No. 22-823

IN THE
Supreme Court of the United States

ALICIA THOMPSON,

Petitioner,

v.

JANELLE HENDERSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES (NAMIC) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE**

Amicus National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade group in the United States. It has a diverse membership of over 1,400 local, regional, and national member companies, including seven of the top ten property/casualty insurers in the United States. NAMIC members represent 66 percent of the homeowner's insurance market and 53 percent of the auto market.

Through its advocacy programs, NAMIC promotes public policy solutions that benefit its member companies and the policyholders they serve. NAMIC and its member companies are committed to the fair pricing of risk and adjudication of disputes, without regard to race. The issues presented in this case are of particular importance to NAMIC's members, which are involved as insurers in vast numbers of civil trials across America every year.

INTRODUCTION AND SUMMARY OF ARGUMENT

This started as an ordinary personal injury case. Alicia Thompson's car rear-ended Janelle Henderson's vehicle on a bridge in Seattle. There were "no obvious bodily injuries" and the police elected not

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* Under Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to fund its preparation or submission. Counsel of record for all parties were timely notified under Rule 37.2 of *amicus curiae*'s intent to file this brief.

to respond. Plaintiff's Trial Brief, 2019 WL 8163156, at *1 (Wash. Super. filed Jan. 28, 2019). The parties exchanged insurance information and both drove their cars from the scene. *Id.*; Defendant's Amended Trial Brief, 2019 WL 8163159, at *1 (Wash. Super. filed Jan. 28, 2019). Henderson later sued Thompson, demanding $3.5 million. App. 5a. Henderson argued that she was an "eggshell" plaintiff and the accident worsened her existing health conditions. Plaintiff's Trial Brief, at *1. Thompson, with counsel provided by her insurance company, admitted liability but argued that any injury was very minor. The jury agreed. It found Thompson liable, but awarded Henderson only $9,200. App. 8a.

On appeal, the Washington Supreme Court ruled that several statements by defense counsel—none of which mentioned race—might have triggered *subconscious* racist impulses among white jurors. App. 19a (ordering that "courts must ascertain whether an objective observer who is aware that *implicit, institutional, and unconscious biases* . . . have influenced jury verdicts in Washington State *could* view race as a factor in the verdict"). The supposed triggers of racial bias were so subtle that the plaintiff's counsel never objected when they were spoken in open court. Nor did the trial judge, who the law properly presumes is a neutral arbiter, hear anything biased. Indeed, the trial judge, who saw and heard everything, did not see racial bias even after later briefing and argument on the subject. App. 45a-48a.

The Washington Supreme Court focused intently on the race and gender of every participant.

The court found it important to state, at the very beginning of its discussion, that the plaintiff and her counsel were "Black wom[en]," that defendant and her counsel were "white wom[en]," the judge was a "white woman," and "there were no Black jurors." App. 5a.

The Washington Supreme Court's premise is that racial bias is so deeply imbedded in American society that common and facially race-neutral arguments trigger "implicit, institutional, and unconscious biases" that alter jury verdicts and warrant presumptive new trials. App. 19a; App. 16a (describing "subtle references" as "just as insidious" and "more effective" than blatant appeals to prejudice); App. 16a n.6 ("racial microaggressions are often carried out in subtle, automatic, or unconscious forms"). In the Washington Supreme Court's view, the solution to this is express discrimination based on race—preventing counsel from making common, everyday arguments about minority witnesses.

As the Washington Supreme Court saw it, defense counsel suggesting that the plaintiff was seeking a financial windfall when she asked for $3.5 million could invoke a "welfare queen" stereotype. App. 21a-22a. Describing the plaintiff's refusal to answer questions on cross-examination as "confrontational" could invoke an "angry Black woman" stereotype. App. 20a. Suggesting that Black witnesses who gave near-identical testimony had been coached or colluded set up an "us-versus-them" racist stereotype. App. 22a. The Washington Supreme Court's innovation—attributing racial stereotypes to facially race-neutral arguments by counsel and

reversing for a presumptive new trial—does not make sense.

At minimum, the Washington Supreme Court has baked into the law that everyday lawyer arguments cannot be made against minority parties or witnesses. More broadly, that court has signaled that the race and gender of the parties and witnesses (and counsel, and judge, and jury) will always be essential factors in whether a jury verdict can stand. Even more broadly, it is now open to question what *can* be argued in Washington court *at all* against any minority party or witness. After all, by the rationale of the Washington Supreme Court, nearly any criticism of a minority witness is a suggestion that the minority witness is untrustworthy, which in turn would likely trigger an implicit race or gender stereotype of some kind.

The decision below—on top of violating the Constitution—poses at least three significant problems for the actual practice of civil jury trials in Washington and anywhere else it may spread. First, it is not clear now how counsel may challenge or criticize minority witnesses without triggering any reversible implicit biases. Second, the decision invites intentional discrimination by suggesting to insurance companies that the race of their trial counsel matters and could affect the risk of reversal later. And third, the decision below invites new trials or appeals in broad and amorphous circumstances, to the needless expense and frustration of all parties as well as insurance companies and their policyholders alike.

This Court should summarily reverse, or grant the petition for review.

ARGUMENT

I. Broad assumptions of racial impropriety violate the Equal Protection and Due Process Clauses.

In this and all future Washington cases, verdicts are open to a Pandora's box of new challenges based on facially non-racial statements by counsel. Put differently, the court has baked into law an *assumption* that Janelle Henderson lost this trial because of her race and should presumptively have another go at it (with a different judge, even). The same assumption would apply in many or most cases to a disappointed minority party. Meanwhile, the same arguments about Henderson's motive, manner, and testimony found reversible here remain proper in Washington against a non-minority plaintiff or witness.

The Washington Supreme Court's zealous effort to root out "implicit, institutional, and unconscious bias" actually injects *express and intentional* race and gender discrimination into the justice system. The court's idea is that the way to address implicit racial concerns is to mandate a practice of express, intentional discrimination in the supposed opposite direction. The Washington Supreme Court has engaged in the "sordid business" of "divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

This Court has long since recognized that trying to address implicit racial concerns through explicit government discrimination is wrong and contrary to Due Process and Equal Protection. "[O]utright racial balancing . . . is patently unconstitutional." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 311 (2013). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). "[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Fisher*, 570 U.S. at 316 (Thomas, J., concurring).

Drawing lines through the law based on race violates Due Process and Equal Protection. Express racial distinctions "exacerbate rather than reduce racial prejudice." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995). Race-oriented rules "stimulate our society's latent race consciousness" and "perpetuat[e] the very racial divisions the polity seeks to transcend." *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 308 (2014). "This Court has repeatedly reaffirmed that 'racial balancing' by state actors is 'patently unconstitutional,' even when it supposedly springs from good intentions." *Texas Dep't of Housing v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 555 (2015) (Thomas, J., dissenting). In short, the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality op.).

II. The decision below creates an unworkable and disastrous system.

Jury trials are a crown jewel of the American justice system. Thousands of civil jury trials occur in this country every year. Bureau of Justice Statistics, Civil Justice Survey of State Courts, *Civil Bench and Jury Trials in State Courts, 2005*, at pg. 3 (Oct. 2008), https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf (estimating 18,000 civil jury trials in one year). Studies show that "juries almost always decide tort trials," and that motor vehicle accidents are by far the most common type of tort claim. National Center for State Courts, *Caseload Highlights, Vol. 11 No. 1*, at pg. 1 (Feb. 2005), https://www.courtstatistics.org/__data/assets/pdf_file/0017/30563/An-Empirical-Overview-of-Civil-Trial-Litigation.pdf. In vehicle accident cases, the median jury award for winning plaintiffs has been around $15,000. *Civil Bench and Jury Trials in State Courts, 2005*, *supra*, at pg. 1.

Simply put, the prototypical civil trial in this country is a car accident case with a moderate sum of money at stake. Insurance companies are almost always involved.

The decision below—on top of violating the Constitution—throws a tremendous wrench into civil jury trials in Washington and anywhere else it may catch on. There are at least three distinct problems. First, it is unclear how counsel may challenge minority witnesses without triggering such reversible implicit biases. Second, the decision invites further discrimination by suggesting that the race of trial

counsel matters and could affect risk of reversal later. And third, it invites new trials or appeals in broad and amorphous circumstances, to the needless expense and frustration of parties as well as insurance companies.

A. The decision below limits counsel from challenging a minority party or witness.

The members of NAMIC are insurance companies involved in tort trials across America every day. Car crash cases, in particular, usually have either liability or damages, or both, hotly in dispute. In other words, the key questions are who caused the accident and whether the plaintiff was injured and how badly.

In everyday cases, these issues lean heavily on party and witness testimony. One classic example using the issue of liability is the plaintiff may claim that the defendant ran a red light, and the defendant denies it, asserting that the plaintiff ran the red light. Surrounding facts or witnesses pad the stories the parties tell. The jury then decides who to believe. Contested damages are very similar. When a plaintiff testifies about pain and suffering, a jury must decide whether to believe it. Any jury can react strongly—favorably or unfavorably—to the plaintiff's statements and demeanor. Finally, *hard* cases are the ones that reach trial. After all, most cases settle. When it is reasonably clear what a jury will do, the parties normally reach compromise in a settlement that they all accept.

The point is, torts are the most common civil trials in America. The most common issues in those cases often rely on party testimony. And only when counsel and the parties deeply disagree over how a jury will view their positions and testimony do the cases go to trial at all.

So once the trial is underway, counsel must be allowed to call into question the credibility of parties and witnesses. This is a fundamental aspect of the American justice system. *E.g.*, *California v. Green*, 399 U.S. 149, 158 (1970) (discussing the Confrontation Clause and quoting Wigmore: "cross-examination [is] the greatest legal engine ever invented for the discovery of truth"). Arguments the Washington Supreme Court found racist in this case are everyday points made against parties and witnesses of all races in courtrooms across America.

For instance, defense counsel, as in this case, commonly use the "lottery ticket" line of argument. Counsel will show photographs of barely damaged cars, suggesting that the impact was hardly violent. Counsel will then compare that to an eye-opening demand—here, for example, $3.5 million dollars, for an accident that didn't even disable a *car*. (Everyone drove away, and the police chose not to even come to the scene). Counsel will argue that the plaintiff, especially one suffering from serious prior maladies, is using the accident as a lottery ticket.

The argument has nothing to do with race. Anyone can play the lottery. It *should be* difficult for jurors to wrap their minds around multi-million dollar

demands for car accidents that had no obvious injuries on the scene and no prompt medical treatment. After all, model jury instructions specifically say that jurors "may take into account" the witness's "interest in the outcome of the case, if any" in deciding whether to believe them. Ninth Circuit Manual of Model Civil Jury Instructions, § 1.14(4) (2023); 6 Washington Pattern Jury Instructions: Civil, § 1.02 (7th ed. 2022) ("you may consider . . . any personal interest that the witness might have in the outcome").

Along the same line, counsel arguments about a witness' demeanor have nothing to do with race. Using this case as an example, counsel argued to the jury about the "credibility factors." App. 127a. The "credibility factors" is an obvious reference to Washington's pattern jury instructions, which specifically instruct that a jury "may consider" the "manner of the witness while testifying." 6 Washington Pattern Jury Instructions: Civil, § 1.02 (7th ed. 2022). Federal pattern jury instructions invite the same argument. Ninth Circuit Manual of Model Civil Jury Instructions, § 1.14(3) (2023) ("in considering the testimony of any witness, you may take into account . . . the witness's manner while testifying."). Counsel here suggested that the jury should consider "the manner of [Henderson's] testimony." App. 127a.

The core point was that Henderson had been open and forthcoming on direct examination, but evasive and obstructionist on cross. After all, Henderson had denied knowing what she had told her own doctors, denied knowing when she had seen her

own doctors, and denied that she knew the contents of her own medical record. Counsel called that behavior "combative" and said that "there's definitely no search for the truth there." App. 128a. Again, anyone of any race or gender can be combative and evasive in testifying. It is hard to envision how counsel may argue about a witness' "manner" at all if counsel cannot characterize stonewalling witness answers as unworthy of trust.

Similarly, it is proper, common, and detached from race for counsel to argue that a series of witnesses who give remarkably matching testimony were coached. The implication is that the witnesses all using the same terms to describe Henderson is more likely to reflect coaching than their own independent viewpoints. Counsel specifically said: "I thought it was interesting also that all four of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. Almost—almost like someone had told them to say that. It was—it was like a tape on repeat." App. 119a. Counsel then challenged the substance of that testimony, pointing out that doctors had assessed Henderson before the accident as having "constant fatigue" from her preexisting medical conditions. App. 119a-120a. Nothing about race was said whatsoever.

Regardless of race, four different witnesses all using the same term can suggest coaching and not authenticity. The Washington Supreme Court's view that this argument was "akin to" asserting that "Black witnesses are unreliable because there was a code that Black folk don't testify against Black folk" is a triumph

of imagination. App. 23a. The effect is to hamstring ordinary arguments when they are made against minority witnesses.

The Washington Supreme Court would seem to have no problem with any of these lines of argument being pursued against a non-minority party or witness. According to that court, the lottery and demeanor arguments trigger subconscious racist tropes about welfare queens and angry black women. But, if the same arguments were made against a black *man*, or maybe a white woman, they would just trigger other tropes. One article cited by the Washington Supreme Court came up with a non-exhaustive chart of demeaning stereotypes. T. Jones & K. Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2045 (2017). For Black women, it listed "morally deficient," "welfare queens," and "disagreeable/unpleasant." *Id.* For Black men, among others, "lazy" and "morally questionable." *Id.* For white women, it was "pampered/entitled," "flighty," and "fake." *Id.* *See also* M. Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 HASTINGS WOMEN'S L.J. 27, 41 (2021) (pointing out that "white women and black men . . . can act as oppressor or be oppressed" and that both "have supported the continued oppression of other groups"); M. Yarbrough & C. Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 630 (2000) ("Society regularly depicted women as . . . deceitful and untrustworthy."). Certainly with

creative thought, more races and far more stereotypes could be added. Yet the same arguments made in this case could just as plausibly trigger any of these other supposed subconscious biases.

The bottom line is that whole categories of ordinary, appropriate, everyday lawyer arguments used at trial in search for truth are now foreclosed or suspect in Washington.

On top of that, it is also not at all clear exactly *what* arguments are impermissible. Every modern lawyer should know not to ask a jury to make decisions based on race or gender. *See, e.g.*, *Schotis v. N. Coast Stevedoring Co.*, 163 Wash. 305, 316 (1931) (ordering a new trial when a lawyer argued against a Japanese company that "we don't like Japanese and they don't like us"); *State v. Monday*, 171 Wash. 2d 667, 679 (2011) (counsel improperly argued that "black folk don't testify against black folk").

One great benefit of that rule was that it barred obvious and intentional invocation of race—not alleged "subtle, automatic, or unconscious" statements, App. 16a n.6, that one could speculate may trigger subconscious biases. Now, it is not clear what may be said at all. Can a plaintiff be depicted as a greedy opportunist? Not if it could trigger a "welfare queen" or "lazy" or "entitled" stereotype. Can a witness be painted as a liar? Not if it could trigger a stereotype of minorities as untruthful or shifty. The system the Washington Supreme Court has invented does not make sense.

B. The decision below invites selection of counsel to emphasize race, which is wrong, illegal, and impractical.

The opinion below creates unsolvable problems for counsel and litigants. That said, insurance companies generally aim to mitigate risk. Mitigating the risk of a new trial under the new standard in Washington is mostly impossible. No one can predict which common arguments now will be improper as against certain minority parties and witnesses. And an improper argument—regardless of counsel's knowledge or intent, and regardless of timely objection from the other side—leads to a presumptive new trial. App. 18a, 20a (explaining that "courts must therefore focus on the effect of racially biased comments or actions, not the intent of the actor," and then must "presume that racial bias affected the verdict" at a hearing on the topic).

The Washington Supreme Court's opinion emphasized the race and gender of every party, counsel, and the judge.[1] The court's description of the trial itself begins: "Henderson's lead trial counsel was a Black woman; Thompson's was a white woman. The judge was a white woman, and there were no Black jurors. The only Black people in the courtroom were Henderson, her attorney, and her lay witnesses." App.

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[1] The court's hint that the *judge's* race mattered is concerning by itself. Nothing in this record calls into question the impartiality of the trial judge. The Washington Supreme Court suggesting that the judicial assignment—which is far beyond the control of any party—mattered and may have harmed the Black plaintiff is wrong and dangerous to the system in its own right.

5a. Given that focus, the hint is that the Washington court may have viewed the same or similar statements differently if made by a Black counsel, especially a Black woman.[2]

The only apparent way for an insurance company to mitigate the risk of breaching the new standard would be to *intentionally* hire counsel of the same race and gender as the opposing party (or key witnesses). Which, of course, is wrong, illegal, and impractical to boot.

First—it is wrong for a company to select counsel expressly on the basis of race. *Should* a company tell a lawyer that "we are not hiring you because we need an Asian lawyer to try this case," or "we need a Black female lawyer for this trial"? No. Taken to its logical conclusion, the Washington Supreme Court's unfortunate view reinjects intentional racial discrimination into our justice system as the solution for unproven, hypothetical and

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[2] Even using a counsel of the same race and gender as the challenged witness may or may not help. The same lines of scholarship embraced by the Washington Supreme Court now argue that members of racial minority groups are racist against themselves too. "[N]egative associations thrust upon black people and black culture can color how we black people view each other. Blacks and whites receive the same narratives and images that perpetuate stereotypes of black criminality and flippancy. . . . It is to be expected that there will be an observable impact on black intragroup perceptions." T. Johnson, THE ATLANTIC, *Black-on-Black Racism: The Hazards of Implicit Bias* (Dec. 26, 2014), https://www.theatlantic.com/politics/archive/2014/12/black-on-black-racism-the-hazards-of-implicit-bias/384028/ (describing a black author being surprised by a bias test that found him biased against black people and in favor of whites).

residual implicit racial bias. *See Schuette*, 572 U.S. at 317 (Scalia, J., concurring in judgment) (expressing support for states that, "opposed in principle to the notion of 'benign' racial discrimination—have gotten out of the racial-preferences business altogether"); *id.* at 315-16 (Roberts, C.J., concurring) ("it is not out of touch with reality to conclude that racial preferences may . . . do more harm than good").

Second, intentional racial discrimination in the hiring of counsel is illegal. That is true no matter if the company would be intentionally selecting Black, Hispanic, white, or any other race of counsel to best address the racial makeup of any given case. Section 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts." 42 U.S.C. § 1981(a). The Supreme Court has made clear that this provision protects all races. "[W]ith respect to § 1981, we have explained that the provision was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976) (allowing a white person to sue under § 1981)). *See also Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016) (a candidate passed over for chief of police in favor of an allegedly less-qualified candidate of a more-preferred race sued the decisionmakers under § 1981).

It is also clear that § 1981 applies to contracts with independent contractors, like lawyers and law firms. *E.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989) (Section 1981 "prohibits, when

based on race, the refusal to enter into a contract with someone") (superseded by statute on other grounds); *Webster v. Fulton Cnty., Ga.*, 283 F.3d 1254, 1256 (11th Cir. 2002) (allowing an independent contractor to sue under § 1981 after it bid on jobs but allegedly was not selected on racial retaliatory grounds); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999) (holding that an independent contractor company could sue under § 1981 after racial incidents by the hiring company).

Third, even beyond the illegality of intentional discrimination in hiring counsel, doing it would be impractical. Insurance companies often have no idea what the plaintiff's race is when they first enlist counsel for the defense of a tort case. And they certainly will not know both what the key issues are *and* the race and gender of any important opposing witnesses, such as the friends of the plaintiff or the doctors who treated the plaintiff. Changing counsel later, in preparation for trial—once the issues and racial makeup have crystallized—is almost as impractical. It would amount to yet another round of intentional racial discrimination, done in pursuit of the Washington Supreme Court's vision of "justice."

In short, the Washington Supreme Court's opinion makes the race of counsel a prominent consideration in addressing statements of implicit bias. Hiring counsel to suit the racial profile of each case is one of the few steps that an insurance company could take to mitigate the risk of amorphous statements being construed as racial microaggressions or dog whistles. Yet for decades

federal law has banned that practice, and it is morally wrong and impractical regardless.

C. The decision below undermines trust in juries and invites needless appeals.

The prototypical civil trial in this country is a tort case with tens of thousands of dollars at stake. *Caseload Highlights, Vol. 11 No. 1*, *supra*, at pg. 1. That type of case—especially after a jury verdict—is very rarely appealed. One study found that that while appeals in general arise after 15% of civil trials, in automobile accident cases that number drops to only 5%. Bureau of Justice Statistics, Supplemental Survey of Civil Appeals, *Appeals from General Civil Trials in 46 Large Counties, 2001-2005,* at pg. 2 (June 2006), https://bjs.ojp.gov/content/pub/pdf/agctlc05.pdf.

So nineteen times out of twenty, American litigants in automobile accident cases accept what the jury finds. This reflects meaningful trust that all litigants tend to place in the functioning of the justice system and the jury in particular.

The decision below threatens that trust. Because the standard announced is so amorphous and so race-oriented, the decision invites appeals or new trials whenever a minority party loses a trial. The decision deeply mistrusts a jury's ability to weigh the actual evidence and testimony. App. 16a (calling "subtle references" "insidious"); App. 17a (contending that "racial bias can influence our decisions without our awareness"); App. 18a ("[w]e attach significance to

race even when we are not aware that we are doing so").

Any frustrated minority litigant will have incentive to dig through the trial record looking for statements that might trigger *any* racist trope or implicit bias. It will not matter that no objection was made during the trial, when a judge could have addressed it or given a corrective instruction to the jury. App. 45a (the trial judge noting that "the use of the terms that the plaintiff now complains of was not objected to when defense counsel made her argument"). Nor does the trope need to be something specific and concrete. Under the decision below, asserting that the plaintiff was seeking a windfall was adequate to trigger "stereotypes about Black women being untrustworthy, lazy, deceptive, and greedy." App. 22a (citing *Cassandra and the "Sistahs"*, *supra*, at 636-39). What criticism of Henderson's testimony would *not* threaten to trigger such generic stereotypes?

The decision below invites appeals in which appellate courts will dig through trial records, focusing on the race and gender of each participant and asking whether it is possible that various facially neutral arguments could trigger implicit biases. Such an amorphous and racially-oriented new pathway for appeal—no matter which side it may "help" in any given case—is a problem for the efficient adjudication of tort cases in this country.

CONCLUSION

For these reasons, the decision below should be summarily reversed or the petition granted.

Respectfully submitted,

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