

Nos. 09-55673, 09-55812

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MGA ENTERTAINMENT, INC., MGA ENTERTAINMENT HK
LTD., and ISAAC LARIAN,
Appellants,

v.

MATTEL, INC., a Delaware Corporation,
Appellee.

Appeal from a Judgment of the United States District Court
for the Central District of California, No. 2:04-cv-09049-SGL (RNBx)
Honorable Stephen G. Larson

**BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE,
PUBLIC AFFAIRS ALLIANCE OF IRANIAN AMERICANS,
IRANIAN AMERICAN JEWISH FEDERATION, AND
IRANIAN AMERICAN BAR ASSOCIATION SUPPORTING
APPELLANTS AND URGING REVERSAL**

Simon J. Frankel
Margaret D. Wilkinson
Steven D. Sassaman
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Counsel for Amici Curiae

Steven M. Freeman
Steven C. Sheinberg
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158-3560
Telephone: (212) 885-7700
Facsimile: (212) 885-5882

Michelle N. Deutchman
ANTI-DEFAMATION LEAGUE
10495 Santa Monica Boulevard
Los Angeles, CA 90025-5031
Telephone: (310) 446-8000
Facsimile: (310) 470-8712

*Counsel for Amicus Curiae
Anti-Defamation League*

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae Anti-Defamation League is a non-profit corporation qualified under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly-held company owns ten percent or more of it.

Amicus curiae Public Affairs Alliance of Iranian Americans is a non-profit organization qualified under Section 501(c)(4) of the Internal Revenue Code. It has no parent corporation, and no publicly-held company owns ten percent or more of it.

Amicus curiae Iranian American Jewish Federation is a non-profit organization. It has no parent corporation, and no publicly-held company owns ten percent or more of it.

Amicus curiae Iranian American Bar Association is a non-profit corporation qualified under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly-held company owns ten percent or more of it.

Dated: July 21, 2009

By: /s/ Steven D. Sassaman
Steven D. Sassaman

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST OF AMICI AND SOURCE OF AUTHORITY TO
FILE..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 7

I. JUROR NO. 8’S ACTUAL BIAS, ESTABLISHED BY HER BIGOTED
COMMENTS, VIOLATED DEFENDANTS’ CONSTITUTIONAL
RIGHT TO AN IMPARTIAL JURY..... 7

 A. The Injection of Ethnic Prejudice into Jury Deliberations
 Undermines a Civil Litigant’s Right to an Impartial Jury and the
 Public’s Confidence in the Judicial System. 7

 B. Juror No. 8’s Prejudiced Comments Establish Her Actual Bias
 Under the Law. 9

II. A JUROR’S ACTUAL BIAS INFECTS NOT ONLY HER OWN
DECISION-MAKING, BUT THE ENTIRE JURY DELIBERATION
PROCESS..... 11

III. A NEW TRIAL IS THE ONLY APPROPRIATE REMEDY FOR
VIOLATION OF A CIVIL LITIGANT’S RIGHT TO AN IMPARTIAL
JURY. 16

 A. A Biased Juror’s Participation in Reaching a Verdict Violates a Civil
 Litigant’s Right to an Impartial Jury. 16

 B. A New Trial is the Only Remedy That Can Address the Violation of
 a Party’s Right to an Impartial Jury. 18

IV. LITIGANTS MUST NOT BE REQUIRED TO INJECT THE ISSUE OF
RACE AND ETHNICITY INTO EVERY TRIAL THROUGH *VOIR*
DIRE. 20

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 25

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995).....8

Caterpillar Inc. v. Sturman Indus., Inc.,
387 F.3d 1358 (Fed. Cir. 2004)17, 18

Dyer v. Calderon,
151 F.3d 970 (9th Cir. 1998)11, 19

Estrada v. Scribner,
512 F.3d 1227 (9th Cir. 2008)11, 16

Frank v. Mangum,
237 U.S. 309 (1915).....1

Image Tech. Servs., Inc. v. Eastman Kodak Co.,
125 F.3d 1195 (9th Cir. 1997)8, 17

Irvin v. Dowd,
366 U.S. 717 (1961).....7

Jimenez v. Heyliger,
792 F. Supp. 910 (D.P.R. 1992)8, 12

MacFarland v. Smith,
611 F.2d 414 (2d Cir. 1979)12

McCoy v. Goldston,
652 F.2d 654 (6th Cir. 1981)18

McDonough Power Equip., Inc. v. Greenwood,
464 U.S. 548 (1984).....passim

Powers v. Ohio,
499 U.S. 400 (1991).....13

Rinker v. County of Napa,
724 F.2d 1352 (9th Cir. 1983)17

Rosales-Lopez v. United States,
451 U.S. 182 (1981).....21

Rose v. Mitchell,
443 U.S. 545 (1979).....8

Skaggs v. Otis Elevator Co.,
164 F.3d 511 (10th Cir. 1998)7

Smith v. Phillips,
455 U.S. 209 (1982).....18, 23

Thiel v. S. Pac. Co.,
328 U.S. 217 (1946).....7

Thompson v. Altheimer & Gray,
248 F.3d 621 (7th Cir. 2001)18

Tobias v. Smith,
468 F. Supp. 1287 (W.D.N.Y. 1979).....9

United States v. Gonzalez,
214 F.3d 1109 (9th Cir. 2000)7, 8, 9

United States v. Heller,
785 F.2d 1524 (11th Cir. 1986)passim

United States v. Henley,
238 F.3d 1111 (9th Cir. 2001)passim

United States v. Sotelo,
97 F.3d 782 (5th Cir. 1996)9

STATUTES, REGULATIONS, AND ADMINISTRATIVE GUIDANCE

Fed. R. App. P. 29(a) 1

Fed. R. App. P. 32(a)(7).....25

Fed. R. App. P. 32(a)(7)(B)(ii)25

Fed. R. Evid. 606(b).....11, 22

Ninth Circuit Rule 29-2(c)(3)25
 Sup. Ct. R. 37.6 1
 U.S. Const. Amend. V.....4
 U.S. Const. Amend. VII.....4, 7

OTHER AUTHORITIES

*Developments in the Law—Race and the Criminal Process: VII. Racist Juror
 Misconduct During Deliberations*, 101 Harv. L. Rev. 1595 (1988)12
 Edelman, Bryan C., *Racial Prejudice, Juror Empathy, and Sentencing in
 Death Penalty Cases* 71 (2006)14
 Ellsworth, Phoebe C., *Some steps between attitudes and verdicts*, in *Inside
 the Juror: The Psychology of Juror Decision Making* 42 (Reid Hastie ed.,
 1993)14
 Frederick, Jeffrey T., *The Psychology of the American Jury* 278 (1987).....14
 Howe, Julia E., *An Ethical Framework for Jury Selection*, in *Jury Ethics:
 Juror Conduct and Jury Dynamics* 35 (John Kleinig & James P. Levine
 eds., 2006).....23
 King, Nancy J., *Ethics for the Ex-Juror*, in *Jury Ethics: Juror Conduct and
 Jury Dynamics* 219 (John Kleinig & James P. Levine eds., 2006)14
 King, Nancy J., *Postconviction Review of Jury Discrimination*, 92 Mich. L.
 Rev. 63 (1993)12

**STATEMENT OF INTEREST OF AMICI AND SOURCE OF AUTHORITY
TO FILE**

This brief is filed with the consent of the parties to this appeal.¹ *See* Fed. R. App. P. 29(a).

The Anti-Defamation League (ADL) was founded in 1913 to “stop the defamation of the Jewish people” and ultimately to “secure equal justice and fair treatment for all.” To do this, ADL works to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice for, and fair treatment of, all citizens. Today, it is one of the world’s leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism.

This case implicates not only ADL’s broad goal of eradicating bigotry, but its particular concern about any allegation of racial, ethnic, or religious bias on the part of a juror. Notably, ADL rose from the ashes of a trial based on prejudice. In 1913, the year ADL was founded, Leo Frank, a Jewish Atlanta businessman, was falsely convicted of rape and murder in a situation rife with anti-Semitism. *See Frank v. Mangum*, 237 U.S. 309 (1915). Since then, ADL has

¹ Although not required under the current Federal Rules of Appellate Procedure, Amici state that no counsel for a party authorized this brief in whole or in part, and that no person or entity other than Amici, their members, and their counsel contributed monetarily to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

worked to combat all forms of intolerance, not just anti-Semitism. Its mission and history lead it to file a brief in this case where a litigant appears to have been denied a fair trial due to a juror's perpetuation of bias on the basis of ethnicity.

Public Affairs Alliance of Iranian Americans (PAAIA) is a non-sectarian, national membership organization dedicated to protecting the rights and advancing the interests of Iranian Americans in the United States. It being a bedrock principle of United States law that no person should be discriminated against on the basis of ethnicity, national origin or religion, PAAIA is committed to securing fair treatment under the law for Iranian Americans and combating any and all instances of bias, discrimination or civil rights violations against them on the basis of their ethnicity, national origin or religion. PAAIA's mission leads it to file a brief in this case on the question of whether an Iranian American litigant was denied a fair trial because of a juror making derogatory comments about, and exhibiting bias towards, Iranians during jury deliberations.

The Iranian American Jewish Federation (IAJF) was formed in 1980. One of the major consequences of 1979 revolution in Iran was the mass emigration of the Iranian elite and minorities, including Iranian Jews. Immediately after these exiles arrived in the United States, the Iranian Jewish community that settled in California began forming various organizations, including the IAJF, to cater to the needs of their community. The IAJF's main objective is to defend and protect the

interests and welfare of Iranian Jews throughout the world. This case is of particular interest to the IAJF, because the IAJF aims to defend and protect Iranian Jews against bias like that revealed during jury deliberations here.

Incorporated in 2000 in the District of Columbia, the Iranian American Bar Association (IABA) is a non-profit organization of more than 1,500 attorneys in over 9 official chapters nationwide. IABA is the only national association of Iranian judges, lawyers, and law students organized for the specific purpose of protecting the rights of the Iranian American community. IABA's core mission is to promote the "social, economic, professional and educational advancement of the Iranian American community and the community at large." Additionally, IABA advocates nationally on legal issues that are of widespread interest to the Iranian American community. To accomplish these goals, one of IABA's primary tasks is to prevent discrimination based on ethnic, cultural or religious background.

The IABA membership has a vital interest in the outcome of this appeal. This case fits squarely within IABA's broad goal of assuring that the legal rights of Iranian Americans are upheld and respected. In the past 10 years, Iranian Americans have come under increased attack based on their ethnic and cultural background. As the leading Iranian American legal organization, IABA has actively taken efforts to combat racism and discrimination against individuals of

Iranian origin by issuing public statements and press releases, calling for legal action, and encouraging policy-makers to prevent future abuse. This broad mandate dictates that IABA file as amicus in this case where it is clear that an individual has been denied the right to a fair trial based on their cultural and ethnic background as an individual of Iranian origin.

Amici take no position on the underlying dispute in this matter.

Rather, their interest is confined to supporting the principle that a new trial must be granted where an actually biased juror participated in the verdict.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates two values that lie at the heart of the United States legal system: the right to a fair trial by an impartial jury, and the importance of avoiding racial and ethnic discrimination in the administration of justice. It is undeniable that the Fifth and Seventh Amendments guarantee civil litigants a jury that will reach a verdict based on the evidence before it, free from the influence of bias and extraneous information. It is equally indisputable that the Constitution demands the equal treatment of all people, regardless of race or ethnicity. Yet both values are severely undermined when a juror who holds racial or ethnic prejudice participates in the reaching of a verdict, to the detriment not only of a litigant's rights but the integrity of and public confidence in the justice system.

It is the rare case in which a sitting juror's actual bias will come to light. The trial court here, presented with the unusual opportunity to send a decisive message that ethnic prejudice has no place in the courtroom, instead found that Juror No. 8 was not biased because she attributed her comments to her husband, found that the other jurors were not affected by Juror No. 8's participation in deliberations, and put the burden of rooting out ethnic or racial bias on the defendants, ultimately allowing a verdict in which Juror No. 8 participated to stand. *Amici curiae* urge this Court to reaffirm the fundamental premise that ethnic prejudice can be permitted to play no role in any jury's deliberations, through the following findings:

First, Juror No. 8's wildly inappropriate comments about the ethnicity of defendant Isaac Larian established her actual bias under the law. That she attributed her contentions about Iranians to her husband does not establish her impartiality. It is difficult to believe that Juror No. 8 would have repeated these comments if she were not influenced by them herself, and if she had no interest in influencing other jurors through them. The fact that her comments went to the heart of this case—through her contention that Iranians “have stolen other people's ideas”—further demonstrates that Juror No. 8's preconceived notions rose to the level of legal bias.

Second, Juror No. 8's bias likely influenced the other jurors, not only through her overt demeaning of Iranians but also via her covert expression of that bias throughout jury deliberations. As a result, a remedy for this bias that fails to account for Juror No. 8's impact and influence on the rest of the panel also fails to address the full extent of the partiality that she introduced into the proceedings.

Third, a civil verdict in which a biased juror has participated cannot stand. In this case, clear evidence emerged that a juror who participated in the verdict harbored ethnic prejudice. It is likely that this bias infected not only Juror No. 8's, but the entire jury's approach to deliberations as well. Removing Juror No. 8 may have diminished the danger of biased deliberations in the trial's later phases, but that removal could not fix the verdict already reached. Avoiding the inconvenience of a new trial cannot justify overlooking a juror's legal bias. In such circumstances, a new trial is the only remedy that can address the violation of the right to an impartial jury and maintain public confidence in the legal system.

Finally, litigants do not have an obligation to ask probing questions about any possible prejudice during *voir dire*, as the district court held here. This burden would force litigants to inject the issue of race and ethnicity into every case, or risk not being able to challenge biased comments made during deliberations. Such a regime would be both untenable and repugnant to cherished judicial and social values.

ARGUMENT

I. JUROR NO. 8'S ACTUAL BIAS, ESTABLISHED BY HER BIGOTED COMMENTS, VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY.

A. The Injection of Ethnic Prejudice into Jury Deliberations Undermines a Civil Litigant's Right to an Impartial Jury and the Public's Confidence in the Judicial System.

The right to a jury trial in civil cases, guaranteed by the Seventh Amendment and Due Process, “necessarily contemplates an impartial jury.” *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514-15 (10th Cir. 1998) (“the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury”). A jury is impartial only if it is “capable and willing to decide the case solely on the evidence before it.” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000). A juror “cannot be impartial” if he or she has formed any opinion about a case that he or she cannot “lay aside.” *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

A juror who harbors racial or ethnic prejudice is actually biased under the law. Actual bias is “the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” *Gonzalez*, 214 F.3d at 1112; *see also Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220 (9th Cir. 1997) (“Actual bias involves an inability to act impartially or a refusal to

weigh the evidence properly.”). The Constitution’s guarantee of an impartial jury is thwarted by a juror who harbors prejudice on the basis of race, ethnicity, or national origin: such a person holds “certain negative stereotypes which, despite his [or her] protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that [the] jury system requires.” *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986); see *Jimenez v. Heyliger*, 792 F. Supp. 910, 918 (D.P.R. 1992) (noting that *Heller*’s concern with bias is “equally applicable when dealing with prejudice based on national origin”).

Any bias held by a juror is cause for concern, but a juror’s racial or ethnic bias is particularly disturbing. Racial and ethnic discrimination persist as major problems in American society. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *Heller*, 785 F.2d at 1527. Such discrimination, “odious in all aspects, is especially pernicious in the administration of justice,” as it undermines not only a litigant’s constitutional rights but “destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.” See *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). In order to advance “the broad goal of eliminating racial prejudice from the judicial system,” courts must watch for and react to evidence of such bias in jurors with especial vigilance. See *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001); *Heller*, 785 F.2d at 1527. Quite simply, racial and ethnic prejudice cannot be allowed to play *any* role in jury

deliberations. *See, e.g., United States v. Sotelo*, 97 F.3d 782, 796 (5th Cir. 1996) (noting that “open racial bias is unacceptable during jury deliberations”); *Tobias v. Smith*, 468 F. Supp. 1287, 1291 (W.D.N.Y. 1979) (“jurors who manifest . . . prejudice,” whether it be on the basis of race, ethnicity, or religion, “have no place in the jury room”).

B. Juror No. 8’s Prejudiced Comments Establish Her Actual Bias Under the Law.

Because a juror will rarely admit his or her own bias, it “necessarily must be inferred from surrounding facts and circumstances.” *McDonough*, 464 U.S. at 558 (Brennan, J., concurring); *Gonzalez*, 214 F.3d at 1111-12.² In this case, however, Juror No. 8 explicitly referred to Iranians as people “who are stubborn, rude, and *who have stolen other people’s ideas.*” Order at 4 (emphasis added). It is rare that a court will be confronted with such direct evidence of actual bias, much less bias going to the heart of a case’s issues. Yet the district court found that Juror No. 8 was not legally biased. *Id.* at 11. The court’s

² In *McDonough*, the Supreme Court held that a litigant can establish actual bias by showing that (1) “a juror failed to answer honestly a material question on *voir dire*,” and (2) “a correct response would have provided a valid basis for a challenge for cause.” 464 U.S. at 556. The *McDonough* test is merely one way of proving actual bias. *See id.* at 556-57 (Blackmun, J., concurring) (“regardless of whether a juror’s answer is honest or dishonest, it remains within a trial court’s option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias”).

conclusion that she was not biased, because she attributed her comments to her husband and claimed she could be impartial, defies all logic.

In *Henley*, the Ninth Circuit rejected the similar argument that a juror was not necessarily racially biased just because he had used the slur “nigger” to refer to African-Americans. This Court wrote, “We have considerable difficulty accepting the government’s assumption that, at this time in our history, people who use the word ‘nigger’ are not racially biased.” 238 F.3d at 1121. Indeed, in its order, the district court noted that it was “mindful of [*Henley*’s] suggestion that those who use . . . statements regarding ethnocentric bias . . . generally subscribe to the views that the use of such terms imply.” Order at 7. Yet the district court did not explain the logic by which Juror No. 8 would repeat derogatory statements about Iranians if she did not subscribe to them herself.³ Juror No. 8 did not disclaim her own belief in the views she expressed. What was her intent in reporting such views if not to influence the other jurors to believe the same? In particular, why would she state that Iranians “steal other people’s ideas” in the midst of deliberations in a high-stakes case concerning whether Mr. Larian had participated in taking ideas and concepts from Mattel, if she did not mean to affect the jury’s deliberations? And, finally, why would she suggest to other jurors *what*

³ Not only did the district court fail to explain its logic in finding Juror No. 8 unbiased; but it has also declined to unseal the transcripts of its *in camera* interviews with jurors.

they should believe if she did not harbor those views herself? It is hard to conceive of any reason that an impartial juror, who took seriously her duty to set aside any preconceived notions or prejudices, would introduce such bigoted comments into deliberations.⁴ The only fair conclusion is that Juror No. 8 held an actual bias against Iranians.⁵

II. A JUROR'S ACTUAL BIAS INFECTS NOT ONLY HER OWN DECISION-MAKING, BUT THE ENTIRE JURY DELIBERATION PROCESS.

Not only do Juror No. 8's ethnically derogatory statements demonstrate that she was unfit to serve on a jury; they also raise troubling questions about the baleful influence that she may have exerted on her fellow

⁴ Even if Juror No. 8's comments were merely "extraneous prejudicial information" (Order at 6), by introducing such information into deliberations she failed to follow the court's instructions. This failure casts serious doubt on her ability to follow the court's directive to decide the case with impartiality. *See Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) (where a juror disregarded "the court's admonition to answer *voir dire* questions truthfully, she [could] be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn," and was "unfit to serve") (emphasis added).

⁵ Because Juror No. 8 attributed her comments to her husband, the district court concluded that they constituted "extraneous prejudicial information" which the court could consider under Federal Rule of Evidence 606(b). Order at 6. The fact that the comments expressed Juror No. 8's own bias does not change the conclusion that Rule 606(b) does not apply here: Juror No. 8's comments about Iranians were formed outside the courtroom and were not part of the evidence. Indeed, the Ninth Circuit has suggested in dicta, but not held, that Rule 606(b) never bars the admission of bigoted statements made during jury deliberations. *Henley*, 238 F.3d at 1119-21; *see Estrada v. Scribner*, 512 F.3d 1227, 1241 n.14 (9th Cir. 2008). Amici urge the Court to confirm that Rule 606(b) is inapplicable to comments such as those made by Juror No. 8.

jurors and their deliberations, further undermining the impartiality of the proceedings.

It is difficult to imagine that the other members of the jury were not impacted by Juror No. 8's open avowal of anti-Iranian bigotry. Such incendiary statements can be persuasive in their own right, inviting their hearers to either adopt them outright or at least to take their content into consideration during deliberations. *See MacFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979) (finding that “[e]ven a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended”); *Jimenez*, 792 F. Supp. at 917 (ordering a new trial after an alternate juror's comments about the national origin of a party and noting that “[j]uries necessarily act as a unit and the misconduct of any juror . . . is misconduct of the entire jury, vitiating their verdict and requiring a new trial”); *Developments in the Law—Race and the Criminal Process: VII. Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1602 (1988) (“Even a single, brief racist comment can distort a juror's assessment of every fact and event at trial without necessarily resulting in any outward, explicit juror consideration of race.”); *see also* Nancy J. King, *Postconviction Review of Jury Discrimination*, 92 Mich. L. Rev. 63, 89-90 (1993) (describing findings that a juror's racial slurs may, despite disapproval by other jurors, nonetheless sway the

jury's ultimate verdict). The persuasive value of biased statements may be heightened when (as was the case with Juror No. 8's comments) they appear to be grounded in the speaker's own experience and other jurors lack familiarity or have had little contact with members of the maligned group. In such situations, one of the strengths of the jury system (creating a forum in which individuals with disparate backgrounds and experiences may draw on the knowledge and insight of others) may actually undermine the impartiality of the deliberations by leading formerly non-biased jurors to lend credence to the bigotry of their empanelled peers.⁶

Finally, Juror No. 8's influence on her fellow jurors is unlikely to have been restricted to her overt statement of bias alone. It is improbable that her animus towards individuals of Iranian extraction first arose at the moment she shared it with the jury; rather, common sense suggests that she harbored these

⁶ Overt statements of bias may compromise a jury's impartiality in quite the other direction, by spurring jurors who reject the stated bias to compensate for the clear prejudice of another member of the panel. One juror's frank avowal of her bias against a defendant's ethnic group is unlikely to be accepted by all her hearers; many may respond with dismay and disgust at such a display of animus. But this animus may cause other jurors to feel the obligation to compensate by giving the maligned party more than a reasonable benefit of the doubt out of a misplaced belief that doing so will somehow restore an even playing field. Although this may work to the favor of the party attacked, the result is no less pernicious, for impartiality is promised to all persons who come before the court and not merely to those individuals who belong to minorities or marginalized groups. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 402, 411-12 (1991) (defendants of any race may challenge racial discrimination in selection of jurors because such discrimination violates all defendants' right to an unbiased jury).

beliefs from the start of her jury service. As a result, her entire participation in the deliberative process was informed by her bias and her contributions toward the final verdict would have reflected her underlying belief that the defendant's ethnicity inclined him toward theft of "other people's ideas." See Phoebe C. Ellsworth, *Some steps between attitudes and verdicts*, in *Inside the Juror: The Psychology of Juror Decision Making* 42, 48-51 (Reid Hastie ed., 1993) (describing how jurors' pre-existing beliefs can structure their decision-making processes); Bryan C. Edelman, *Racial Prejudice, Juror Empathy, and Sentencing in Death Penalty Cases* 71 (2006) (noting that biased jurors "will make a cognitive effort to disconfirm evidence and argument that is inconsistent" with their racial prejudices about defendants). Each question that she posed in jury deliberations, each answer she gave in response to another juror's inquiries, and all of her statements about how she interpreted the evidence placed before the panel would have been shaped and shaded by this pernicious belief. See Nancy J. King, *Ethics for the Ex-Juror*, in *Jury Ethics: Juror Conduct and Jury Dynamics* 219, 221 (John Kleinig & James P. Levine eds., 2006) (noting that evaluation of fellow jurors' reasoning is a necessary part of jury deliberations); Jeffrey T. Frederick, *The Psychology of the American Jury* 278 (1987) (describing how the initial phase of jury deliberations is "characterized by statements made by the jurors which reveal their personal opinions and preferences"). Her bias as manifested in her

approach to deliberations no less undermined the jury's impartiality than her later overtly biased statements—and may have caused still greater harm, as the other jurors would not yet have been put on their guard against her influence because her true sentiments remained cloaked.

It is true that such covert bias is normally beyond the reach of the courts to discover or to remedy. But where a juror's bias against members of an racial or ethnic group has been laid bare by her overt comments, it would be irresponsibly naïve for a court not to consider the covert role that her bias—no less potent when it is more hidden—may have played in shaping the entire course of the jury's deliberations. The judiciary has a grave duty to “ensure equality and fairness” in the cases before it, and “must remain ever vigilant in its responsibility.” *Heller*, 785 F.2d at 1527. Both constitutional guarantees of impartiality and commitment to the values underlying our judicial system demand that courts take *full* measure of bias in the jury room when its presence has become so clearly known.

Where the courts take a more formalistic and narrow view—when they decline to consider that bias spoken aloud is merely the tip of the iceberg—they do more than harm an individual plaintiff or defendant in a single case. Their misplaced caution also undermines the credibility of the judicial system in the eyes of all members of the wider community, for whom the understanding that a

person's beliefs do not require explicit statement to influence others is a truism grounded in common sense and every-day experience.

III. A NEW TRIAL IS THE ONLY APPROPRIATE REMEDY FOR VIOLATION OF A CIVIL LITIGANT'S RIGHT TO AN IMPARTIAL JURY.

A. A Biased Juror's Participation in Reaching a Verdict Violates a Civil Litigant's Right to an Impartial Jury.

As discussed in Part I.A, *supra*, civil litigants, like criminal defendants, are guaranteed an impartial jury as part of their right to a fair trial. The Ninth Circuit has explicitly held that one biased juror's participation in a verdict violates a criminal defendant's right to a fair trial. *Estrada*, 512 F.3d at 1239; *see also Henley*, 238 F.3d at 1120 (“[o]ne racist juror would be enough” to violate a criminal defendant's right to an impartial jury). Here, the district court refused to find that the presence of a biased juror violates a civil litigant's right to an impartial jury as well, yet the truth of this principle is inherent in the jurisprudence on juror bias in civil cases. Amici curiae urge this Court to explicitly extend the *Estrada* rule to the civil context and make clear that all parties, whether criminal or civil, have the right to a jury without *any* racially or ethnically biased members.

There is no support for the position that an “impartial” jury has one meaning in the criminal context, and another in the civil context. “[T]he integrity of the jury system is no less to be desired in civil cases” than in criminal cases, making the juror bias case law developed in criminal cases applicable to civil

cases, and vice versa. *See Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983); *see also Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358, 1371 (Fed. Cir. 2004) (noting that reasoning of criminal cases on implied bias is “germane” in a civil case). Indeed, courts freely apply juror bias standards without regard for whether they were generated in criminal or civil cases. *See, e.g., McDonough*, 464 U.S. at 554 (relying on criminal case’s definition of impartiality); *Henley*, 238 F.3d at 1121 (applying *McDonough* test for establishing bias in a criminal case); *Image Technical Servs.*, 125 F.3d at 1220 (applying definition of actual bias drawn from a criminal case in a civil case). If one biased juror violates a criminal defendant’s right to an impartial jury, then one biased juror—not two, not three, not four—violates a civil litigant’s right to an impartial jury as well.

This principle is inescapable when one considers the situations in which courts have held that a civil litigant was unconstitutionally denied an impartial jury. For example, in *McDonough*, the Supreme Court held that a civil litigant’s right to an impartial jury is violated where *one* juror has lied during *voir dire*, and a truthful answer would have made him or her subject to dismissal for cause. 464 U.S. at 549, 556. Similarly, in *Caterpillar*, the court found that the right to an impartial jury was violated where *one* juror who should have been struck for cause on the basis of her implied bias actually sat on the jury. 387 F.3d at 1371, 1373. Counsel is not aware of any case, civil or criminal, in which a court

has found that a sitting juror was legally biased, but that the parties' right to an impartial jury was preserved. One prejudiced juror "would be enough" to violate a civil litigant's constitutional rights as well. *See Henley*, 238 F.3d at 1120.

B. A New Trial is the Only Remedy That Can Address the Violation of a Party's Right to an Impartial Jury.

The Constitution requires not only an impartial jury, but also "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217. Where a legally biased juror has participated in deliberations and a verdict has been returned, the only way for a court to remedy the resulting constitutional violation and preserve public confidence in the legal system is to order a new trial.

There is no saving a verdict in which a legally biased juror has participated. "Denial of the right to an unbiased tribunal is one of those trial errors that is not excused by being shown to have been harmless." *Thompson v. Altheimer & Gray*, 248 F.3d 621, 622 (7th Cir. 2001). A civil litigant is "entitled to a new trial" if his or her "right to an impartial jury" is violated. *McDonough*, 464 U.S. at 549; *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981) ("[A] showing of juror bias is the touchstone to determine whether to grant a new trial."); *see, e.g., Caterpillar*, 387 F.3d at 1373 (vacating civil verdicts because a legally biased juror "actually sat on the jury"); *Thompson*, 248 F.3d at 627 (a "verdict cannot stand" where a biased juror sat on the jury that reached it). Had the district

court here properly found that Juror No. 8 was biased, merely removing her from the jury for the next phases of the trial would have been insufficient. A new trial is the only remedy that can protect the right to an impartial jury where a biased juror has participated in the verdict.

Amici recognize that the district court here may have been disinclined to start from the beginning in a trial that had lasted several weeks, but the inconvenience of doing so is not—and should not—be the test. That granting a new trial where juror bias has been exposed will require further “time and expense” is of no moment. “[T]his factor cannot even be weighed in the balance when the right of an individual to a fair trial has been so severely compromised.” *Heller*, 785 F.2d at 1529; *see also Dyer*, 151 F.3d at 979 (finding that court’s investigation of evidence of juror bias was insufficient, even though “[n]o judge would be eager to discover bias” with “five weeks of trial completed and a verdict in hand”).

Moreover, where a juror who participated in the verdict has made bigoted comments, a new trial is necessary to protect the public’s belief in the fairness of the legal system, for “justice must satisfy the appearance of justice.” *Dyer*, 151 F.3d at 983 (internal quotation marks and citation omitted). In *Heller*, a case involving jurors’ anti-Semitic statements, the court emphasized that the judiciary has a duty to “ensure that prejudice plays no role in the functioning of

[the] judicial system.” 785 F.2d at 1528. Because the comments there were “potentially so damaging to public confidence in the equity of [the] system of justice,” the court found that a new trial was required: “affirming the . . . jury’s verdict would be an affront to [the] system for the administration of justice. The people cannot be expected to respect their judicial system if its judges do not, first, do so.” *Id.* at 1527, 1529. Amici believe that courts must be vigilant against any suggestion that racial or ethnic bias has played a role in the administration of justice. Where a juror has made bigoted comments, only a new trial, free from that juror’s influence, can protect our legal system from tarnish.

IV. LITIGANTS MUST NOT BE REQUIRED TO INJECT THE ISSUE OF RACE AND ETHNICITY INTO EVERY TRIAL THROUGH *VOIR DIRE*.

Besides the district court’s perplexing finding that Juror No. 8 was not legally biased, Amici are particularly troubled by another aspect of the decision below. The district court found that in order for Juror No. 8’s bigoted statements to have entitled MGA to a new trial under the *McDonough* test, MGA would have had to ask specific questions about potential jurors’ bias against Iranians during *voir dire*. Order at 7. As discussed above, Juror No. 8’s comments established her legal bias, so there was no need to perform a *McDonough* analysis. However, the district court’s decision suggests that litigants must ask numerous and detailed *voir dire* questions about a host of potential biases in order to have any hope of later

seeking the court's protection from a juror's revealed racial or ethnic bigotry.

Amici urge the Ninth Circuit to clarify that litigants do not have to inject the issue of race and ethnicity into every case in order to preserve a possible *McDonough* argument.

The Supreme Court has explained that “requiring an inquiry [into jurors’ racial prejudices] in every case is likely to create the impression that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth,” undermining “the appearance of justice in the federal courts.” *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (internal quotation marks and citations omitted). In addition, the questioning of jurors about racial and ethnic bias in every case, regardless of whether the case fairly raises such issues, may actually increase the danger of biased decision-making. If attorneys are forced to focus jurors’ attention on the immutable characteristics of the key players in a trial, jurors receive the message that race or ethnicity will or should play an important role in their deciding on a verdict. The district court’s ruling therefore forces litigants to choose between asking explicit questions about racial and ethnic bias during *voir dire* and waiving the right to obtain a new trial under *McDonough*

where evidence later surfaces that a juror has made bigoted comments during deliberations.⁷

Moreover, it would be impossible to anticipate every potential bias a juror might have and to ask a question about it during *voir dire*. The district court faulted MGA for “fail[ing] to ask questions designed to ferret out preconceptions regarding Persians and/or Iranians (or even Middle Easterners in general),” and “questions regarding the jury panel’s personal experiences or business dealings—or those of their family or friends—with other individuals who share Mr. Larian’s ethnicity and/or national origin.” Order at 7. In other words, in a case such as this where there was no reason to think that Mr. Larian’s ethnicity or national origin would play any role, MGA could not have prevailed on its *McDonough* argument unless it had asked the jurors the extremely specific question of whether their

⁷ The district court’s ruling also exposes the danger of using Federal Rule of Evidence 606(b) to exclude prejudiced comments made by jurors during deliberations. *See* note 5, *supra*. It is settled law that such comments made during jury deliberations are admissible to establish that a juror has lied during *voir dire* under the first prong of *McDonough*. *Henley*, 238 F.3d at 1121. If bigoted comments were not generally admissible to establish actual bias under Rule 606(b), then a litigant effectively would be prevented from challenging them except through the *McDonough* test, even though *McDonough* is merely one way to establish actual bias. *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring). In turn, if *McDonough* were the only way to establish actual bias, then the district court’s ruling would effectively prevent litigants from *ever* obtaining a new trial unless they had asked specific questions about bias during *voir dire*.

relatives had business dealings with Iranians and/or Persians. This sets the bar too high. Based on their experience, Amici assure this Court that however diligent an attorney may be, it is impossible to identify and ask about every bias or combination of biases that may manifest itself in the jury room.⁸ Amici therefore urge that this Court reject the district court's imposition of an undue burden on litigants to engage in such questioning during *voir dire*.

CONCLUSION

For the foregoing reasons, Amici Curiae ask this Court to send a clear message that one biased juror violates a civil litigant's constitutional rights, and

⁸ Nor is it certain that direct questions during *voir dire* will always reveal a potential juror's hidden biases, as many individuals are reluctant to admit that they harbor socially unacceptable views in open court. *See Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."); Julia E. Howe, *An Ethical Framework for Jury Selection*, in *Jury Ethics: Juror Conduct and Jury Dynamics* 35, 38 (John Kleinig & James P. Levine eds., 2006) ("A major inhibitor [of honest responses from prospective jurors] is the obligation to reveal information about their private lives, not only in front of a group of other prospective jurors, but also in open court where there is elevated emphasis on the standard of 'fair and impartial.' Such an atmosphere limits opportunities for candid responses and encourages more 'politically correct' responses, for example, 'I can be fair.'").

that bigotry has no place in the jury room, by ordering a new trial in this action.

Dated: July 21, 2009

Respectfully submitted,

By: /s/ Steven D. Sassaman
Simon J. Frankel
Margaret D. Wilkinson
Steven D. Sassaman
COVINGTON & BURLING LLP

Counsel for Amici Curiae

Steven M. Freeman
Steven C. Sheinberg
Michelle N. Deutchman
ANTI-DEFAMATION LEAGUE

Counsel for Amicus Curiae Anti-Defamation League

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(c)(3), the attached brief is proportionally spaced, has a typeface of 14 points and, according to the word-count feature of Microsoft Office Word 2003, contains 6,169 words, including footnotes, but not including parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: July 21, 2009

By: /s/ Steven D. Sassaman
Steven D. Sassaman

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2009, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE, PUBLIC AFFAIRS ALLIANCE OF IRANIAN AMERICANS, IRANIAN AMERICAN JEWISH FEDERATION, AND IRANIAN AMERICAN BAR ASSOCIATION SUPPORTING APPELLANTS AND URGING REVERSAL** with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused to be mailed the foregoing document by First Class Mail, postage prepaid, to the following non-EM/ECF participants:

John B. Quinn
Jon D. Corey
Brett Dylan Proctor
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
22nd Floor
865 South Figueroa Street
Los Angeles, CA 90017

E. Joshua Rosenkranz
ORRICK HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103-0001

Leah Chava Gershon
JAMES W. SPERTUS LAW OFFICES
Suite 620
12100 Wilshire Boulevard
Los Angeles, CA 90025

Linda M. Burrow
CALDWELL LESLIE & PROCTOR
Suite 600
1000 Wilshire Blvd.
Los Angeles, CA 90017

Ronald L. Olson
MUNGER, TOLLES & OLSON LLP
35th Floor
355 South Grand Avenue
Los Angeles, CA 90071-1560

/s/ Steven D. Sassaman

Steven D. Sassaman