No. 1039247

SUPREME COURT
STATE OF WASHINGTON

JOUMANA ALHAYEK and NICHOLAS PHILLIPS,
Petitioners,

vs.

KATHRYN MILES, M.D., and NORTHWEST OB-GYN, P.S.,
Respondents.

AMMNENDED- AMICUS BRIEF OF MARSHALL CASEY

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I. IDENTITY AND INTEREST OF AMICUS

Marshall Casey is a practicing attorney in Washington. He is interested in a justice system that serves his family.

Marshall Casey was briefly the Petitioners' lawyer for about a month when the WSBA suspended their former counsel. He received no compensation for that work and has no financial interest in this case.

II. ISSUE ADDRESSED

This case gives a chance for this Court to revisit *Henderson v. Thompson* in light of the Equal Protection Clause of the 14th Amendment. The "could" standard furthers the Equal Protection Clause of the 14th Amendment.

III. INTRODUCTION

The very essence of justice lies in an individual approaching the sovereign to seek redress for an injury. Among the many evils of racism and prejudice based on national origin

is how it transforms individuals into disfavored groups. "Justice" dispensed based on being part of a disfavored group both contradicts the concept of justice and violates the 14th Amendment's Equal Protection Clause.

In *Henderson v. Thompson*, this Court established a remedy for introduced racial or national origin bias when an objective observer "could" view such bias as a factor in the verdict. The *Henderson* decision created this test to address the harm of racial or national origin discrimination to society. It did not provide a basis for the decision under the 14th Amendment's Equal Protection Clause protection of the individual.

The Court of Appeal's decision in this matter raised *Henderson's* objective observer test from "could" (i.e., a "possibility") to a higher standard of "reasonably possibility" that bias impacted the verdict. This standard is even higher if the disadvantaged individual needs to discuss their cultural and language differences as part of their case. By establishing a higher standard, the Court of Appeals overlooked the important

constitutional rights of equal protection and access to courts that the *Henderson* decision safeguarded.

The Court of Appeals also failed to recognize that attorneys are officers of the court. While they should have considerable latitude in their arguments, they are also "guardians of the law, [who] play a vital role in the preservation of society."[1] If a lawyer creates an "us-versus-them" mentality that undermines the right to access courts and equal protection, this is the act of an officer of our courts. The objective observer "could" standard does not impose an unreasonable burden to address and remedy such a violation by a member of our court system.

IV. STATEMENT OF THE CASE

The Petitioners sued Dr. Miles for medical negligence and failure to obtain informed consent, specifically alleging that

[1] Fundamental Principles of Professional Conduct.

she failed to use an interpreter to explain the risks. *Al Hayek v. Miles*, 562 P.3d 1270, 1274 (Wash. App. 2025).

During opening statements, Dr. Miles's attorney remarked that "Dr. Miles is from this part of the world," and "This is her town," following comments about Ms. Al Hayek's arrival in the U.S. in 2003. *Id.* at 1275. The trial court found these remarks risked invoking stereotypes. *Id.* The Court of Appeals agreed, calling them an improper "us-versus-them" argument under *Henderson*, especially when directed at a person of color or ethnic minority. *Id.* at 1276.

The Court of Appeals also reinterpreted *Henderson's* standard, redefining it as what an objective observer would see as "reasonable possibility" that race or ethnicity influenced the verdict, and not "could" as set by this Court. *Id.* at 1277.

The Court of Appeals declined to order a new trial because Ms. Al Hayek introduced evidence about her language and cultural background. "But for" this, an objective observer would have found a reasonable possibility of ethnic bias. *Id.*

V. ARGUMENT

A. The United States Constitution Protects the Right to Obtain Justice as an Individual and Treating a Person as a Member of a Group (Favored or Disfavored) Denies That Justice.

Racism and prejudice are injustices to "individual men and women, 'created equal,'" and not just slanders on disfavored ethnic or racial groups such as Blacks, Jews, or, here, Palestinians. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring). The 14th Amendment was adopted to ensure everyone was treated equally before the law; as members of just one class – Americans. *Students For Fair Admissions, Inc., v. President and Fellows of Harvard College,* 600 U.S. 181, 201-202 (2023). Its purpose was to forbid "all legal distinctions based on race or color." *Id.* at 233 (Thomas, J., concurring). The 14th Amendment declared that "hostility to race and nationality" is not justified in the "eye of the law." *Id.* at 202.

The 14th Amendment accomplishes its purpose of equality by treating everyone as an individual, not as a disfavored group. *Students For Fair Admissions*, 500 U.S. at 241 (Thomas, J., concurring) (The 14th Amendment "pledges that even noncitizens must be treated equally 'as individuals, and not as members of racial, ethnic, or religious groups.'"). Treating people as individuals takes us closer to the core American principle: "that all men [and women] are created equal, are equal citizens, and must be treated equally before the law." *Id.* at 287.

The defense attorney's opening statement violated Ms. Alhayek's right to be evaluated as an individual rather than based on her ethnic origin. The Court of Appeals acknowledged this. *See Al Hayek,* 562 P.3d at 1277.

The Court of Appeals' finding is accurate in stating that the argument was an improper "them" and group argument. The Court of Appeals falls short in recognizing that this is not only forbidden by *Henderson* but, importantly, by the 14th

Amendment's Equal Protection Clause. Treating people as a group based on race or national origin rather than as individuals is the wrong that the 14th Amendment was meant to remedy.

1. Defense Counsel Violated Ms. Alhayek's 14th Amendment Equal Protection Rights as an Officer of the Court.

Lawyers are officers of the court. *State v. White*, 94 Wn.2d 498, 502, 617 P.2d 998 (1980). An attorney's arguments to a jury hold significant sway. Our jury instructions remind jurors that attorneys' statements are not the law or facts yet these arguments help shape the jury's understanding of the case. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02, 7th ed.

Our rules establish a distinct role for attorneys in assisting jurors in comprehending the facts of the case. This assistance is provided during the opening statement, where each attorney outlines a roadmap or framework to guide the jury through the evidence that will later be presented. *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.01 (7th ed.); *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929, 938 (1984).

Many attorneys believe the case is won or lost based on the opening statement. Thomas M O'Toole, Ph.D & Kevin Boully, Ph.D, *Do Jurors Make Up Their Minds After Opening Statement?*, King County Bar Bulletin Blog (July 1, 2024). Whether that is true or not, the "extensive research clearly demonstrates that opening statements are impactful." *Id.*

It is within this framework, as an officer of the court in litigation, that "an attorney is the guardian of the law and plays a vital role in the preservation of society by this Court." Fundamental Principles of Professional Conduct. This Court has also mandated that lawyers take an oath to uphold the United States Constitution, which includes the 14th Amendment. *See* APR 5.

Here, the defense counsel framed the facts as "us-versus-them." "[T]he apparent purpose of the remarks was to cause jurors to identify more closely with Dr. Miles than Al Hayek, who is not from this part of the world or Spokane." *Al-Hayek*, 562 P.3d at 1277. As an officer of the court, the defense

counsel established a framework for presenting the facts in a manner that the jury could perceive Ms. AL Hayek as an ethnic minority rather than as an individual.

This is particularly problematic since Ms. AL Hayek had the right to introduce her cultural and language experiences as part of her case. Individuals are, after all, the sum of their unique experiences, challenges, and accomplishments. *Students for Fair Admissions*, 600 U.S. at 280 (Thomas, J., concurring). Ms. Al Hayek had a right to have those experiences interpreted as part of her individuality, rather than throwing her into a disfavored minority group. Defense counsel's opening statement was an officer of the court violating Ms. Al Hayek's equal protection rights.

2. Any Bias in the Jury Violated the 14th Amendment's Equal Protection Clause.

Although a lawyer introduced the equal protection violation, it is furthered if acted upon by the jury. Juries are a branch of the judiciary. *Mathisen v. Norton*, 187 Wn. 240, 245, 60 P.2d 1 (1936). The jury acts as a unit; any juror's actual or

implied misconduct that forestalls or prevents fair and proper consideration of the case is considered misconduct by the jury and vitiates the verdict. *Id.* The judgment of the jury is not that of twelve individuals but rather the "voice of the country" or community. *U.S. v. Maybury,* 274 F.2d 899, 903 (2d Cir. 1960).

Ms. Alhayek was entitled to trial by an unbiased and unprejudiced jury. *Mathisen*, 187 Wn. at 245. Determining the jury's motivations is difficult, but any bias against her as a member of a disfavored group, rather than as an individual, turns their decision from justice into discrimination, violating her equal protection rights.

B. The Objective Observer "Could" Standard Is the Proper Equal Protection Standard, and the Court of Appeals Ignores the Equal Protection Standard When It Created a More Stringent Standard.

The key issue in this case is not whether a court officer violated a party's equal protection rights, but what impact the injured party must demonstrate to obtain a new trial. Ms. Al Hayek showed that the Defendants' attorney allowed the jury to

consider her national origin or ethnicity in their decision. The question remains: what level of impact must the injured party show for a new trial?

In *Henderson*, this Court held that the injured party's burden was to make a prima facie showing that an objective observer "*could* view" racial prejudice as a factor in the verdict. *Henderson*, 200 Wn.2d at 435 (emphasis in original). This is also a proper standard under the 14th Amendment's Equal Protection Clause.

As small groups, juries are more susceptible to arguments of national origin or ethnic minority bias than the public at large. The smaller the group, the more it can be swayed by the human propensity to oppress a minority or to harbor prejudice. *See City of Richmond*, 488 U.S. at 523-524 (Scalia, J., concurring). However, even a critical mass is unnecessary for a jury to violate the Equal Protection Clause, since just one or two jurors may be enough to sway a jury verdict. *See Ramos v. Louisiana*, 590 U.S. 83, 126 (2020) (Kavanaugh, J., concurring)

(Louisiana's law allowing 10-person convictions was meant to minimize the voice of minorities in juries since just two jurors had sufficient impact). Even one juror embracing us-versus-them arguments is misconduct that vitiates the verdict. *See Mathisen, supra.*

In contrast to the "could" standard laid out by this Court; the Court of Appeals established a higher requirement of showing jury verdict impact than set by this Court. The Court of Appeals changed the standard from "could" have impacted the jury verdict to determining whether it was "reasonably possible" it affected the jury verdict. *Al Hayek*, 562 P.3d at 1277. The Court of Appeals also introduced another requirement: if the case involved an individual's differences due to culture, then the proof must be "but for" such cultural differences. *Id.* Neither of these provides adequate protection under the Equal Protection Clause.

Once a court officer has empowered a jury to treat a person as part of a disfavored group rather than as an individual, the

Equal Protection Clause has been violated. Not every violation should be remediable, but the burden of proving harm should rest lightly on the innocent party and heavily on the wrongdoer. This was the framework laid out in *Henderson*. 200 Wn.2d at 435.

Such a framework supports the state's role in enforcing the Equal Protection Clause. The state has a proper role in ending identified discrimination. *See City of Richmond*, 488 U.S. at 509. Because the "could" standard happens after an officer of the court introduces improper arguments, Washington has a role in actively protecting against such discrimination. Placing a lighter burden to prove jury impact on the innocent party, while shifting a heavier burden on the party that introduced the discrimination, is proper state support for the Equal Protection Clause.

Along with that, the remedy of a new trial is a race-ethnic-and-national origin-neutral remedy. A state has little interest in a two-tiered racial system. *See City of Richmond*, 488 U.S. at 526 (Scalia, J., concurring). However, the state may

impose a race-neutral remedy for an identified wrong. *Id.* In this case, a new trial is race-neutral remedy since both parties, even the wrongdoer, get a fair and neutral playing field with the new trial.

The "could" standard is correct. It furthers the equal protection mandate of the 14th Amendment. It is triggered to shift the burden onto the offending party, and only after the violation has been shown. It also provides a race-neutral remedy. It would be wise to maintain that standard.

C. Accepting Review Would Address Important Constitutional Issues in the 14th Amendment That Were Left Unaddressed in *Henderson*.

This Court's decision in *Henderson* focused on "substantial justice" without addressing the Equal Protection Clause of the 14th Amendment. *See Henderson*, 200 Wn.2d at 430. It examined the impacts of a racially biased verdict on society, rather than directly on the individual who was harmed by the equal protection violation. *Id.* at 430-431 ("Our commitment to substantial justice rings hollow if we fail to

recognize that racial bias often interferes with achieving justice in our courts… This kind of treatment diminishes the legal profession by continuing to tell lawyers of color that their presence seems unusual and surprising."). This is not incorrect, but it leaves Washington law underdeveloped in its basis for the 14th Amendment's support of evaluation for a new trial based on an attorney's discriminatory comments.

This can be seen by Justice Alito's comments on the denial of certification for *Henderson*. *Thompson v. Henderson*, 143 S. Ct. 2412, 2413, 216 L. Ed. 2d 1276 (2023). Justice Alito claimed the decision was on a collision course with the Equal Protection Clause. *Id.* at 2413-2414.

This case allows the Supreme Court to address the *Henderson* decision in light of the Equal Protection Clause. Such an evaluation would demonstrate that *Henderson's* decision actually supports the Equal Protection Clause rather than violating it.

The Supreme Court's review of this matter allows it to address the Equal Protection Clause related to *Henderson*, certification would further the cause of justice, and this critical constitutional issue.

VI. CONCLUSION

Granting certification would allow this Court to address the intersection of Henderson and the 14th Amendment's equal protection clause.

In accordance with RAP 18.17, I certify that there are 2,489 words in this document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits).

RESPECTFULLY SUBMITTED this 5nd day of May 2025.

/s/ Marshall Casey
Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify that on the 5nd day of May 2025, I caused the above document to be electronically filed with the Clerk of the Court using the Washington State Appellate Court's Portal which effected service of the same upon all counsel of record.

/s/Marshall Casey
Marshall W. Casey

M CASEY LAW

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