No. 22-823

In the Supreme Court of the United States

ALICIA THOMPSON, PETITIONER

v.

JANELLE HENDERSON, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTERESTS OF AMICI CURIAE[1]

Racial bias in our society—and in the justice system in particular—is a real issue that must be taken seriously. The Washington Supreme Court's objective of eliminating such bias is a noble goal. But that court's approach to this issue deviates sharply from the way this Court has sought to minimize racial bias in civil litigation. The court has adopted a test that injects a new form of unfairness and uncertainty into the judicial system. As a result, the decision below violates due process and broadly threatens the fairness and predictability of civil trials. It will tie the hands of trial lawyers, decrease the ability of judges to manage the cases before them, and destabilize the role and finality of jury verdicts. To explain the due process implications of this threat, Amici present this brief in support of the petition and urge this Court to grant certiorari and reverse, either summarily or after plenary review. This Court should make clear that allegations of racial bias in litigation must be decided based on *evidence*, not on general presumptions based merely on the race of the litigants.

Amici are well suited to provide the perspective of the business community on these important issues. The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than Amici, their members, or their counsel made any monetary contribution intended to fund the brief's preparation or submission. Counsel of record for both parties received the required notice of this brief.

indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases (like this one) that raise issues of concern to the nation's business community.

The American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The Washington Supreme Court's decision represents a threat to Amici's members and the business community as a whole. If allowed to stand, decisions like this one will drive up the cost of litigation and the settlement value of even meritless cases by making jury verdicts more uncertain and trials less fair. Such decisions will also expose the Amici's members to endless litigation by making it far too easy for litigants to void unfavorable verdicts and obtain a retrial whenever they receive verdicts they do not like. This Court's intervention is required.

SUMMARY OF ARGUMENT

Courts should use all the evidence-based tools at their disposal to keep racism out of the justice system. But the Washington Supreme Court has adopted a shocking new rule that eschews evidence altogether. It effectively assumes that any verdict involving a member of a minority race was the product of racial bias unless proven otherwise. Rather than presume that a properly empaneled and screened jury's verdict was reached fairly, that court now presumes the opposite. This approach is an unfair and unconstitutional recipe for chaos. It allows litigants to void any disappointing verdict and obtain a new trial based on a heavy-handed presumption that it is impossible for litigants and witnesses of minority races to receive fair consideration in the State of Washington.

Indeed, illustrating the extreme consequences of that approach, the Washington Supreme Court further held that a new trial is presumptively warranted if there is any possibility that a race-neutral argument might have evoked a historical trope or stereotype—no matter how common or generic the argument, and no matter how tenuous the connection. Here, for example, the supposedly racially tinged argument was as simple and inoffensive as the suggestion that the plaintiff had been "confrontational" in her testimony and was seeking an excessive damages award.

In the State of Washington, then, no proof of actual racism by the jury is required. Instead, when deciding a motion for a new civil trial, "'[t]he ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) *could*

view race as a factor in the verdict.'" Pet. App. 3a (emphasis added) (quoting *State* v. *Berhe*, 444 P.3d 1172 (Wash. 2019)). If "this objective observer *could* view race as a factor in the verdict," a prima facie claim has been made and a hearing is mandatory, "regardless of whether intentional misconduct has been shown or the court believes there is another explanation." Pet. App. 4a (emphasis added). Then, "[a]t that hearing, the party seeking to preserve the verdict bears the burden to prove that race was *not* a factor. If that burden is not met, the court must conclude that substantial justice has not been done and order a new trial." *Id.* (emphasis added).

Plainly, the Washington Supreme Court's hypothetical "objective observer" is not an impartial third party looking for evidence of unfairness or racism in a particular case. The central premise of this analysis is that "[r]acism is endemic" and that this hypothetical observer would know that historically "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." Pet. App. 3a, 4a. That historical knowledge alone, evidently, is enough for courts to find that this objective observer "could view race as a factor in the verdict," even if there is no evidence of racism by the court, the trial lawyers, or the jurors—and even if innocent explanations are more likely. This remains true even where, as here, the litigant who claims discrimination actually won the case. Pet. App. 4a.

The very premise of this analysis proves its overbreadth. Given the weight the court's analysis places on the historical impact of racism, a disappointed litigant in a minority racial group will nearly *always* be able to make out a prima facie case of racial bias.

Regardless of case-specific facts or context, the baseline assumption of racism leads unavoidably to the conclusion for which the court is supposedly testing in the first place. The court's analysis is thus not any sort of objective, wholistic consideration of the evidence; it is a legal presumption of racial bias.

Further, this presumption is effectively irrebuttable. The Washington Supreme Court shifts the burden of proof to the party defending the verdict to prove there *could not* have been any such bias—conscious or unconscious. But especially in this context, it would be impossible for a litigant to prove a negative. For starters, how could a litigant possibly prove that negative when the court already declared as a matter of law that racism remains endemic? And how could a litigant "prove that race was not a factor" in the minds of jurors (Pet.4a), when the potential racism could have been silent, implicit, unintentional, or unconscious? Although voir dire offers parties an opportunity to exclude jurors for any potential biases (racial or otherwise), litigants at a post-trial hearing typically cannot question jurors about their deliberations or how they reached their verdict. See*, e.g.*, *Tanner* v. *United States*, 483 U.S. 107, 117–21 (1987). Consequently, it would be effectively impossible for a litigant to prove that race did *not* factor into the mind of any juror, even unconsciously.

Worse, the Washington Supreme Court's decision effectively declares off-limits a variety of race-neutral arguments commonly used to challenge witness credibility, if those approaches are used with respect to witnesses of minority races. The Washington Supreme Court fears that such routine, race-neutral arguments may consciously or unconsciously play into racist tropes that may exist in the minds of jurors. In this

case, for example, the court held that it was improper (and even potentially sanctionable) for a trial lawyer to suggest that the testimony of a Black plaintiff seeking money damages was biased due to her financial interest in the case—or that her Black witnesses were biased in her favor due to friendship. According to the court, such arguments are suspect, as they could play into broader racist tropes. Pet. App. 20a–22a. Of course, such arguments—which are exceedingly common in all manner of trials—would presumably remain fair game if the plaintiff or witnesses were of a different race.

In short, the Washington Supreme Court has taken a subtle and complex issue and attempted to solve it by casting the entire civil litigation system in doubt. The decision allows litigants of minority races (or with a supporting witness of a minority race) to void a verdict at will because their opponents' common, race-neutral arguments trigger a presumption that racism *could* have impacted the verdict—even in the absence of proof that it actually did. The outcome is unfair and uncertain, placing an unwarranted burden on litigants depending on the race of the person on the witness stand or on the other side of the "v."

Rather than entrusting the fairness of trials to the sound discretion of experienced trial judges, the court's rule creates a presumption of racial bias that will be all but impossible to displace. The deciding factor in too many post-trial motions in the State of Washington will now be *more* likely—not less—to be the race of the litigants or witnesses. This result cannot stand.

ARGUMENT

I. The decision violates this Court's precedents by creating an effectively irrebuttable presumption.

Racism is real, and it has undeniably had an impact on our justice system over time. This Court has sought to reduce the impact of racial bias in our justice system through a variety of important reforms, including removing barriers that have prevented racial minorities from serving on juries,[2] barring litigants from striking jurors based on race,[3] encouraging the robust screening of jurors for racial bias through voir dire,[4] and recognizing a racial-bias exception to the no-impeachment rule to examine clear statements of racial bias by a juror.[5] The aim of these authorities (among others) has been to promote fairness and reliability in the process itself.

With those procedural protections in place, this Court has questioned the fairness of a verdict only where bias is proven. See, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 398 (2010) (finding it improper to

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[2] See, *e.g.*, *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Avery* v. *Georgia*, 345 U.S. 559 (1953).

[3] See, *e.g.*, *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to private litigants in civil trials).

[4] See, *e.g.*, *Turner* v. *Murray*, 476 U.S. 28 (1986); *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981); *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

[5] See, *e.g., Peña-Rodriguez* v. *Colorado*, 580 U.S. 206, 211 (2017).

presume juror prejudice absent extreme circumstances, and holding that a challenge to a verdict requires proof of "actual bias"); *Tanner*, 483 U.S. at 117–21 (recognizing that it is improper to examine jurors for internal sources of bias after a verdict is reached, noting that such biases should be addressed before a verdict is reached through voir dire).

To be sure, the *possibility* of unconscious bias is always present, at least hypothetically. But this Court has routinely recognized the ability of juries to render fair verdicts, and it presumes that they have done so, unless the circumstances demonstrate otherwise. The Court has explained: "Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense." *Peña-Rodriguez*, 580 U.S. at 211.

In the interest of finality and fairness, then, this Court presumes the effectiveness of the trial judge's discretion and the various other safeguards for preventing racial bias by juries, absent proof that "one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 225. There must be proof of a "clear statement" by a juror that "he or she relied on racial stereotype or animus" in reaching a verdict. *Id.* "Not every offhand comment indicating racial bias or hostility" is sufficient. *Id.* Rather, "the statement must tend to show that racial animus was a significant motivating factor." *Id.* This Court has never disturbed the finality of a verdict by hypothesizing that a jury "could" have been influenced by unconscious bias.

Similarly, this Court recognizes that due process rights are violated when a litigant exercises a peremptory strike of a potential juror based on race, but it requires the movant to prove that such a race-based juror strike occurred. After a prima facie claim of an improper juror strike has been made, the claim will be defeated if the party can "present a race-neutral explanation" for the strike. *Rice* v. *Collins*, 546 U.S. 333, 338 (2006). This Court "does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Id.* (citations omitted). This principle respects the efforts of those in the judicial system who work tirelessly to ensure a fair process and the finality of jury verdicts absent actual proof that something went awry.

By contrast, the Washington Supreme Court has essentially assumed that all efforts to minimize racial bias will necessarily fail. It starts its analysis with a virtually irrebuttable presumption—relatively easy to invoke—that racism is so deeply entrenched that it *must* have motivated any verdict involving litigants or witnesses of particular races based on the history of racism in the state. The court applies this presumption even when the jury found in *favor* of the plaintiff invoking it, awarding that plaintiff a verdict that was by no means nominal. The fact that the jury awarded the plaintiff here a sizeable sum certainly undercuts the inference that this jury was biased against her. Nor is there any evidence of actual racial bias in the record—unlike, for example, the juror admissions of race-based decision-making at issue in *Peña-Rodriguez*. Still, based simply on the history of racism and the fact that a lawyer used a race-neutral credibility argument that the litigant argues invoked a

stereotype, the court presumed bias and placed the burden on the other side to prove its absence.

In effect, the court allowed Respondent to treat the verdict like an initial offer in a round of negotiation, which she was free to reject by invoking the presumption of racism, only to try again for a better award before a second jury. Civil litigation in Washington has thus become a game of "heads, I win; tails, I get a do-over." The loser here is not just the opposing party; it is the legitimacy and finality of civil trials.

This Court has held that a presumption that "operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); see also *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973) (same). Washington's new standard does exactly that, by presuming that racial bias affected the jury verdict and placing the burden on the non-movant to prove there was "no effect on the verdict." Pet. App. 20a.

II. The decision will create unfair disadvantages for litigants—and particularly corporate litigants—by tying the hands of trial lawyers.

Importantly, the Washington Supreme Court's test not only threatens the ability of litigants to defend favorable verdicts but may also compromise the fairness of the trial itself. By deeming routine race-neutral arguments out-of-bounds—if and only if the litigant or witness is a member of a racial minority group—the Washington Supreme Court has hamstrung the ability of trial lawyers to represent their clients. This case highlights the problem, making it an ideal vehicle for this Court's review.

The Washington Supreme Court's decision arose from a routine car accident in which a White woman (Petitioner) admitted fault in striking a Black woman (Respondent). A trial was held on damages, and Respondent, who did not appear to suffer any serious injuries, was awarded $9,200 in damages, rather than the $3.5 million she sought.

Despite her victory, Respondent sought a new trial, arguing (among other things) that Petitioner's counsel had told the jury that Respondent's testimony was "combative" and "confrontational," that the testimony of her friends and family was inherently biased, and "that the only reason for the trial was [Respondent's] desire for a financial windfall." Pet. 6a–7a. She maintained that these race-neutral arguments may have triggered the jurors' unconscious racial bias against her, and the Washington Supreme Court agreed.

But these are race-neutral, routine arguments about the credibility of the witnesses and the reasonableness of the demands. Trial lawyers make such arguments every day. Indeed, it may well have been irresponsible for defense counsel *not* to have made them on this record. According to the Washington Supreme Court, however, because of the race of the plaintiff and her supporting witnesses, these kinds of arguments raise an irrebuttable presumption of racial bias in the verdict. Indeed, the Washington Supreme Court remanded the case for the trial court to decide whether defense counsel should be *sanctioned* for making such statements. Pet.31a–32a.

Witness credibility is of critical importance in any trial. If a witness was combative, self-interested, or personally tied to a party, the trial lawyer must be able

to point that out. Similarly, if a plaintiff is seeking money damages, it should be fair game to note for the jury that the plaintiff's financial interest in the case may warrant reviewing her testimony with a critical eye. And if the damages demand seems to exceed the plaintiff's level of injury dramatically, that too should be fair game for a defense lawyer to mention.

But in the Washington Supreme Court's view, defense counsel's argument that Respondent's "injuries were minimal and intimat[ion] that the sole reason she had proceeded to trial was that she saw the collision as an opportunity for financial gain" somehow improperly "alluded to racist stereotypes about Black women as untrustworthy and motivated by the desire to acquire an unearned financial windfall." Pet. App. 21a–22a. The court claimed that this argument played into the "myth of the 'welfare queen,'" which "refers to a woman who purposefully 'shuns work' in order to live off public benefits." Pet. App. 21a n.9. Similarly, that court found that describing Respondent's conduct on the witness stand as "combative" and "confrontational," rather than forthright, to be potentially sanctionable because those words "evoke the harmful stereotype of an 'angry Black woman.'" Pet. App. 20a.

The Washington Supreme Court also criticized defense counsel's argument that Respondent's witnesses were biased in her favor due to friendship—and that their testimony seemed rehearsed, given that three of them used the same "life of the party" reference to describe Respondent. Pet. App. 141a, 142a, 146a. From this, the court somehow found that "[i]ntimating that the Black witnesses had joined together to lie for the Black plaintiff could invite jurors to suspect them as a group and to make decisions based on biases about race and truthfulness." Pet. App. 23a. Based in part

on these findings, the court put the burden on Petitioner to *disprove* the impact of racial bias.

These conclusions are deeply problematic. All these arguments were race-neutral on their face, and all of them are common arguments relating to a witness's credibility. Going forward, whether a trial lawyer may use these kinds of arguments about credibility apparently depends on the witness's race. Under the Washington Supreme Court's ruling, making such arguments about a Black witness casts the jury verdict in doubt and even may subject the lawyer to sanctions.

Such a rule impairs the ability of litigants to defend themselves in civil litigation and to receive fair judicial process. This violates the fundamental due process principle that all parties have a "meaningful opportunity to present their case." *Mathews* v. *Eldridge*, 424 U.S. 319, 333, 349 (1976) (citation omitted). That principle includes the right "'to present every available defense,'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168, (1932)), and prohibits "evidence rules that * * * are 'arbitrary' or 'disproportionate to the purposes they are designed to serve." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citing *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)).

Thus, the Washington Supreme Court's decision makes the trial process itself unfair by unreasonably and arbitrarily limiting the arguments trial lawyers may make. Apparently, a trial lawyer in Washington may no longer argue that a Black witness was not credible—either because of her demeanor, or because of her relationships, or because of her financial self-interest in the outcome. This rule creates an unfair imbalance at trial—and then compounds that unfair

advantage by presuming that any trial victory won in the face of such comments was presumptively tainted by bias and is subject to challenge by a dissatisfied litigant.

This is not to say the State of Washington and its courts are powerless to address the risk of bias. Quite the contrary. Although Amici take no position on any particular proposal, the Washington courts and legislature have several options to address potential racial bias in the judicial system beyond the safeguards already prescribed by this Court. They could require a more equitably drawn venire, or direct more rigorous questioning of prospective jurors for bias, or eliminate peremptory strikes altogether so that a litigant must show cause to strike any juror. And certainly trial judges should be on guard for instances in which arguments by trial lawyers do invoke bias or cross the line to racist tropes. But precluding common, race-neutral challenges to the credibility of certain witnesses—but not others—introduces a degree of unfairness and uncertainty that is both unmanageable for trial lawyers and intolerable for the justice system as a whole.

III. This Court should summarily reverse or otherwise grant plenary review.

The Washington Supreme Court's decision is flatly contrary to a long line of precedents of this Court, so it meets this Court's criteria for review. Review is warranted when "a state court * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R.10(c). Whether this new approach is confined to the State of Washington—or other courts follow suit—the decision will have a profound impact on Amici's members. Even as it stands, the decision applies to every civil

case across the State of Washington that involves litigants or witnesses of historically marginalized races, severely compromising the fairness and predictability of civil trials.

In a case like this, in which a state court's decision so flagrantly violates this Court's precedents, this Court often summarily reverses, and it should do so here. See, *e.g.*, *Caetano* v. *Massachusetts*, 577 U.S. 411, 412 (2016) (reversing summarily a state court decision that "contradict[ed] this Court's precedent"); *Brousseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) ("We exercise our summary reversal practice here to correct a misapprehension [of law.]"). This has been particularly true when the state court decision has involved the misuse of race for legal purposes. See, *e.g.*, *Johnson* v. *Virginia*, 373 U.S. 1053 (1963); *Pennsylvania* v. *Bd. of Dirs. of City Trust of City of Phila.*, 353 U.S. 230 (1957).

The situation here is comparable to *Turner* v. *Industrial Commission of Utah*, 423 U.S. 44 (1975), in which this Court summarily reversed a decision by the Supreme Court of Utah that upheld a presumption that discriminated against pregnant women seeking unemployment compensation. There, as here, the state court decision ran counter to this Court's precedent regarding the use of a protected status in dispensing government rights. And the impact of the decision here is even broader, as it undermines the fairness of all kinds of civil cases across the state and is not confined to any distinct category of cases, such as those involving unemployment compensation.

The record in this case is clear, and the Washington Supreme Court's decision is patently inconsistent with this Court's precedent, with devastating

consequences for both the fairness and the appearance of fairness in the judicial system. Summary reversal is warranted. At a minimum, however, this Court should grant plenary review and assess the Washington Supreme Court's decision on the merits.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the judgment of the Washington Supreme Court or, alternatively, grant the petition for plenary review.

Respectfully submitted.

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