B247080

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION EIGHT

WILFREDO VELASQUEZ,

Plaintiff and Appellant,

v.

CENTROME, INC. dba ADVANCED BIOTECH,

Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, HON. ANTHONY J. MOHR
CASE NO. BC370319

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF WILFREDO VELASQUEZ; *AMICUS CURIAE* BRIEF OF THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, AND ACLU OF SOUTHERN CALIFORNIA

*Gary A. Watt (SBN 191265)
gwatt@archernorris.com
Stephen Tollafield (SBN 221170)
Tiffany J. Gates (SBN 279447)
THE HASTINGS APPELLATE PROJECT
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 581-8987

Deborah Liu
PEOPLE FOR THE AMERICAN WAY
1101 15th Street, NW, Suite 600
Washington, DC 20005
Telephone: (202) 467-4999

Jennifer Pasquarella (SBN 263241)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
Telephone: (213) 977.5236

Attorneys for Amici
THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, and AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA

TABLE OF CONTENTS

Page

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT WILFREDO VELASQUEZ 1

I. Introduction 1

II. Interest of *Amici* 2

AMICUS CURIAE BRIEF OF THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, AND ACLU OF SOUTHERN CALIFORNIA 6

SUMMARY OF ARGUMENT 6

ARGUMENT 6

I. This Court Should Hold That in a Personal Injury Case Where Immigration Status Is Not an Issue, a Trial Court Commits Prejudicial Error *Per Se* by Informing Prospective Jurors That One of the Parties Is an Undocumented Immigrant 6

A. A Judge's Comments Can Have a Tremendous Impact on Jurors, Particularly During Voir Dire—the Primary Mechanism Through Which the Constitutionally Guaranteed Right to a Fair and Impartial Jury Is Protected 7

B. It Is Widely Recognized That the Highly Charged Political Debate Surrounding the Rights of Undocumented Immigrants Warrants Particularly Careful Treatment of the Issue When It Is Presented to a Jury 11

C. Application of These Well-Settled and Widely Recognized Principles to Mr. Velasquez's Case Requires Reversal and a New Trial 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Arizona v. Fulminante
(1991) 499 U.S. 279 10

Bollenbach v. United States
(1946) 326 U.S. 607 10

California Supreme Court Cases

Clemente v. State
(1985) 40 Cal.3d 202 ..... 12, 17

Lombardi v. California St. Ry. Co.
(1899) 124 Cal. 311 7

People v. Flood
(1998) 18 Cal.4th 470 10

In re Garcia
(2014) 58 Cal.4th 440 7

California Court of Appeal Cases

Haluck v. Ricoh Electronics, Inc.
(2007) 151 Cal.App.4th 994 ..... 11, 17

Holley v. J & S Sweeping Co.
(1983) 143 Cal.App.3d 588 8

Kelly v. Trans Globe Travel Bureau, Inc.
(1976) 60 Cal.App.3d 195 8

People v. Bradford
(2007) 154 Cal.App.4th 1390 10

TABLE OF AUTHORITIES
(continued)

Page

People v. Mello
(2002) 97 Cal.App.4th 511 ..... 8, 9, 10, 17

People v. Taylor
(1992) 5 Cal.App.4th 1299 ..... 8, 9, 16

People v. Whaley
(2007) 152 Cal.App.4th 968 10

Tapia v. Barker
(1984) 160 Cal.App.3d 761 7

Out-of-State Cases

Diaz v. State
(Del. 1999) 743 A.2d 1166 13

Gonzalez v. City of Franklin
(Wis. 1987) 403 N.W.2d 747 14

Klapa v. O&Y Liberty Plaza Co.
(N.Y. Sup. Ct. 1996) 645 N.Y.S.2d 281 14

Maldonado v. Allstate Ins. Co.
(Fla.Ct.App. 2001) 789 So.2d 464 13

Peterson v. Neme
(Va. 1981) 281 S.E.2d 869 14

Republic Waste Servs. v. Martinez
(Tex.Ct.App. 2011) 335 S.W.3d 401 ..... 12, 13

Romero v. Boyd Bros. Transp. Co.
(W.D. Va. 1994) 1994 U.S. Dist. LEXIS 8609 14

Salas v. Hi-Tech Erectors
(Wash. 2010) 230 P.3d 583 ..... 12, 13

TABLE OF AUTHORITIES
(continued)

Page

State v. Mims
(Minn. 1975) 235 N.W.2d 381 10

Constitutions, Statutes, and Rules

Cal. Const., art. I, § 16 7

Cal. Code Civ. Proc., § 222.5 8

Cal. Evid. Code, § 350 15

Cal. Rules of Court, rule 3.1540 8

Other Authorities

Agosto et al., *"But Your Honor, He's an Illegal!"—Ruled Inadmissible and Prejudicial: Can the Undocumented Worker's Alien Status Be Introduced at Trial?* (2011) 17 Tex. Hisp. J.L. & Pol'y 27 11

Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions* (2010) 4 Harv. L. & Pol'y Rev. 149 11

Suro, *America's Views of Immigration: The Evidence from Public Opinion Surveys* (2009) 12

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT WILFREDO VELASQUEZ

I. Introduction

It is beyond dispute that litigants in California have a constitutional right to a fair trial by *impartial* jurors. Critical to the protection of this right is voir dire—the process through which judges and attorneys question prospective jurors at length to discover any potential bias or prejudice. Trial judges in particular occupy a powerful position in this process because they are viewed by prospective jurors as the central courtroom authority figure and the unbiased source of the law. As a result, prospective jurors are especially sensitive to a judge's comments during voir dire. Indeed, California courts have already recognized that a judge's improper comments during voir dire—no matter how well intentioned—can so infect the jury selection process that reversal is warranted without regard to whether the error may have been harmless.

This case presents this Court with the unique and compelling opportunity to extend this recognition to cases where, as here, the trial judge unnecessarily reveals a litigant's immigration status during voir dire. Anxiety associated with the issue of undocumented immigration has been steadily growing in this country for the past decade; this trend is evident across all segments of the population. In the courtroom setting, the passionate responses inspired by immigration issues create a substantial

danger of interfering with jurors' ability to perform their duty of engaging in reasoned deliberation. Indeed, this danger is so great that courts across the country—including in California—are increasingly excluding evidence of a litigant's immigration status, even if arguably relevant to an issue in the case, because it is simply too prejudicial to be heard by a jury.

A logical extension of such protection of the right to a fair trial by impartial jurors is to hold that a judge who informs prospective jurors during voir dire about a litigant's immigration status, where that status ultimately has no bearing on any issue in the case, commits prejudicial error *per se*. Such a holding would be entirely consistent with the already widely recognized prejudicial effect of exposing jurors to such information, as well as the equally recognized principle that a judge's comments during jury selection can change the very course of a trial. This Court should so hold, and reinforce the right of all litigants to have a verdict rendered by an *impartial* jury.

II. Interest of *Amici*

Amicus The Hastings Appellate Project ("HAP") is a *pro bono* clinical program at the University of California, Hastings College of the Law providing access to justice for *pro se* litigants. Through HAP, with the supervision of experienced appellate attorneys, third-year law students represent low-income litigants in their civil appeals. Since the program's inception in 2009, the majority of clients represented by HAP have been

undocumented immigrants facing removal proceedings. Thus, HAP furthers the strong public interest in resolving any issues that may impact the rights of undocumented immigrants in the United States.

Amicus People For the American Way is a nonpartisan, nonprofit citizens' organization established to promote and protect civil and constitutional rights. Founded in 1984 by a group of civic, religious, and business leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For the American Way now has 900,000 members and activists nationwide, including 321,772 in the State of California alone. People For the American Way tracks and exposes the agenda of the far right, particularly anti-immigrant groups who foment racial prejudice and spread fear and bigotry aimed at undocumented immigrants, and is dedicated to ensuring that everyone has the equal right to seek justice in a court of law—the issue at the heart of this case.

Amicus American Civil Liberties Union ("ACLU") of Southern California is a nonprofit, nonpartisan membership organization dedicated to preserving and expanding the civil rights and liberties enshrined in the Bill of Rights and civil rights law, including ensuring that all people have equal access to justice and a fair trial.

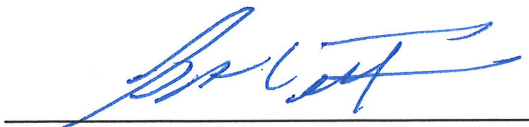
This brief reflects the opinions and arguments of The Hastings Appellate Project, People For the American Way, the ACLU of Southern California, and their respective counsel. No part of this brief was authored

by any party or any counsel for a party in the pending appeal. No party or any counsel for a party in the pending appeal made any monetary contribution intended to fund the preparation or submission of this brief. And no monetary contribution intended to fund the preparation and submission of this brief was made by any person, entity, or party other than *amici*, their members, or their counsel.

The Hastings Appellate Project, People For the American Way, and the ACLU of Southern California believe this brief will assist this Court by offering a broader view of current attitudes towards undocumented immigrants and providing a workable framework within which to decide the primary issue in this case. The Hastings Appellate Project, People For the American Way, and the ACLU of Southern California respectfully request permission to file the attached brief in support of Appellant Wilfredo Velasquez.

Dated: June 18, 2014

THE HASTINGS APPELLATE PROJECT
200 McAllister Street
San Francisco, CA 94102



Gary A. Watt
Attorneys for *Amicus Curiae*
THE HASTINGS APPELLATE PROJECT

Dated: June 18, 2014

PEOPLE FOR THE AMERICAN WAY
1101 15th Street, NW, Suite 600
Washington, DC 20005

/s/ Deborah Liu

Deborah Liu
Attorneys for *Amicus Curiae*
PEOPLE FOR THE AMERICAN WAY

Dated: June 18, 2014

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017

/s/ Jennifer Pasquarella

Jennifer Pasquarella
Attorneys for *Amicus Curiae*
ACLU OF SOUTHERN CALIFORNIA

AMICUS CURIAE BRIEF OF THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, AND ACLU OF SOUTHERN CALIFORNIA

SUMMARY OF ARGUMENT

This case presents this Court with a unique opportunity to reinforce every litigant's right to have a verdict rendered by an *impartial* jury—a cornerstone of American jurisprudence. This case highlights both the importance of voir dire in the protection of that right and the powerful role that judges play in the jury selection process, as well as demonstrates the highly divisive nature of issues surrounding the rights of undocumented immigrants in our country. In the context of a civil personal injury case where immigration status is ultimately not an issue, this Court should hold that when a judge informs prospective jurors during voir dire that one of the parties is an undocumented immigrant, such disclosure is prejudicial error *per se*.

ARGUMENT

I. This Court Should Hold That in a Personal Injury Case Where Immigration Status Is Not an Issue, a Trial Court Commits Prejudicial Error *Per Se* by Informing Prospective Jurors That One of the Parties Is an Undocumented Immigrant

This Court should reverse the judgment entered in favor of Centrome, Inc. dba Advanced Biotech and hold that Mr. Velasquez is entitled to a new trial. By informing prospective jurors that Mr. Velasquez is an undocumented immigrant—a fact that ultimately did not become an

issue at trial—the trial judge irremediably tainted the jury selection process and infringed upon Mr. Velasquez's fundamental right to an impartial jury.[1] Such an error is prejudicial *per se*.

A. A Judge's Comments Can Have a Tremendous Impact on Jurors, Particularly During Voir Dire—the Primary Mechanism Through Which the Constitutionally Guaranteed Right to a Fair and Impartial Jury Is Protected

Article I, section 16, of the California Constitution declares that "Trial by jury is an inviolate right and shall be secured to all . . . ." Although section 16 of Article I does not explicitly guarantee trial by an "impartial" jury, as does the Sixth Amendment to the federal Constitution, courts have long recognized that the right is no less implicitly guaranteed by our state's charter. (See, e.g., *Lombardi v. California St. Ry. Co.* (1899) 124 Cal. 311, 317 ["The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution"].) Thus, in California, it is well settled that "a litigant in a jury trial has a constitutional right to a fair trial by 12 *impartial* jurors." (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 765, emphasis added.)

---

[1] Like this State's Supreme Court did in one of its recent opinions, *amici* in this brief use the term "undocumented immigrant" to refer to a "non-United States citizen who is in the United States but who lacks the immigration status required by federal law to be lawfully present in this country and who has not been admitted on a temporary basis as a nonimmigrant." (See *In re Garcia* (2014) 58 Cal.4th 440, 446, fn. 1.)

To protect this important right, both the trial judge and counsel for the parties question prospective jurors at length during jury selection to ferret out any potential bias and prejudice. (See Code Civ. Proc., § 222.5; Cal. Rules of Court, rule 3.1540(b) & (c); see also *Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3d 195, 203; *People v. Mello* (2002) 97 Cal.App.4th 511, 516.) This process—known as voir dire—is "critical to assure that the . . . right to a fair and impartial jury will be honored."[2] (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312.)

Although both the judge and the attorneys are allowed to question prospective jurors during voir dire, the obligation to impanel an impartial jury ultimately rests with the trial judge. (*Taylor, supra*, 5 Cal.App.4th at p. 1313.) Thus, judges have "an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*Id.* at p. 1314.) And where a judge's actions or comments during voir dire frustrate this purpose, the resulting error is prejudicial *per se*. (See *Mello, supra*, 97 Cal.App.4th at p. 519.)

---

[2] Although many of the cases cited in this brief involved criminal prosecutions, the reasoning of those cases relating to the right to an impartial jury applies with equal force in the civil setting. (See *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 592 [recognizing that although different interests are at stake, and differing standards of proof and adjudication apply, juries in both types of cases perform the same important function of ultimate fact finders under the same state constitutional guarantee, so the goal of achieving impartiality is served by extending the same protections to civil litigants as criminal defendants].)

Mello is instructive. There, the defendant—an African-American woman—was charged with various crimes relating to a gas station robbery. (97 Cal.App.4th at p. 513.) During voir dire, the trial judge—believing that prospective jurors might hesitate to publicly admit racial bias towards the defendant—instructed prospective jurors that if they harbored such bias, they should lie about it and invent another excuse for their failure to serve on the jury. (*Id.* at pp. 513-514.) When the jury returned guilty verdicts, Mello moved for a new trial on the ground that the judge's remarks during voir dire constituted prejudicial error. (*Id.* at pp. 514-515.) The trial court denied Mello's motion. (*Id.* at p. 515.)

The Court of Appeal reversed, holding that the judge's instructions to prospective jurors to lie under oath about racial bias violated Mello's right to a fair and impartial jury. (*Mello, supra*, 97 Cal.App.4th at p. 519.) The court explained that the instructions made it impossible for the parties to know whether a fair and impartial jury had been seated. (*Id.* at p. 517.) And although the judge's directive was well intentioned (if also misguided), by inviting the jury pool to lie under oath, it ultimately frustrated the main object of voir dire—to "'ferret[] out bias and prejudice on the part of prospective jurors.' [Citation.]" (*Id.* at p. 518, quoting *Taylor, supra*, 5 Cal.App.4th at p. 1314.) The court further held that this error—which "inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the

evidence"—was a "'defect affecting the framework within which the trial proceeds' that is not subject to harmless error analysis. [Citations.]" (*Id.* at p. 519, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 and *People v. Flood* (1998) 18 Cal.4th 470, 500.) In other words, the error was prejudicial *per se*. Thus, concluded the Court of Appeal, Mello was entitled to a new trial. (*Ibid.*)

Implicit in *Mello* is the recognition that a judge's comments can have a tremendous impact on jurors—whether they be prospective or seated. As our nation's high court recognized long ago, "'[t]he influence of the trial judge on the jury is necessarily and properly of great weight,' [citation], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) Jurors, who are called upon to perform typically unfamiliar duties in strange surroundings, view trial judges as both the central courtroom authority figure and the unbiased source of the law. (*People v. Whaley* (2007) 152 Cal.App.4th 968, 985 (concur opn. of McAdams, J.); see also *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1415 ["[T]he trial judge's position in performing his role and function before submission of the case is a powerful one and makes him an imposing figure in the minds of the jurors"].) So "[t]he average juror is very sensitive to any hint or suggestion by the judge . . . ." (*Bradford, supra*, 154 Cal.App.4th at p. 1415, quoting *State v. Mims* (Minn. 1975) 235 N.W.2d 381, 387; see also *Haluck v. Ricoh Electronics, Inc.*

(2007) 151 Cal.App.4th 994, 1007 [recognizing the tremendous power that the comments of a trial judge can have on a jury].)

And as *Mello* suggests, a judge's ability to influence jurors is particularly strong in the voir dire context. Indeed, empirical and anecdotal research suggests that prospective jurors are more likely to tell a judge what they think the judge wants to hear—for example, that they can "be fair and impartial"—regardless of whether such statements are true. (See Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions* (2010) 4 Harv. L. & Pol'y Rev. 149, 160.) Thus, not only do judges shoulder the heaviest responsibility when it comes to seating an impartial jury, they also carry the biggest risk of tainting the jury selection process if their words are not carefully selected.

B. It Is Widely Recognized That the Highly Charged Political Debate Surrounding the Rights of Undocumented Immigrants Warrants Particularly Careful Treatment of the Issue When It Is Presented to a Jury

Now, more than ever, terms like "illegal alien," "illegal immigrant," and "undocumented worker" generate fear and distress in our society. (See Agosto et al., *"But Your Honor, He's an Illegal!"—Ruled Inadmissible and Prejudicial: Can the Undocumented Worker's Alien Status Be Introduced at Trial?* (2011) 17 Tex. Hisp. J.L. & Pol'y 27, 50; see also Suro, *America's Views of Immigration: The Evidence from Public Opinion*

Surveys (2009) pp. 10-16 [explaining that in recent years, Americans have viewed illegal immigration as an ever greater source of anxiety and this trend is evident across all segments of the population].) This phenomenon is already well documented in cases nationwide. (See, e.g., *Republic Waste Servs. v. Martinez* (Tex.Ct.App. 2011) 335 S.W.3d 401, 409 ["Undeniably, the issue of immigration is a highly charged area of political debate"]; see also *Salas v. Hi-Tech Erectors* (Wash. 2010) 230 P.3d 583, 586 ["immigration is a politically sensitive issue"].)

In the courtroom setting, the passionate responses inspired by issues involving immigration "carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." (*Salas, supra*, 230 P.3d at p. 586.) So significant is this danger that, in fact, courts across the country—including in California—are increasingly excluding evidence of a litigant's immigration status, even if arguably relevant to an issue in the case, because it is too prejudicial to be heard by a jury. For example:

- In California, the state Supreme Court has held that immigration status, "even if marginally relevant [on damages issues], [is] highly prejudicial." (*Clemente v. State* (1985) 40 Cal.3d 202, 221.)
- In Texas, an appellate court affirmed the trial court's exclusion of the decedent's immigration status because "the probative value of evidence concerning a plaintiff's illegal

immigrant status is low, while the prejudicial effect of this evidence is high." (*Republic Waste Services, Ltd. v. Martinez, supra*, 335 S.W.3d at p. 409.)

- In Washington, the state Supreme Court has held that "the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice." (*Salas, supra*, 230 P.3d at p. 587.)
- In Florida, an appellate court reversed a judgment entered following a jury verdict where immigration status and a false Social Security number improperly became "a central feature" of trial, holding that any "limited probative value" on the issue of legal residence in Florida "was thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury." (*Maldonado v. Allstate Ins. Co.* (Fla.Ct.App. 2001) 789 So.2d 464, 466, 470.)
- In Delaware, the state Supreme Court found that even if a witness's concern about immigration status was relevant to impeach her, the court still must "determine if the probative value of that immigration status . . . is outweighed by any unfair prejudice." (*Diaz v. State* (Del. 1999) 743 A.2d 1166, 1184.)

- In New York, a trial court precluded "evidence which would indicate a plaintiff's immigration status" because "whatever probative value illegal alien evidence may have [as to damage calculations] is far outweighed by its prejudicial impact." (*Klapa v. O&Y Liberty Plaza Co.* (N.Y. Sup. Ct. 1996) 645 N.Y.S.2d 281, 282.)
- In Wisconsin, the state Supreme Court affirmed the exclusion of illegal alien status, which had only "speculative or conjectural" relevance to damage issues but carried "obvious prejudicial effect." (*Gonzalez v. City of Franklin* (Wis. 1987) 403 N.W.2d 747, 759-760.)
- And in Virginia, the state Supreme Court affirmed the trial court's decision to exclude evidence of a plaintiff's illegal immigrant status offered to rebut a future lost wage claim, noting that such evidence is "uniquely prejudicial" and that "the trial court properly could conclude that the prejudicial impact of the proffered evidence outweighed its probative value." (*Peterson v. Neme* (Va. 1981) 281 S.E.2d 869, 872; see also *Romero v. Boyd Bros. Transp. Co.* (W.D. Va. 1994) 1994 U.S. Dist. LEXIS 8609 at *7 ["The danger of a jury unfairly denying [the plaintiff] relief based on his status alone

outweighs the probative value of the evidence that he acted dishonestly in the past"].)

Thus, it is now widely recognized that when a jury is aware of a litigant's immigration status, there is a high risk that this knowledge will prejudice the outcome of that litigant's case.

C. Application of These Well-Settled and Widely Recognized Principles to Mr. Velasquez's Case Requires Reversal and a New Trial

Notably, in the cases discussed above, immigration status had some relevance at trial—for example, to impeach a witness's credibility, or as bearing on a plaintiff's ability to recover lost future wages. So the courts in those cases had to engage in a balancing test—weighing probative value against potential prejudicial effect—to determine whether it was proper for the jury to learn of a party's status as an undocumented immigrant. And in each of those cases, the courts concluded that the risk of prejudice was so high that any such disclosure was prohibited.

Here, by contrast, the trial court ultimately concluded that immigration status had *no relevance whatsoever*. (18 RT 3755)[3] Thus, under California law, the jury should have had no knowledge of Mr. Velasquez's immigration status. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) But by the time the court made this

[3] "RT" refers to the Reporters' Transcript on Appeal. Citations to the Reporters' Transcript are preceded by volume designations.

determination about relevance, it was too late: the jury already knew about Mr. Velasquez's immigration status because the trial judge told prospective jurors that Mr. Velasquez is an undocumented immigrant during voir dire. (7 RT 1313-1314) The harm was irreparable.

Undoubtedly, revealing Mr. Velasquez's immigration status to prospective jurors was a well-intentioned effort on the part of the trial judge—who, at the time, believed that immigration status would become an issue at trial (see 6 RT 1292; see also 7 RT 1303)—to root out potential bias against undocumented immigrants from the jury pool. But regardless of intentions, the judge's statement to prospective jurors became reversible error when the court later determined that Mr. Velasquez's immigration status was irrelevant after all, and so no evidence would be admitted on the topic. At that moment, what had previously been a good-faith effort to *protect* Mr. Velasquez's right to an impartial jury became an irreparable *infringement* upon that same right. And given the setting in which Mr. Velasquez's immigration status was revealed, who revealed it, and what was revealed, this Court should hold that the error is prejudicial *per se*.

The *setting* in which Mr. Velasquez's immigration status was revealed—voir dire—is paramount because, as discussed above, voir dire is the primary mechanism through which the right to an impartial jury is safeguarded. (See *Taylor, supra*, 5 Cal.App.4th at p. 1312.) Thus, any irregularity during that process has the greatest potential to interfere with a

litigant's constitutionally-guaranteed right to a fair trial by impartial jurors. (See, e.g., *Mello, supra*, 97 Cal.App.4th at pp. 517-519.) Equally important is *who* revealed Mr. Velasquez's immigration status—the trial judge—because, as discussed above, jurors give significant weight to everything that trial judges say. (See *Haluck, supra*, 151 Cal.App.4th at p. 1007.) Finally, *what* was revealed—Mr. Velasquez's immigration status—is critical because given the explosive nature of the current nationwide debate surrounding issues of immigration, the risk that revealing such information to the jury will prejudice the outcome of a trial is too high to be tolerated. (See *Clemente, supra*, 40 Cal.3d at p. 221.)

In light of this factual and procedural background, Mr. Velasquez's case is ripe for the following narrow, but bright-line rule: when a trial judge reveals a litigant's immigration status to prospective jurors during voir dire in a case where immigration status is ultimately not an issue, the error is prejudicial *per se*. Such a holding would be entirely consistent with the already widely recognized prejudicial effect of exposing jurors to such information, as well as the equally recognized principle that a judge's comments to a jury, particularly during voir dire, can so infect the proceedings that reversal is warranted without regard to the potential harmlessness of the error.

The proposed rule leaves room for the possibility that, in certain civil personal injury cases, it may be proper for a trial judge to inform

prospective jurors about a litigant's immigration status during voir dire. For example, in a case where immigration status actually is an issue (and the trial court determines that the relevance of such evidence is not outweighed by its potential prejudicial effect), it could be proper—subject to *how* it is done—for the judge to question prospective jurors about their feelings toward undocumented immigrants in order to discover any potential bias or prejudice. At the same time, however, the proposed rule would protect litigants in cases like Velasquez's, where the trial court initially determines that immigration status will be an issue—thereby creating the need to question prospective jurors about their feelings toward undocumented immigrants—but then subsequently reverses that ruling, *after* the jury has been informed about a litigant's immigration status. In such situations, the proposed rule would require that the litigant be given a second chance to seat a jury whose prejudices have not been unnecessarily excited by a judge's statements about immigration status during voir dire—in other words, an *impartial* jury.

Furthermore, such a rule leaves room for the doctrine of invited error. For example, if a trial court determined that a litigant's immigration status will not be an issue in the case, but that litigant insists that the trial judge question prospective jurors about their feelings toward undocumented immigrants anyway, then that litigant would be barred by the doctrine of invited error from later complaining about the jury selection process. But

in cases like Mr. Velasquez's, where the litigant's decision to have the judge question prospective jurors about their feelings towards undocumented immigrants is based solely on the trial court's initial determination that immigration status will be an issue at trial, invited error would not apply.

Nor would the rule create any incentives to game the system on the part of those representing undocumented immigrants. Rather, the proposed rule places the court and the parties on equal footing as to whether evidence of immigration status will be introduced at trial. If the answer is "no," then absent invited error, it will be prejudicial error for the court to inject immigration status into voir dire. If the answer is "yes," but counsel for the undocumented immigrant chooses *not* to address immigration status during voir dire (and the court does not address it either), then a forfeiture could result. And, as happened here, if the answer is initially "yes," but evidence of immigration status is later excluded at trial, the court's introduction of a litigant's immigration status during voir dire is prejudicial error *per se*.

Applying the proposed rule here, this Court should reverse the judgment and remand the matter for a new trial. Although the original decision to reveal Mr. Velasquez's immigration status to prospective jurors may have been well intentioned, it inevitably undermined the very purpose of voir dire. Rather than *protect against* prejudice, the judge's statement unnecessarily *injected* prejudice into the selection process, making it

impossible to know whether Mr. Velasquez received his constitutionally guaranteed fair trial by impartial jurors. Such a result cannot and should not stand.

CONCLUSION

By revealing Mr. Velasquez's immigration status unnecessarily to prospective jurors, the trial judge frustrated the very purpose of voir dire—to safeguard a litigant's right to a fair and impartial jury by ferreting out bias and prejudice on the part of prospective jurors. Under such circumstances, reversal is warranted without regard to whether the error may have been harmless. For the foregoing reasons, this Court should reverse the judgment and remand the matter for Mr. Velasquez to receive a new trial.

Dated: June 18, 2014

THE HASTINGS APPELLATE PROJECT
200 McAllister Street
San Francisco, CA 94102

Gary A. Watt
Attorneys for *Amicus Curiae*
HASTINGS APPELLATE PROJECT

Dated: June 18, 2014

PEOPLE FOR THE AMERICAN WAY
1101 15th Street, NW, Suite 600
Washington, DC 20005

/s/ Deborah Liu

Deborah Liu
Attorneys for *Amicus Curiae*
PEOPLE FOR THE AMERICAN WAY

Dated: June 18, 2014

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017

/s/ Jennifer Pasquarella

Jennifer Pasquarella
Attorneys for *Amicus Curiae*
ACLU OF SOUTHERN CALIFORNIA

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF WILFREDO VELASQUEZ; *AMICUS CURIAE* BRIEF OF THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, AND ACLU OF SOUTHERN CALIFORNIA** consists of 4,327 words as counted by Microsoft Word, a word processing program used to generate the foregoing application and *amicus* brief.

Dated: June 18, 2014

THE HASTINGS APPELLATE PROJECT
200 McCallister Street
San Francisco, CA 94102

Gary A. Watt
Attorneys for *Amicus Curiae*
THE HASTINGS APPELLATE PROJECT

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, Walnut Creek, California 94596-3728.

On the date set forth below, I caused the foregoing **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF WILFREDO VELASQUEZ; *AMICUS CURIAE* BRIEF OF THE HASTINGS APPELLATE PROJECT, PEOPLE FOR THE AMERICAN WAY, AND ACLU OF SOUTHERN CALIFORNIA** to be served by placing a true copy thereof in a sealed envelope, and transmitting said document via **UPS OVERNIGHT MAIL (EXPRESS DELIVERY, AM delivery)** addressed as follows:

Original, three (3) hardcopies, and one (1) softcopy in Portable Document Format (submitted electronically)
Court of Appeal
Second Appellate District
Division Eight
300 S. Spring St., Floor 2, North Tower
Los Angeles, CA 90013-1213

Also on this date, I served the same by placing a true copy thereof in a sealed envelope, and transmitted said document via **UPS OVERNIGHT MAIL (EXPRESS DELIVERY, AM delivery)** addressed as follows:

Raphael Metzger
Kimberly A. Miller
Kathryn A. Saldana
Kenneth A. Holdren
METZGER LAW GROUP
401 E. Ocean Boulevard, Suite 800
Long Beach, CA 90802

Attorneys for Plaintiff and Appellant
Wilfredo Velasquez

Brian P. Barrow
SIMON GREENSTONE PANATIER BARTLETT
301 E. Ocean Boulevard, Suite 1950
Long Beach, CA 90802

Bradley S. Pauley
David M. Axelrad
HORVITZ & LEVY
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000

Attorneys for Defendant and Respondent
Centrome, Inc. dba Advanced Biotech

Peter L. Garchie
Ruben Tarango
LEWIS, BRISBOIS, BISGAARD & SMITH
701 B Street, Suite 1900
San Diego, CA 92101

Craig S. Barnes
Robert Kum
SEDGWICK LLP
801 S. Figueroa Street, 18th Floor
Los Angeles, CA 90017

Hon. Anthony J. Mohr
Department 61
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012-3014

Also on this date, I caused one softcopy of the document listed above to be delivered to the California Supreme Court, in compliance with California Rules of Court, rule 8.212(c)(2), by electronically submitting said document through the Second Appellate District's e-submission program.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 18, 2014, at Walnut Creek, California.

AAlter

Anna Alter