome (last visited Apr. 19, 2023); Dave Itzkoff, *Elon Musk Hosts a Mother's Day Episode of 'Saturday Night Live,'* N.Y. TIMES (May 9, 2021), https://www.nytimes.com/2021/05/09/arts/television/elon-musk-snl.html.

needing care. The claim that those very things are what made Elmezayen select them for death—instead of his older, higher-functioning son—was especially likely to spark strong emotions.

The panel's conclusion that the general question about experience with domestic violence within the immediate family was sufficient to probe whether veniremembers would be biased in evaluating Diab's allegations of severe and long-standing domestic violence rests on similarly unsupportable assumptions. First, impactful personal connections with domestic violence can happen outside the immediate family, for instance with a friend, a co-worker, or a neighbor. *See Anderson v. Gipson*, 902 F.3d 1126, 1134 (9th Cir. 2018) (in a domestic violence case, irrational to fail to challenge juror whose friend was a domestic violence survivor). More importantly, one need not have any personal connection with domestic abuse to have strong feelings about believing asserted survivors, any more than one needs a family member in law enforcement to have deliberation-skewing feelings about the credibility of police officers. *See, e.g.*, *Baldwin*, 607 F.2d at 1297.

b. The Ninth Circuit's apparent notion that voir dire is sufficient so long as some question is asked which connects in some general way with an issue of concern for trial runs headlong into the Sixth Amendment guarantee of an impartial jury and the more general constitutional requirement that

trials be fair. It blesses a fig-leaf approach to voir dire, where as long as the trial court has gone through the motions and asked some question in some way related to the issue, it has fulfilled its duties. But the trial court's duty is not simply to be seen performing something approximating voir dire. Rather, the point of voir dire is to put in front of the venire the actual issues of potential bias and partiality present in the case and evaluate veniremembers' responses to those issues. And if the questions asked are too general to get at the specific issue of concern, then nothing has been done to determine if the potential jurors can maintain the required "mental attitude of appropriate indifference" despite the emotional issues involved in the case. *Wood*, 299 U.S. at 145-46.

Indeed, this Court has recognized the insufficiency of general questions for getting at specific issues in voir dire. For instance, in *Morgan*, it rejected the claim that asking veniremembers generally whether they could follow the law was sufficient to voir dire for jurors who might automatically vote for the death penalty. 504 U.S. at 734. Although such an automatic vote would have violated the law, such that a question about following the law got at the issue in some general way, specific questions probing veniremembers' attitudes towards the death penalty were still required, because a veniremembers might fail to understand from the general questions the specific issue at play. *Id.* at 735-36.

So too here. Asking about veniremembers' general experiences with a spectrum disorder like autism, without any reference to the children having autism or the severity of their condition, simply failed to probe whether jurors could maintain an appropriate indifference in the face of hearing that the children were severely disabled and the government's allegation that Elmezayen chose them for death because of their disability. Similarly, just asking whether veniremembers had any experience with domestic violence did nothing to address whether they subscribed to popular slogans like "Believe All Women." *See, e.g., Sanchez v. Sanchez*, No. 1:18CV449, 2021 WL 1227133, at *9 (M.D.N.C. Mar. 31, 2021) (in considering domestic violence allegations, "the Court cannot refrain from acknowledging 'the term that's been going around: 'Believe All Women'"" (quoting Lesley Wexler, *2018 Symposium Lecture: #MeToo and Procedural Justice*, 22 Rich. Pub. Int. L. Rev. 181, 187 (2019)). Any thought by veniremembers that domestic violence allegations should be given a presumption of truth at the expense of Elmezayen's presumption of innocence would obviously bias deliberations.

Moreover, discretion to dispense with a necessary voir dire topic by asking a general question that fails to reach the specific issue is also far removed from the reasons that this Court gives trial court's discretion over voir dire in the first place. As noted above, that discretion is founded on trial

judges' advantage in seeing veniremembers in person and being able to evaluate numerous clues as to credibility and demeanor that do not appear in a cold transcript, as well as in the trial court's local knowledge. Whether a trial court has asked an appropriately specific question appears on the cold face of a transcript, and so is wholly reviewable on appeal. Similarly, local knowledge plays little or no role in whether a question is general or specific—certainly there is no community that would assume as a matter of course that a question about experiences with autism indicated that children who died in a car accident were severely disabled. The fact that the discretion to which the Ninth Circuit points partakes in no way of the trial court's particular advantages makes it all the more inadequate as a protection for the right to an impartial jury.

B. Clarifying the Limits on a Trial Judge's Discretion in Voir Dire Is of Exceptional Importance

This Court has been clear that the guarantee of an impartial jury is a constitutional right of full dimension, and that it can only be secured via voir dire. At the same time, it has recognized that by necessity district judges will have a great deal of discretion over voir dire. As this case demonstrates, however, if taken to an extreme, that discretion can overwhelm the right, leaving defendants with no genuine remedy for a district court's failure to properly voir dire.

To err is human, and even the best district judges err in voir dire. *See, e.g.*, *United States v. Nieves*, 58 F.4th 623, 626 (2d Cir. 2023) (reversing the Honorable Jed S. Rakoff for failure to effectively screen prospective jurors for gang-related bias). If a trial court cannot effectively be reversed for inadequate voir dire, the right to an impartial jury becomes nugatory. "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1866); *see also In re Mrs. Alexander's Cotton*, 69 U.S. 404, 413 (1864) ("there should be no right without a remedy"). Adding to the mix is a concern by at least some members of the judiciary that counsel will try to coopt voir dire as an opportunity for advocacy, and that in order to resist such efforts the federal courts must be "reluctant" to reverse for failure to ask questions requested by counsel. *See United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002). Such a defensive stance risks elevating protection of the district court's discretion over protection of the constitutional right itself. This Court should step in to ensure that the right balance is being struck, and that protection of the right to an impartial jury remains the voir dire process's goal and outcome.

Conclusion

For the foregoing reasons, Ali Elmezayen respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

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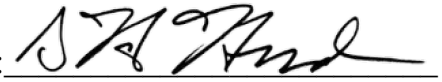
By: 
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