No. 04-1340

IN THE
Supreme Court of the United States

CATERPILLAR INC.,

Petitioner,

v.

STURMAN INDUSTRIES, INC.,
ODED E. STURMAN, AND CAROL K. STURMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Sturman Industries, Inc. states that it has no parent companies and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition for certiorari in this case is wholly contrived: it challenges the Federal Circuit's application of settled Seventh Circuit law (which is therefore not binding on either the Seventh Circuit or the Federal Circuit), conjures up bogus "circuit splits," and presents questions that were never raised below. Caterpillar is upset that a unanimous panel of the Federal Circuit reversed a hometown jury verdict in Caterpillar's favor on the ground that the trial court erred by rejecting a for-cause challenge to a juror married to a Caterpillar employee. According to Caterpillar, the reversal of the jury verdict violates its Seventh Amendment right to a jury trial. That argument, however, is frivolous. An employer has no constitutional right to have its employees and/or their spouses sit on a jury adjudicating the employer's case; to the contrary, the employer's litigation adversary has a right *not* to have the employer's employees and/or their spouses sit on the jury. Needless to say, Caterpillar can hardly present itself as a victim where Caterpillar itself chose the forum and vigorously opposed all efforts to keep Caterpillar-connected prospective jurors off the jury. In any event, Caterpillar never presented its current arguments below, and its efforts to manufacture a circuit split are unavailing. Accordingly, this Court should deny review.

COUNTERSTATEMENT OF THE CASE

Petitioner Caterpillar brought this lawsuit in its hometown of Peoria, Illinois, seeking millions of dollars in damages from respondents (collectively the Sturmans), who in turn counterclaimed against Caterpillar. Needless to say, the Sturmans were aware that the jury pool would include persons with strong Caterpillar ties. Accordingly, at the beginning of the jury selection process, the Sturmans moved to dismiss for cause (1) Caterpillar employees or retirees, and (2) spouses of Caterpillar employees or retirees. Pet. App. 175-79a. Potential jurors in these two categories, the Sturmans explained, necessarily had a financial interest in the outcome of the case,

given their link to Caterpillar's ongoing financial fortunes. *See id.* "It is not appropriate or fair to have people whose livelihood, whose dollars, come from the opposing party and have them sit on the jury .... I don't believe that they can truly be fair in their own minds. That goes to spouses especially ...." Pet. App. 178a. Among the jurors covered by the Sturman's categorical challenge was Juror No. 3, the spouse of a current Caterpillar employee. Pet. App. 126a.

Caterpillar opposed the Sturmans' motion, suggesting that the categorical exclusion of these Caterpillar-connected jurors would violate *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 177-79a. According to Caterpillar:

> This jury is supposed to be representative of this community. And this community is composed of people that have relationships and ties with Caterpillar. ... [W]hat [the Sturmans are] suggesting here is no different than a *Batson* situation. Your Honor, they're trying to exclude a class of people, and the class of people here is anybody having a relationship with Caterpillar. It's not a fair approach. It is not the representation of this community.

Id. The district court agreed with Caterpillar and denied the Sturmans' motion, asserting that "Caterpillar is an important part of this community, and it would not be a representative community [jury] without some Caterpillar connection." Pet. App. 180a.

The Sturmans thereafter made individual challenges for cause that went beyond their unsuccessful categorical challenge. Pet. App. 19a; 181-93a. At least three times, Caterpillar contested these individual challenges on the ground that the Sturmans were simply rearguing their previous categorical objection individually. *See* Pet. App. 183a, 187a; *see also id.* at 185a ("Your Honor, we're arguing again that

same issue. ... [N]ow what we're doing is going one by one, and [the Sturmans are] going to make the argument with respect to each person that he is a current or retired person at Caterpillar, deriving a paycheck. Well, that is the same thing as striking all these people for cause."). Caterpillar also reiterated its position that excluding individuals with a past or current relationship with Caterpillar would be grounds for a "mistrial." *Id.*

Because the trial court's denial of the Sturmans' for-cause challenges left many prospective jurors with Caterpillar connections in the jury pool, the Sturmans were forced to allocate their five peremptory challenges sparingly. In particular, they did not use a peremptory challenge to strike Juror No. 3, the spouse of a current Caterpillar employee, because they wanted to ensure that certain other prospective jurors were not seated as the jury selection process continued. The Sturmans ultimately used all five of their peremptory challenges, but Juror No. 3 sat on the jury that ruled in Caterpillar's favor.

After the trial court entered judgment on the verdict, the Sturmans appealed to the Federal Circuit (because the case included claims arising under the patent laws). A unanimous Federal Circuit panel, applying Seventh Circuit law with respect to the jury selection issue, reversed the judgment in Caterpillar's favor based on the trial court's denial of the Sturmans' categorical for-cause challenge to Juror No. 3. Pet. App. 14-27a. Caterpillar petitioned for rehearing in the Federal Circuit, but not a single judge voted to grant the petition. Caterpillar now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

I. The Federal Circuit Properly Applied Seventh Circuit Law On Implied Bias, There Is No Circuit Split On This Issue, And Caterpillar Did Not Raise Its Current Argument Below.

Caterpillar's first question presented asks this Court to abolish the doctrine of "implied bias," under which certain narrow categories of prospective jurors (*e.g.*, relatives, employees of the litigants) are conclusively presumed to be disqualified, regardless of any assurances of impartiality. The doctrine has ancient common-law roots; indeed, as the *en banc* Ninth Circuit recently noted, it "may indeed be the single *oldest* rule in the history of judicial review." *Dyer v. Calderon*, 151 F.3d 970, 984 (1998) (*en banc*) (Kozinski, J.) (tracing the common-law doctrine back to *Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610)); *see also Crawford v. United States*, 212 U.S. 183, 195-96 (1909) (applying doctrine); *United States v. Burr*, 25 F.Cas. 49, 50 (D. Va. 1807) (Marshall, C.J., sitting by designation) (same). Caterpillar, however, now labels the doctrine "controversial," Pet. 2, and asserts that this Court "sound[ed] the death knell" for the doctrine in *Smith v. Phillips*, 455 U.S. 209 (1982), Pet. 3; *see also id.* at 8 (asserting that this Court "proscri[bed] ... implied bias in *Smith v. Phillips*").

That assertion is simply untrue. *Smith* presented the question whether a habeas petitioner was entitled to relief on the ground that a juror in his criminal case, "submitted during the trial an application for employment as a major felony investigator in the District Attorney's Office," which was prosecuting the case. 455 U.S. at 212. Under these circumstances, this Court refused to impute bias to the juror as a matter of law. *See id.* at 215-18. The Court did not, however, remotely purport to abolish the venerable doctrine of implied bias altogether, or to overrule its earlier cases applying that doctrine. Indeed, Justice O'Connor joined the Court's opinion, but wrote separately "to express

[the] view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (concurring opinion); *see also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) (endorsing doctrine of implied bias); *id.* at 558 (Brennan, J., joined by Marshall, J., concurring in judgment) (same); *J.E.B. v. Alabama*, 511 U.S. 127, 143-44 (1994) ("*Voir dire* provides a means of discovering actual *or implied* bias.") (emphasis added).

Not surprisingly, Caterpillar's assertion that the circuits are "irreconcilably in conflict" with respect to the ongoing validity of the implied bias doctrine, Pet. 10 (capitalization modified), is manifestly incorrect. As the *en banc* Ninth Circuit recently explained, after canvassing the history of the doctrine, "every court that has dealt with the question has understood ... that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without a finding of actual bias." *Dyer*, 151 F.3d at 984; *see also id.* at 985 ("No opinion in the two centuries of the Republic—except the dissent in our case—has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias.").

According to Caterpillar, however, "[t]he Eighth Circuit has definitively rejected the implied bias doctrine altogether, and requires the party challenging a juror to demonstrate actual bias." Pet. 11 (citing *Rogers v. Rulo*, 712 F.2d 363 (8th Cir. 1983), and *United States v. Kelton*, 518 F.2d 531 (8th Cir. 1975) (*per curiam*)). Notwithstanding some broad language in those opinions, they do not stand for the sweeping proposition that the Eighth Circuit will *never* imply bias (which the Eighth Circuit could hardly hold in light of this Court's contrary precedent), but only that the Eighth Circuit would not imply bias in the particular circumstances presented there. Thus, in subsequent cases, the Eighth Circuit has recognized the ongoing

validity of the implied bias doctrine. *See, e.g.*, *United States v. Tucker*, 243 F.3d 499, 509 (8th Cir. 2001); *Fuller v. Bowersox*, 202 F.3d 1053, 1056 (8th Cir. 2000); *United States v. Parmley*, 108 F.3d 922, 924 (8th Cir. 1997) (*per curiam*). Indeed, in its unsuccessful petition for rehearing in the Federal Circuit, Caterpillar itself cited *Parmley* as standing for "*implied bias* when jurors acquired prejudicial information in prior proceeding against defendant." Caterpillar Pet. for Reh'g 13 n.10 (emphasis added).

In the absence of a real circuit split, Caterpillar quickly falls back on the argument that some circuits have "expressed doubts" about the implied bias doctrine. Pet. 11-12. But none of those circuits, as Caterpillar implicitly acknowledges, have held that the doctrine does not exist. To the contrary, the doctrine is alive and well in the very circuits cited by Caterpillar (including the Seventh Circuit, which provided the governing law in this case). *See, e.g., United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) ("The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias."); *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001) ("Challenges for cause are subject to approval by the court and must be based on a finding of actual *or implied* bias.") (emphasis added; internal quotation omitted); *United States v. Rhodes*, 177 F.3d 963, 965 (11th Cir. 1999) ("[W]hen bias is implied because the juror has some special relationship to a party (such as a familial or master-servant relationship), the court must dismiss the prospective juror for cause."); *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1050-51 (4th Cir. 1984) (holding that bias must be implied when a prospective juror owns stock in a corporate party).

In any event, Caterpillar's argument that the implied bias doctrine has been and/or should be abolished is not properly presented here, because Caterpillar never raised any such

argument below, and the lower courts consequently did not have the opportunity to consider or address any such argument. To the contrary, as noted above, Caterpillar responded to the Sturmans' implied-bias challenge in the district court not by disputing the validity of the implied-bias doctrine, but instead by asserting a *Batson*-style right to a "representative" jury comprised in part of Caterpillar-connected jurors. Pet. App. 177-79a. Nor did Caterpillar argue on appeal that the implied bias doctrine had been and/or should be abolished altogether; instead, Caterpillar insisted that the Sturmans had "waived" any challenge to Juror No. 3 by failing to challenge that juror individually for cause in the district court. *See* Opp. App. 5-7a. Needless to say, this Court is not in the business of granting certiorari to review issues that were neither pressed nor passed upon below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Thus, the first question presented, to the extent it challenges the validity of the implied bias doctrine at all, is bogus. The real question presented is whether the Federal Circuit properly applied Seventh Circuit law (since this is not a patent issue, *see* Pet. App. 23a) on whether bias should have been implied on the facts of this case. That narrow question, however, is not remotely worthy of this Court's review. Indeed, because the decision below involves the Federal Circuit's interpretation of Seventh Circuit law, it is not binding on *either* the Seventh Circuit *or* the Federal Circuit. And Caterpillar did not even squarely address that narrow question below; rather, it couched its argument in waiver terms, insisting that the Sturmans' "generic motion to strike all current and former Caterpillar employees and their relatives" did not suffice to preserve the Sturmans' objection to Juror No. 3 for appeal. Opp. App. 5a.

The Federal Circuit readily rejected that waiver argument, *see* Pet. App. 17-23a, and it does not remotely present an issue worthy of this Court's review.[1]

Under common law stretching back to Blackstone's day, moreover, courts have recognized that it is appropriate to impute bias to prospective jurors in cases involving their private employers. *See, e.g., United States v. Wood*, 299 U.S. 123, 138 (1936) (citing Blackstone); *Crawford*, 212 U.S. at 195-96 (same).[2] The Federal Circuit, like the Tenth Circuit, *see Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995), simply recognized that this rule logically applied to the spouses of employees, who have the same financial interest as an employee in the employer's financial welfare, *see* Pet. App. 23-27a. Not surprisingly, thus, Caterpillar has not identified a single case holding that the spouse of an employee should be treated differently from an employee for purposes of implied bias.[3]

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[1] Caterpillar's repeated assertions that the Sturmans "acquiesce[d] in Juror No. 3's service," Pet. 24, "expressly announced a decision not to challenge" Juror No. 3, *id.* at 25, and "raised their objections to Juror No. 3 for the first time" in a post-trial motion, *id.* at 5, are simply false. As noted in the text, and specifically upheld by the Federal Circuit, the Sturmans categorically challenged current and retired Caterpillar employees and their spouses for cause, and that categorical challenge encompassed Juror No. 3.

[2] As Caterpillar points out, *see* Pet. 13, a panel of the Ninth Circuit has stated that "we do not have a per se rule against employees serving as jurors in a case involving their employer." *Nathan v. Boeing Co.*, 116 F.3d 422, 425 (9th Cir. 1997) (Wallace, J.). It is questionable at best, however, whether that panel opinion (which limited the doctrine of implied bias to cases in which a prospective juror employed by a litigant was under "reasonable apprehension of violence," *id.*) survived the Ninth Circuit's subsequent *en banc* decision in *Dyer*, 151 F.3d 970. Indeed, the panel opinion in *Dyer* (which the Ninth Circuit took *en banc* and reversed) was written by none other than Judge Wallace, the author of the panel opinion in *Nathan*.

[3] Caterpillar's predictions of doom and gloom resulting from the Federal Circuit's decision are, to put it mildly, fanciful. Those predictions are based primarily on Caterpillar's assertion that the decision below necessarily would

II. The Federal Circuit Properly Applied This Court's Law On Preservation Of Juror Challenges, There Is No Circuit Split On This Issue, And Caterpillar Did Not Raise Its Current Argument Below.

Caterpillar next argues that, even if the trial court erred by denying the Sturmans' categorical for-cause challenge to Juror No. 3, the Sturmans waived their right to appeal that error by failing to use a peremptory challenge to strike that juror. Pet. 21-26. Again, that argument is meritless, and provides no basis for this Court's review.

Indeed, this argument really boils down to nothing more than a challenge to *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). That recent decision, joined by seven Justices of this Court, specifically rejected the rule proposed by Caterpillar here: that a litigant in federal court should be required "to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for-cause ruling impaired the defendant's right to a fair trial." *Id.* at 314. Such a litigant, the *Martinez-Salazar* Court explained, should not be required to "use a peremptory challenge curatively" to correct an error by the trial court. *Id.* at 315. To the contrary, a litigant who uses a peremptory challenge to strike a juror *loses* the right to appeal the denial of a for-cause challenge to that juror, since the litigant cannot complain about

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apply to all corporate affiliates of a litigant. *See* Pet. 21 ("[T]he spouse of an employee making Hanes underwear (headquartered in North Carolina) would be excluded from jury service in a case against Jimmy Dean sausages (headquartered in Cincinnati), or Kiwi shoe polish, or Coach handbags, all of which are (or were) owned by Sara Lee Corporation. The spouse of an employee making Life Savers candy would be excluded from jury service in a case against Phillip Morris cigarettes, once under common corporate ownership."). This case does not present the issue whether bias should be imputed to employees of corporate affiliates: this case was brought by Caterpillar in its hometown of Peoria, Illinois, and the prospective juror was the spouse of a Caterpillar employee.

a juror who did not actually sit on his or her jury. *See id.* at 315-16. The Federal Circuit thus properly applied *Martinez-Salazar* here by holding that the Sturmans did not forfeit, but indeed preserved, their challenge to the district court's denial of their for-cause challenge to Juror No. 3 by not using a peremptory challenge to remove her from the jury. *See* Pet. App. 26-27a.

Caterpillar, however, asserts that "the lower courts are ... divided" on "the interpretation and application" of *Martinez-Salazar*. Pet. 21; *see also id.* at 3 (asserting that "the courts of appeals are divided" on the *Martinez-Salazar* issue). That assertion, once again, is incorrect. In support of that assertion, Caterpillar cites a grand total of two cases: (1) *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001), and (2) *Merritt v. Evansville-Vanderburgh School Corp.*, 765 N.E.2d 1232 (Ind. 2002). Neither one supports Caterpillar's assertion.

Thompson did not challenge the rule of *Martinez-Salazar*, and indeed *reversed* a jury verdict based on the trial court's erroneous denial of a for-cause challenge. *See* 248 F.3d at 624-27. Although Judge Posner, writing for the *Thompson* majority, expressed some skepticism about *Martinez-Salazar*, he expressly *declined* to address the issue raised by Caterpillar here, "since the defendant is not arguing that the plaintiff's failure to use a peremptory challenge against [the allegedly biased juror] prevents the plaintiff from challenging [the juror's] presence on the jury." *Id.* at 623. And Judge Diane Wood wrote a concurring opinion in that case just to emphasize that "I do not share the majority's reservations about [the *Martinez-Salazar*] rule, and I therefore support strongly the majority's decision to reserve any exploration of this rule for another day (assuming for the sake of argument that the Supreme Court has left us any room in which to operate)." *Id.* at 627.

Merritt, if anything, provides even less support for Caterpillar's position. In that case, the Indiana Supreme Court decided, as a matter of Indiana state law, that a litigant cannot challenge the denial of a for-cause challenge to a juror on appeal unless the litigant has exhausted its peremptory challenges. *See* 765 N.E.2d at 1237. The *Merritt* Court acknowledged that this Court said in *Martinez-Salazar* "that under federal law a defendant is *not* required to use a peremptory strike to preserve a challenge-for-cause denial claim," *id.* at 1236 n.5 (emphasis added), but simply disagreed with that position. Needless to say, the fact that Indiana has adopted a different rule under state law than this Court has adopted under federal law does not establish any conflict on an issue of federal law.

In any event, Caterpillar's critique of the *Martinez-Salazar* rule is not well-founded. It is fanciful to attribute "gamesmanship," Pet. 3, 21, 22, 23, 24, 26, to a litigant invoking the rule, because by definition a litigant invoking the rule has unsuccessfully challenged a juror for cause. If the trial court had not erred by denying the for-cause challenge in the first place, there would be no problem at all. *See Thompson*, 248 F.3d at 627 (D. Wood, J., concurring) ("It is important to remember that no problem arises until the party has challenged a prospective juror for cause and the court has rejected the challenge. The district court thus cannot be sand-bagged into permitting a biased juror to sit."). As the *Martinez-Salazar* Court recognized, a litigant in this situation faces a "hard choice": either use a peremptory to strike an objectionable juror (and lose the right to challenge the disputed for-cause ruling on appeal), or allow the objectionable juror to be seated. 528 U.S. at 315. This is not the stuff of "gamesmanship." To the contrary, it is Caterpillar that proposes a "heads-I-win-tails-you-lose" regime in which a litigant loses the right to appeal an erroneous for-cause challenge if he exercises a peremptory challenge *and* if he does not. In any event, this Court carefully

considered this issue just recently in *Martinez-Salazar*, and Caterpillar proffers no reason for this Court to revisit the issue again now.[4]

Finally, Caterpillar's argument regarding *Martinez-Salazar*—like its argument concerning implied bias—is brand new; Caterpillar never made that argument below. While the Sturmans pointed out in their opening brief on appeal that *Martinez-Salazar* required reversal of the judgment if the Federal Circuit agreed that the district court erred in denying the Sturmans' for-cause challenge to Juror No. 3, *see* Opp. App. 3-4a, Caterpillar did not address that argument in its response brief, *see* Opp. App. 5-7a. Instead, Caterpillar simply asserted in a footnote that "Sturmans' reliance on [*Martinez-Salazar*] is misplaced ... [because] the Court ruled that the presence of a biased juror was error where defendants individually objected to the juror and only if the objection was preserved." Opp. App. 7a n.5. Needless to say, that assertion (which simply reiterated Caterpillar's argument that the Sturmans' categorical for-cause challenge did not preserve their objection to Juror No. 3) is a far cry from Caterpillar's current argument that *Martinez-Salazar* spells the end of the jury system as we know it. Having failed to raise its current argument below, and hence having denied the lower courts the opportunity to address that argument, Caterpillar is in no position to raise that argument now. *See, e.g., United Foods*, 533 U.S. at 417; *Yeskey*, 524 U.S. at 212-

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[4] Caterpillar also asserts in passing that "[i]n conflict with the decision below, the Ninth Circuit holds that a defendant waives his challenge to jurors by failing to follow the judge's preference for individual, rather than blanket *per se* analysis." Pet. 25 (citing *Zamora v. Guam*, 394 F.2d 815, 816 (9th Cir. 1968)). That assertion, as the Federal Circuit noted, is meritless. "*Zamora* is distinguishable from this case," the Federal Circuit explained, because *Zamora* involved *actual* bias (which must be fleshed out on an individual basis), whereas this case involves *implied* bias (which is categorically attributed to certain groups of prospective jurors). *See* Pet. App. 22a.

13; *Rogers*, 458 U.S. at 628 n.10; *Ortiz*, 422 U.S. at 898; *Adickes*, 398 U.S. at 147 n.2.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[. . .]

ARGUMENT

I. The District Court Erred By Allowing The Spouse Of A Caterpillar Employee To Sit On The Jury.

The district court erred, as a threshold matter, by allowing Juror No. 3, the spouse of a current Caterpillar employee, to sit on the jury that ruled in Caterpillar's favor. Under settled law, "a court *must* excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case." *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) (emphasis added). Being married to a party's employee necessarily meets that standard: an employee's spouse has a self-evident interest in the employer's financial health. Indeed, "[t]his is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause," *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995), *regardless* of whether the juror asserts that he or she could be impartial, *see id.* "The determination of implied bias is a question of law reviewed *de novo*." *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998); *see also Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (same).

Precisely because allowing the spouse of a party's employee to serve on the jury is such manifest error, the Sturmans moved before trial to dismiss for cause every Caterpillar employee, retiree, or spouse of a Caterpillar employee or retiree, *see* A20172-74, explaining their reasoning thus:

> MR. STREFF: It is not appropriate or fair to have people whose livelihood, whose dollars, come from the opposing party and have them sit on the jury.... I don't believe that they can truly

> be fair in their own minds. *That goes to spouses especially* ....

A20175-76 (emphasis added). Indeed, the Sturmans noted that denial of their motion to dismiss for cause "would be not just highly prejudicial, but it would be grounds for a mistrial to allow those people who are so closely tied to the company category to be members of the jury." A20172-73; *see also* A20184. And the district court specifically acknowledged that the Sturmans' motion applied to "*spouses of current employees*." A20174 (emphasis added). There is no dispute that Juror No. 3 falls into this category: she specifically identified herself as the spouse of a Caterpillar employee, A20115-16, and the Sturmans specifically identified her on a list of eleven prospective jurors that they sought to dismiss for cause in light of their connections to Caterpillar, A20172-73.

Caterpillar vehemently opposed the dismissal for cause of current and former Caterpillar employees and/or their spouses, suggesting that such persons were a constitutionally protected group under *Batson v. Kentucky*, 476 U.S. 79 (1986):

> MR. ABRAMS: This jury is supposed to be representative of this community. And this community is composed of people that have relationships and ties with Caterpillar. ...[W]hat [the Sturmans are] suggesting here is no different than a *Batson* situation. Your Honor, they're trying to exclude a class of people, and the class of people here is anybody having a relationship with Caterpillar. It's not a fair approach. It is not the representation of this community.

A20174, A20177. The district court accepted this outlandish suggestion and denied the Sturmans' motion. According to

the court, "Caterpillar is an important part of this community, and it would not be a representative community [jury] without some Caterpillar connection. ... I'm not eliminating everybody who has worked at Caterpillar." A20178, A20182. Thus, the only Caterpillar-connected prospective jurors the court excused for cause were: (1) people who knew potential trial witnesses personally, A20178, A20180; and (2) a single spouse of a Caterpillar manager (in contrast to the spouses of Caterpillar union employees, like Juror No. 3); A20186-90.

That decision is plainly erroneous. The employees of a party and/or their spouses have no constitutional right to sit on a jury adjudicating their employer's rights and liabilities; to the contrary, the party adverse to their employer has a constitutional right *not* to have such persons on the jury. Were the law otherwise, a large employer (like Caterpillar) could always sue in its hometown (like Caterpillar did here), and unfairly obtain a jury comprised at least in part of its own employees and/or their spouses. Nor were the Sturmans required, after the district court specifically denied their blanket objection to all current and former Caterpillar employees and their spouses, to continue raising that same objection with respect to individual jurors; once the Sturmans had made the basis for their objection clear and had been rebuffed by the district court, they were not required to continue pressing the point. *See, e.g., Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1450 (7th Cir. 1992). And nor, for that matter, were the Sturmans "obliged to use a peremptory challenge to cure the judge's error." *See, e.g., United States v. Martinez-Salazar,* 528 U.S. 304, 307 (2000); *see also id.* at 315-16; *Polichemi*, 219 F.3d at 704.

Because the district court erred by refusing to dismiss Juror No. 3 for cause, *and she actually sat on the jury that ruled in Caterpillar's favor*, the Sturmans are entitled to a new trial as a matter of law. *See, e.g., Martinez-Salazar*, 528

U.S. at 316; *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). Precisely because "the presence of a biased juror, like the presence of a biased judge, is a 'structural defect'" in the trial, it is impervious to harmless-error review. *Hughes,* 258 F.3d at 463; *see also Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992). Accordingly, this Court should reverse the judgment in Caterpillar's favor, and remand for a new trial on all issues submitted to the jury.[1]

[. . .]

[1] Reversing the judgment in Caterpillar's favor in light of the tainted jury verdicts would also entail vacating the district court's order directing the Sturmans to assign Caterpillar sole ownership of the '329 and '987 patents based on those verdicts, A42-43.

APPENDIX B

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IV. ARGUMENT

A. Sturmans Waived (And Had No Grounds For) Objection To Juror No. 3

The district court correctly ruled: "Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee yet declined to individually challenge her for cause when offered the opportunity by the Court to do so. Accordingly, this matter is waived." (A9.) The district court's decision is reviewed for abuse of discretion. *United States v. Beasley*, 48 F.3d 262, 266 (7th Cir. 1995).

As the Supreme Court held in *Frazier v. United States*, a defendant who accepts jurors before trial may not challenge them in a motion for new trial. 335 U.S. 497, 513 (1948); *United States v. Gordon*, 253 F.2d 177, 185 (7th Cir. 1985). If a defendant knows of a basis for challenge and stands mute, gambling on an acquittal while holding the issue in reserve, such conduct may be regarded as waiver by deliberate concealment. *United States v. Shakur*, 723 F. Supp. 925, 932-33 (S.D.N.Y. 1988).

There is no merit to Sturmans' argument that their generic motion to strike all current and former Caterpillar employees and their relatives sufficed. Such a "class" is not presumed biased as a matter of law; rather, bias must be shown individually. For example, in *United States v. Polichemi*, the court ruled that "government employment alone is not, and should not be, enough to trigger the rule under which an employee is disqualified from serving as a juror in a case involving her employer." 219 F.3d 698, 704 (7th Cir. 2000); *United States v. Caldwell*, 543 F.2d 1333, 1347 (D.C. Cir. 1974) ("absent a specific showing of bias, a

defendant accused of murdering a police officer is not entitled to a jury free of policemen's relatives").

Thus, the district court did not abuse its discretion in overruling Sturmans' blanket objection and directing Sturmans to object to individual jurors. Although Sturmans made individual motions, including one against a Caterpillar employee spouse (which the court sustained), they did not mention Adams-Trantham until months after the trial had ended. In these circumstances, the district court correctly ruled "Sturmans cannot now, at this last stage [motion for new trial], challenge the propriety of Juror 3 after accepting her at the close of the jury selection proceedings." (A9.) *Zamora v. Guam*, 394 F.2d 815, 816 (9th Cir. 1968) (defendant waived objection to jurors despite general objection where trial judge invited defense counsel to explore prejudice with individual jurors and failed to do so).[4]

None of Sturmans' cited authorities holds or even suggests that a district court abuses its discretion, as a matter of law, by empanelling a juror who is also a corporate party employee's spouse, nor do they suggest that Sturmans had a non-waivable right to removal of such a juror. In *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995), plaintiff made an *individual* challenge to a prospective juror who both held stock in the corporate defendant *and* whose

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[4] Sturmans' citation to *Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1450 (7th Cir. 1992), is unavailing and, if anything, supports Caterpillar. First, *Dresser* deals with jury instructions, has nothing to do with jury selection, and does not permit a party to preserve objection by disregarding a court's express direction to make individual challenges for cause. Second, *Dresser* states that a party may be excused from objecting again (to jury instructions) only where doing so would be futile. Here, Sturmans did in fact re-object to one Caterpillar-spouse on individual grounds, and the objection was sustained; thus, individual objections were not futile.

spouse worked for that defendant; here, Sturmans made no individual motion and there is no evidence Adams-Trantham owned stock in Caterpillar. In *Polichemi*, 219 F.3d at 703-06, the court found error in seating a juror in a criminal case who herself was a fifteen-year employee of the prosecutor's office.[5]

Fully cognizant of the district court's requirement for individual challenges, Sturmans made the tactical decision not to challenge Adams-Trantham. They thereby waived any objection, and there is no reason to permit Sturmans to benefit now from their deliberate choice at trial.

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[5] Sturmans' reliance on *United States v. Martinez-Salazar* and *Hughes v. United States*, (Sturmans' Br. 26), is misplaced. In *Martinez-Salazar*, the Court ruled that the presence of a biased juror was error where defendants individually objected to the juror and only if the objection was preserved. 528 U.S. 304, 308-09 (2000). In *Hughes*, the court ruled a juror must be excused only where actual bias is shown, and ruled that a juror's statement that "I don't think I could be fair" was sufficient basis. 258 F.3d 453, 460-64 (6th Cir. 2001). Here, Sturmans presented no evidence of bias and did not preserve the objection.