No. _____

In the

Supreme Court of the United States

DAVID W. MURPHY, individually and as Personal Representative for the Estate of KATHLEEN J. MURPHY,

Petitioner,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner sued the cancer doctors who failed to disclose to his mother both the risks of her recommended Hodgkin's lymphoma chemotherapy treatment and the existence of a safer alternative—omissions that caused the mother to proceed with a treatment protocol that led to her death from a treatment side effect called bleomycin lung toxicity.

During jury selection, the trial court learned two different venire panelists had immediate family members who were current and former patients, respectively, of a defendant doctor. Both said they could be fair and petitioner did not move to strike, so the trial court permitted *voir dire* to continue without proactively removing either panelist from the jury venire. The panelist whose brother had been successfully treated—who also said his mother had been "very close" with the defendant doctor—was seated on the jury, which found for defendants.

Two questions are presented:

1. Whether, in a case about medical negligence, the plaintiff's Fourteenth Amendment right to due process was violated by seating a juror whose brother had been successfully treated by, and whose mother had been "very close" with, one of the defendant cancer doctors.

2. Whether providing a fair jury-selection process under the Fourteenth Amendment required the trial court to excuse *sua sponte* all jury venire panelists whose immediate family members were current or former patients of one of the defendant doctors.

PARTIES TO THE PROCEEDING

Petitioner is David W. Murphy, acting as an individual both for himself and in his capacity as personal representative of the Estate of Kathleen J. Murphy (his mother). Petitioner was plaintiff in the Spokane County Superior Court in the State of Washington, appellant in the Court of Appeals of the State of Washington, and petitioner in the Washington Supreme Court.

Respondents are Medical Oncology Associates, P.S., a Washington corporation; and two individual doctors named Arvind Chaudhry, M.D. Ph.D., and Bruce Cutter, M.D. All respondents were defendants in the state trial court, appellees in the state court of appeals, and respondents in the Washington Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a natural person with no parent companies and no outstanding stock.

LIST OF RELATED PROCEEDINGS

- *Murphy v. Medical Oncology Assocs., P.S., et al.*, No. 18-2-00260-0, Superior Court in the State of Washington in and for the County of Spokane. Judgment entered Mar. 20, 2020.

- *Murphy v. Medical Oncology Assocs., P.S., et al.*, No. 37545-5-III, Court of Appeals of the State of Washington, Division III. Judgment entered June 29, 2023. Opinion corrected and reconsideration otherwise denied Aug. 17, 2023.

- *Murphy v. Medical Oncology Assocs., P.S., et al.*, No. 102393-6, Supreme Court of the State of Washington. Review denied Jan. 3, 2024.

- *Murphy v. Medical Oncology Assocs., P.S., et al.*, Application No. 23A844, U.S. Supreme Court. Order extending time to file a petition for a writ of *certiorari* entered Mar. 18, 2024.

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PETITION FOR WRIT OF CERTIORARI

David W. Murphy, acting as an individual both for himself and in his capacity as personal representative of the Estate of Kathleen J. Murphy (his mother), respectfully petitions this Court for a writ of *certiorari* to the Court of Appeals for the State of Washington to review its denial of Murphy's federal claim under the Due Process Clause of the Fourteenth Amendment.

OPINIONS AND ORDERS BELOW

The Washington Court of Appeals' Order Correcting Opinion and Otherwise Denying Motion for Reconsideration is reported at 2023 Wash. App. LEXIS 1581, 2023 WL 5287655 (Wash. Ct. App. Aug. 17, 2023) and is reprinted in Appendix A, at App. 1–3.

The Washington Court of Appeals' Unpublished Opinion affirming the trial court is reported at 27 Wash. App. 2d 1020, 2023 Wash. App. LEXIS 1307 (Wash. Ct. App. June 29, 2023) and is reprinted in Appendix B, at App. 4–40.

The Spokane County Superior Court's Judgment Summary is not reported but is docketed at *Murphy, et al. v. Medical Oncology Assocs., P.S., et al.*, No. 18-2-00260-0 (Spokane Cnty. Sup. Ct. Mar. 20, 2020). It is reprinted in Appendix C, at App. 41–50.

The Washington Supreme Court's Order denying discretionary review is reported at 2024 Wash. LEXIS 6 (Wash. Jan. 3, 2024) and is reprinted in Appendix D, at App. 51–52.

STATEMENT OF JURISDICTION

On March 20, 2020, the Spokane County Superior Court entered its judgment. App. 41–50. The Washington Court of Appeals affirmed the judgment on June 29, 2023, App. 4–40, and issued a corrected opinion but otherwise denied reconsideration on August 17, 2023, App. 1–3. The Washington Supreme Court denied a timely petition for review on January 3, 2024. App. 51–52. By order dated March 18, 2024, the Circuit Justice extended petitioners' time within which to petition this Court for writ of *certiorari* until May 31, 2024, under Application No. 23A844. This Court has jurisdiction to review the state court of appeals decision on a writ of *certiorari* under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend. XIV, § 1.

Washington Rule of Appellate Procedure 2.5 provides, in pertinent part:

> (a) Errors raised for first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: …

> (3) manifest error affecting a constitutional right. ….

Wash. RAP 2.5.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In early June 2015, Ms. Kathleen Murphy was diagnosed with Hodgkin's Lymphoma, a highly survivable form of cancer. At the time of her diagnosis, Kathleen was over 65 years old and was suffering from other health conditions, particularly chronic obstructive pulmonary disease ("COPD") and acute renal failure. Because of these health factors, Kathleen's odds of surviving Hodgkin's were estimated to be between 30 and 40 percent.

Beginning on June 2, 2015, Kathleen had an initial consultation with Dr. Arvind Chaudhry, one of the cancer doctors at Medical Oncology Associates, P.S. On June 4, 2015, Dr. Chaudhry was unavailable, so Kathleen was seen by Dr. Rajeev Rajendra, another doctor in Dr. Chaudhry's practice. Dr. Rajendra ordered several tests, including a pulmonary function test to measure lung health. Pending test results, Dr. Rajendra recommended that Kathleen begin four cycles of chemotherapy treatment using a drug protocol called ABVD.

"ABVD" is a combination of four drugs—adriamycin, bleomycin, vinblastine, and dacarbazine—often used to treat Hodgkin's lymphoma. These drugs fight the cancer, but they are also themselves toxic, each in their own way. Bleomycin poses up to a forty-six percent chance of causing lung toxicity,

which leads to stiffened lungs and can produce up to twenty-seven percent mortality. The risk of bleomycin toxicity is higher in older patients, and in those with lung and kidney problems like COPD and renal dysfunction. Omitting bleomycin from the ABVD protocol reduces the risks of bleomycin lung toxicity, but it comes with a trade-off since using bleomycin in ABVD improves overall survival rates by between zero and five percent compared to using AVD alone.

Recognizing the potential threat of lung toxicity for Kathleen, Dr. Rajendra noted that, if test results showed that she already had "an existing underlying pulmonary disease, we could omit the bleomycin."

Dr. Chaudhry resumed care at Kathleen's next appointment on June 6, 2015, by which time her pulmonary function test had come back, showing results that were abnormally low. These results supported Dr. Chaudhry's testimony at trial that Kathleen had COPD. Kathleen's other lab results showed kidney (renal) dysfunction, which was another risk factor for use of bleomycin.

Despite test results showing contraindications for Kathleen taking bleomycin, Dr. Chaudhry adopted Dr. Rajendra's recommendation that Kathleen should pursue ABVD chemotherapy. Neither Dr. Rajendra nor Dr. Chaudhry recorded advising Kathleen that an alternative protocol to ABVD existed whereby bleomycin could be omitted.

Nor did Dr. Chaudhry memorialize telling Kathleen that bleomycin might prevent her from taking a drug called Neulasta, which is a "colony stimulating factor," a type of drug used to help

chemotherapy patients grow white blood cells and better resist infections.

Following Dr. Chaudhry's recommendation without having been fully informed of all material considerations, Kathleen started her ABVD chemotherapy on June 6, 2015. Although the treatment initially appeared to go well, Kathleen quickly developed febrile neutropenia, which meant she was showing signs of having a serious infection. This infection proved to be *C.difficile*, which ultimately led to Kathleen being hospitalized for a period.

Because she was taking bleomycin, Kathleen could not be given Neulasta to treat her neutropenia. Instead, she had to have her adriamycin dose reduced, and she fell behind schedule on her chemotherapy.

Kathleen had two further ABVD treatments in July, during which she began to develop "crackles" or "rales" in her lungs—sounds like Velcro being pulled apart—which are one of the tell-tale "alarm bell" signs of bleomycin toxicity developing.

On July 30, 2015, due to tension between Dr. Chaudhry and Kathleen's family, Dr. Chaudhry withdrew from treating Kathleen, and Kathleen's ABVD treatment was postponed.

Dr. Bruce Cutter replaced Dr. Chaudhry as Kathleen's oncologist, and on August 13, 2015, she received her next ABVD treatment.

Two weeks later, on August 27, having noted diffuse crackles in Kathleen's lower lungs, Dr. Cutter became concerned about bleomycin toxicity. He

dropped bleomycin from Kathleen's protocol when she received her next treatment on September 10, 2015. Then on September 11, 2015, Dr. Cutter treated Kathleen with Neulasta.

Kathleen's condition deteriorated almost immediately. On September 13, 2015, she went to the emergency room in severe respiratory distress and was placed on a ventilator. The doctor told plaintiff David Murphy over the phone that Kathleen had bleomycin lung toxicity and acute respiratory distress syndrome (or "ARDS"), which put her at a 55 percent chance of dying.

On September 24, Kathleen died. Evidence at trial affirmatively showed that her cause of death was ARDS caused by bleomycin toxicity, likely aggravated by the administration of Neulasta.

Testimony at trial showed that Kathleen was never advised about the lung toxicity risks of bleomycin, about the alternative treatment option to omit bleomycin, or about the fact that taking Neulasta would be contraindicated after ABVD treatment because taking Neulasta after bleomycin might worsen the risks of bleomycin lung toxicity. Evidence at trial showed that all these risks were material and needed to be communicated to a patient as part of the process for obtaining valid informed consent.

II. PROCEDURAL BACKGROUND

A. Proceedings in the State Trial Court

Petitioner commenced his lawsuit as plaintiff below on January 22, 2018. Petitioner David Murphy, acting individually and as personal representative of Kathleen's estate, sued in Washington superior court for medical negligence and wrongful death. Defendants in the case were ultimately narrowed to Dr. Cutter, Dr. Chaudhry, and Medical Oncology Associates, P.S.

During jury selection, two venire panelists turned out to be close relatives of a current patient and a former patient, respectively, of Dr. Chaudhry. The trial court did not strike either panelist, and one was seated as a juror. The handling of these two panelists comprises the constitutional errors that are the subject of this Petition.

First, when the trial court asked whether anything would cause any panelists to begin the trial with feelings or concerns about their participation as a juror, panelist 15 volunteered that his brother had been treated for cancer by defendant Dr. Chaudhry. The panelist stated that he personally had met Dr. Chaudhry at the age of 8 or 9 years old, approximately fifteen years earlier, when the doctor had treated his brother for cancer. App. 55–56. Panelist 15 later testified that his mother "was very close with Dr. Chaudhry during my brother's experience" and that "my brother had a good experience with Dr. Chaudhry." App 61–62.

When the trial court and counsel tried to explore panelist 15's ability to be fair despite his

family's history with Dr. Chaudhry, he gave only half-hearted assurances: "I believe I can be fair," App. 59; "I don't feel like I would have a bias I would express anyways or even have it internally," and "I don't think I would have a problem, to answer you very generically. Personally, I don't know Dr. Chaudhry at all," App. 61. Asked whether he might lean one way or the other, he responded, "I don't believe so because I don't trust anybody's opinion, even my own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his [Murphy's] mother would have." App. 62. Later in *voir dire* questioning, panelist 15's answers became rambling and seemed motivated to assure the lawyers that the panelist's judgment was not "clouded" by his personal experiences. App. 65–67. Panelist 15 never explained why he had initially volunteered, on his own initiative, that his brother's experience would cause him to begin the trial with feelings or concerns about participating as a juror, other than concerns about his own bias. App. 56.

Washington law imposes an affirmative duty on trial court judges to excuse jurors rendered unfit by bias or prejudice,[1] and to do so "regardless of inaction by counsel," *State v. Irby*, 187 Wash. App. 183, 192–93, 347 P.3d 1103 (Wash. Ct. App. 2015). But the trial court did not act *sua sponte* to excuse Panelist 15 on its own initiative. As a result, because of his low seat

[1] RCW 2.36.110 provides in pertinent part: "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias [or] prejudice…."

number, panelist 15 was eventually seated as juror number 8. App. 73.

Second, *voir dire* further revealed that, like panelist 15, panelist 25 *also* knew Dr. Chaudhry—this time because one of her close family members (her mother) was then one of Dr. Chaudhry's *current* cancer patients. App. 56–57. Even when faced with the obvious direct personal conflict of interest inherent in a juror hearing a case against her mother's current cancer doctor, the trial court did not excuse panelist 25 and neither side's counsel probed the panelist for details about the relationship. App. 67–72. Instead, panelist 25 was not removed until off-the-record peremptory challenges, at which point (had she not been removed) her seat number would have positioned her to be one of two alternate jurors. App. 73.

Murphy's trial counsel did not object on the record to errors in jury selection. At the close of trial, the jury returned a defense verdict.

B. State Appellate Proceedings

1. The State Court of Appeals' Decision

Murphy timely filed a notice of appeal. He sought reversal on several grounds, but only his assertion of constitutional errors during jury selection is relevant to this Petition.

Murphy was able to raise these errors on appeal despite making no objections during *voir dire* and jury selection because of Washington Rule of Appellate Procedure 2.5(a)(3), which provides that "a party may raise" "manifest error affecting a constitutional right"

"for the first time in the appellate court." Wash. RAP 2.5(a)(3). Invoking this rule, Murphy argued before the state court of appeals that the trial court's errors in jury selection were manifest and were of constitutional dimension because they had deprived him of due process in two ways.

First, the trial court seated a jury that included a biased juror. Panelist number 15 should have been excused from serving as a juror on grounds that he could not be impartial after *voir dire* testimony revealed that he, his brother, and his mother all had a personal history with defendant Dr. Chaudhry.

Second, the trial court subjected Murphy to a fundamentally unfair jury selection process by not removing panelists whose family members were current and former patients of Dr. Chaudhry. Since panelists 15 and 25 were kept in the venire even after these relationships became known, the defendants had the unfair advantage during jury selection of access to Dr. Chaudhry's exclusive knowledge about how his former and current patients—relatives of panelists 15 and 25—fared (and were currently faring) during his care for them. Murphy not only lacked access to this information, but his counsel could not realistically hope to learn enough about these two panelists to level the playing field during the time-constrained process of *voir dire*. Since both panelists stood a very good chance of being seated on the jury of twelve (with two alternates) unless excused, due to their low seat numbers of 15 and 25, and since panelist 15 was, in fact, seated as a juror, the harm from this unfair process had a real effect on the ultimate composition of the jury.

Murphy argued on appeal that these errors, though unpreserved by objections in the trial court, were properly raised under Wash. RAP 2.5(a)(3) and that they had resulted in a tainted jury and deprived him of a fair trial.

The Washington Court of Appeals rejected Murphy's arguments for reversal and affirmed the judgment of the trial court. App 39. Addressing Murphy's challenges to the jury-selection process, the state court of appeals ruled that it was not error for the trial court to fail to strike prospective juror 15 for cause or to remove both panelists 15 and 25 from the venire because both panelists said they could be fair and the court was unwilling "to *infer* bias from the 'doctor-to-a-close-family-member' relationship." App. 15–22, 22 (emphasis in original). The court of appeals did not consider the greater private knowledge about the panelists that the defendant doctors had, compared with Murphy, to create a disadvantage for Murphy that was of constitutional significance. App. 22–23.

2. Correction of the Opinion

The appeals court's opinion mistakenly described sixteen panelists as raising hands when asked whether they had "feelings or concerns regarding your participation as a juror" and each being questioned by the trial court about this response, App. 12, even though only panelists 15 and 25 had actually raised their hands in response to that question, App. 55–57. Because the appeals court's opinion appeared to rely on this mistaken understanding of the *voir dire* record as important to its recitation of the underlying facts, Murphy timely moved for reconsideration.

In response, the state appeals court corrected its opinion to say that only two individuals raised their hands and were questioned, not sixteen. App. 2–3. Otherwise, the court of appeals denied reconsideration on August 17, 2023. App 3.

3. The Washington Supreme Court's Denial of Review

Murphy timely sought discretionary review by the Washington Supreme Court, which denied review on January 3, 2024. Murphy now petitions this Court to review the federal constitutional questions decided against him below.

III. RULE 14.1(g)(i) SPECIFICATION

Murphy's Fourteenth Amendment claims were timely and properly raised such that this Court has jurisdiction to review the judgment below on a writ of certiorari. Sup. Ct. R. 14.1(g)(i).

First, Washington court rules permit a challenge to a "manifest error affecting a constitutional right" to be raised for the first time on appeal. Wash. RAP 2.5(a)(3). Murphy followed this rule and raised his federal constitutional objections to jury selection for the first time in the Washington court of appeals, as state law permitted. App. 74, 75–79 (appellate opening brief excerpts).

Second, the way Murphy raised the federal question was adequate to present the federal issue. In his state-court appellate briefings challenging the trial court's conduct of the jury-selection process, Murphy expressly invoked "the Due Process Clause of the U.S. Constitution's Fourteenth Amendment," the

"Fourteenth Amendment," and "due process," citing several federal cases. Murphy explicitly argued that Washington's state due process clause offered a degree of protection coextensive with the Fourteenth Amendment. App. 74–81 (reprinting the Opening Brief of Appellant at 28–29, 33 (invoking Fourteenth Amendment), and at 18–20, 28–30, and 33–34 (invoking due process)); App. 82–86 (reprinting the Reply Brief of Appellant at 9–10, 12–13, and 16 (invoking due process)).

Third, the state appeals court considered and passed on Murphy's due process arguments, rejecting them after an extended discussion. App. 15–23. Though the appeals court did not expressly use the words "Fourteenth Amendment" or "due process," it squarely addressed Murphy's arguments using more general terms—fairness and jury impartiality—that lie in the heartland of the Fourteenth Amendment's guarantees.

As the foregoing points demonstrate, Murphy's Fourteenth Amendment claims were "raised 'at the time and in the manner required by the state law'" and "the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams v. Robertson*, 520 U.S. 83, 87 (1997). Accordingly, *certiorari* jurisdiction exists.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition because the state trial court's errors during jury selection denied Murphy a fair trial in a way that conflicts with relevant decisions of this Court defining the scope of protection afforded by the Due Process Clause of the Fourteenth Amendment. Sup. Ct. R. 10(c).

I. The Fourteenth Amendment Was Timely and Properly Raised Below

Murphy expressly invoked Wash. RAP 2.5(a)(3), which allows civil litigants to raise manifest errors affecting constitutional rights for the first time on appeal. *See State v. WWJ Corp.*, 138 Wash. 2d 595, 601–02, 980 P.2d 1257 (1999).

Under Washington law, state appeals courts ask two questions before reviewing unpreserved errors under Wash. RAP 2.5(a)(3): "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" *State v. Kalebaugh*, 183 Wash. 2d 578, 583, 355 P.3d 253 (2015). For the first inquiry, once an unpreserved error is identified, the error will be deemed to be of constitutional magnitude if it implicates a constitutional interest. *Id.* at 584. For the second inquiry, demonstrating that the unpreserved error is manifest "requires a showing of actual prejudice—meaning a "plausible showing" that it had "practical and identifiable consequences" at trial. *Id.* "[T]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wash. 2d 91,

99, 217 P.3d 756 (2009). "[T]he appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.* at 100.

After both the foregoing questions are answered in the affirmative, Wash. RAP 2.5(a)(3) is satisfied, and the state appellate court will proceed to resolve the merits of the unpreserved manifest constitutional error by determining whether the error was harmless. "Harmless error analysis occurs *after* the court determines the error is a manifest constitutional error and is a separate inquiry." *Kalebaugh*, 183 Wash. 2d at 585 (emphasis in original).

Murphy satisfied both requirements of Wash. RAP 2.5(a)(3). First, Murphy invoked the constitutional right of due process under both the Washington and the United States Constitution in raising his challenge the trial court's errors in jury selection. App. 74–86. Civil litigants pursuing claims in Washington's state courts are entitled to due process of law under the state constitution. *See* Wash. Const. art. I, § 3. As Murphy argued in his briefs to the Washington court of appeals, Washington's state right to due process requires applying the Due Process Clause of the Fourteenth Amendment because "Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." *State v. McCormick*, 166 Wash. 2d 689, 699, 213 P.3d 32, 36 (2009). By raising his right to due process under both the federal and state constitutions, Murphy satisfied Wash. RAP 2.5(a)(3)'s requirement that the errors he

asserted for the first time on appeal must be of constitutional magnitude.

Second, the violations that Murphy asserted were "manifest" for purposes of Wash. RAP 2.5(a)(3) because they produced the seating of a biased juror. Under Washington law, the right under both the federal and state constitutions to a fair trial before an impartial jury "is violated by the inclusion on the jury of a biased juror, whether the bias is actual or implied." *In re Pers. Restraint of Yates*, 177 Wash. 2d 1, 30, 296 P.3d 872, 887 (2013).

Moreover, under Washington law, the error of seating a biased juror is manifest by definition:

> The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice. *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). Thus, if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error.

State v. Irby, 187 Wash. App. 183, 193, 347 P.3d 1103, 1108 (Wash. Ct. App. 2015).

Murphy properly invoked Wash. RAP 2.5(a)(3) in the court of appeals to challenge the trial court's errors in jury selection that violated his right to due process under both the Washington Constitution and the Fourteenth Amendment. The federal issues presented by this Petition were properly and timely raised.

II. The Washington Court of Appeals Decided the Case Below in a Way that Conflicts with Relevant Decisions of this Court

This Court should grant review and reverse the decision of the state court of appeals that affirmed the trial court's judgment. The trial court made two similar, but independent, errors during jury selection. First, the trial court should have struck panelist 15 once *voir dire* revealed that one of the defendant doctors had treated the panelist's brother successfully for cancer and had also been "very close" with the panelist's mother. Second, the trial court should have struck all relatives of current and former patients of the doctors from the venire, once *voir dire* revealed the existence of these connections, to avoid giving the doctors the unfair advantage of having exclusive private knowledge about certain venire panelists' family members because of those doctor-patient relationships.

By affirming the trial court's judgment despite these errors, the state court of appeals decided the case below in a way that conflicts with decisions of this Court applying the Due Process Clause of the Fourteenth Amendment in the context of jury selection. Sup. Ct. R. 10(c).

A. Seating Panelist 15 Tainted the Jury

When it failed to excuse panelist 15, the trial court seated a biased jury. Panelist 15 should have been excused after his *voir dire* testimony revealed that he, his brother, and his mother had a positive history with one of the defendant doctors in the case.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "The Constitution guarantees both criminal and civil litigants a right to an impartial jury." *Warger v. Shauers*, 574 U.S. 40, 50 (2014). "[N]o man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." *In re Murchison*, 349 U.S. at 136.[2] "Jurors who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices." *Skilling v. United States*, 561 U.S. 358, 463 (2010) (Sotomayor, J., dissenting).

During *voir dire*, when the trial court asked whether anything would cause any panelists to begin the trial with feelings or concerns about their participation as a juror, panelist 15 volunteered that his brother had been treated for cancer by defendant Dr. Chaudhry. App. 55–56. The panelist stated that he personally had met Dr. Chaudhry approximately fifteen years earlier at the objectively impressionable, "very young age" of "just 8, 9 years old," when the doctor had treated his brother for cancer, App. 56. The

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[2] *See also* Washington Post, "Ketanji Brown Jackson Supreme Court Confirmation Hearing Day 2 – 3/22 (Full Live Stream)," *available at*, https://www.youtube.com/watch?v=UrbvigEPhPs, at 4:47:17–4:48:44 (last visited May 28, 2024) (Jackson, J., as nominee, addressing role of civil juries) ("When we pick juries, we ask as judges, 'Do any of you in this pool have any connection to anyone?'…. The idea, as you've indicated, is to get people from the community who have no connection to the case and can hear the evidence that's presented in the courtroom and the arguments of the lawyers and make a decision that is unconnected to any sort of personal interest they might have.").

panelist said mother was "very close" with Dr. Chaudhry during his brother's illness and that his brother had a "good experience with Dr. Chaudhry." App. 61–62.

When asked questions exploring his ability to be fair, Panelist 15 gave equivocal assurances: "I *believe* I can be fair," App. 59 (emphasis added); "I don't *feel* like I would have a bias I would express anyways or even have it internally." App. 61 (emphasis added); "I don't *think* I would have a problem, to answer you very generically," App. 61 (emphasis added); and "I don't *think* that would cloud my judgment," App. 67 (emphasis added).

Even had these assurances been categorical, they simply could not reasonably have been accepted under the circumstances. No person can objectively be considered a suitable juror for a trial of the doctor who previously saved a family member's life. It is one thing to acknowledge that jurors "who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices." *Skilling*, 561 U.S. at 463 (Sotomayor, J., dissenting). But it is entirely another thing to accept that any person attesting to panelist 15's personal connection to Dr. Chaudhry could reasonably be regarded as free from actual bias or otherwise be considered fit to sit on the jury that was about to be charged with impartially hearing claims against the very doctor who had successfully treated the panelist's brother for a childhood cancer. Yet the trial court did not act *sua sponte* under RCW 2.36.110[3] to excuse panelist 15, and

[3] See *supra* note 1.

the panelist was ultimately seated as one of the twelve jurors responsible for hearing Murphy's case against Dr. Chaudhry.

The court of appeals' approval of the trial court allowing panelist 15 to serve as a juror in a trial of Dr. Chaudhry plainly conflicts with this Court's decisions. A potential juror whose sibling was successfully treated for cancer by—and whose mother was "very close" with—a defendant doctor presents exactly the kinds of "circumstances and relationships" that can least be trusted to "prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. This Court should grant review and reverse the decision of the court of appeals that affirmed the trial court's judgment.

B. Failing to Excuse Panelists Whose Immediate Family Members Were Patients of a Defendant Produced a Fundamentally Unfair Jury-Selection Process

In a second, independent error, the trial court failed to excuse panelists 15 and 25 from the jury selection venire and thereby subjected Murphy to a fundamentally unfair jury-selection procedure. Since panelists 15 and 25 were closely related to patients of Dr. Chaudhry, the defendants had the unfair advantage during jury selection of access to Dr. Chaudhry's exclusive knowledge about how his former and current patients—panelist 15 and 25's relatives—fared during the entire course of his care for them.

The Fourteenth Amendment imposes "minimum requirements of fair jury selection." *Rivera*

v. Illinois, 556 U.S. 148, 157–58 (2009) (citing *Frazier v. United States*, 335 U.S. 497, 506 (1948)) (due process); *see also J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128 (1994) ("we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory") (equal protection).

Voir dire revealed that, like panelist 15, panelist 25 also knew Dr. Chaudhry—this time because one of her close family members (her mother) was one of his *current* cancer patients. App. 56–57. No person can objectively be considered a suitable juror for a trial of the doctor who was currently treating her mother for cancer. Any thinking juror would naturally be expected inevitably to consider how a judgment rendered against the defendant doctor might impact the ongoing care for her loved one. Yet, just as with panelist 15, the trial court did not act *sua sponte* under RCW 2.36.110 to excuse panelist 25 based on her mother's then-active doctor-patient relationship with Dr. Chaudhry. App. 67–73.

Though panelist 25 was ultimately not seated on the jury, her mere presence in the pool of potential jurors, especially given her low seat number on the panel, afforded the defendant doctors an unfair and insurmountable advantage over Murphy throughout the jury selection process. By leaving panelist 15 and panelist 25 in the venire as prospective jurors throughout *voir dire*, the trial court gave the doctors the huge advantage of having exclusive, asymmetrical knowledge about two panelists derived from the intimate context of pre-existing doctor-patient relationships. Murphy's counsel could not hope to level the playing field created by this disparity of knowledge

about these two panelists during the short period of *voir dire* questioning that was available.[4]

Voir dire is an "essential means of protecting" the "right to an impartial jury." *Warger*, 574 U.S. at 50. By frustrating the realization of this purpose, unfairness in the *voir dire* process itself renders a trial fundamentally unfair. Permitting one side to enjoy the advantage that the defendants here possessed during jury selection was utterly inconsistent with due process. *See Estes v. Texas*, 381 U.S. 532, 542–43 (1965) ("It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.").

Murphy was denied a fundamentally fair jury-selection process, and that process resulted in the seating of a jury that included the son of a former patient of Dr. Chaudhry—a juror not only who remembered the doctor from his childhood years, but who also remembered his mother being "very close" with the doctor during his brother's treatment.

The Due Process Clause of the Fourteenth Amendment requires more. This Court should grant review and should reverse the decision of the court of appeals that affirmed the trial court's judgment.

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[4] Both sides were pressed for time to complete *voir dire*. *See* App. 62–64, 67.

CONCLUSION

The Court should grant this Petition for a writ of *certiorari*.

Respectfully submitted,

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