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

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief in opposition spends little time addressing the Washington Supreme Court's egregious due-process and equal-protection violations, and it does not dispute many crucial points. For example, respondent does not dispute that defense counsel's statements concerning witness credibility, bias, and motive are common arguments made daily by trial counsel in courtrooms across the Nation—regardless of race. Respondent also does not dispute that defense counsel's arguments were tethered to the evidence presented at trial and never mentioned race. Nor does respondent dispute that the Washington Supreme Court held defense counsel's arguments amounted to a sanctionable invocation of racist stereotypes. *See* Pet.App.20a-23a (holding that defense counsel's race-neutral, evidence-based arguments "evoke the harmful stereotype," "alluded to racist stereotypes," "appealed to these negative and false stereotypes," "relied on racist stereotypes," and are "akin to . . . prosecutorial misconduct").

Respondent's central argument on the merits remarkably pretends that petitioner "has not been deprived of raising any defense at a forthcoming hearing." BIO.19. But that is precisely what the Washington Supreme Court's decision below holds: it "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." U.S. Chamber Br.5.

With little to say on the merits, the overwhelming majority of respondent's brief instead raises a series of unavailing arguments that do not impede this Court's review of the important constitutional questions presented. Respondent's lead argument asserts petitioner did not properly present and preserve the claims presented.

BIO.6-9. But respondent ignores binding precedent to the contrary: Petitioner properly preserved her federal due-process and equal-protection claims in a "petition for rehearing" below by asserting that "the state-court decision itself is claimed to constitute a violation of federal law." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 712 n.4 (2010). Furthermore, respondent's brief barely engages with the petition's four pages of arguments raising two independent bases for finality under 28 U.S.C. § 1257. *See* Pet.33-36.

This Court's immediate review is needed to preserve the due-process and equal-protection rights of civil litigants throughout Washington—and to ensure the Washington Supreme Court's novel new-civil-trial test does not expand to other jurisdictions.

I. This Court should summarily reverse or grant review of the Washington Supreme Court's novel new-civil-trial standard that violates the Due Process and Equal Protection Clauses.

A. Due Process.

Respondent does not dispute that "[d]ue process requires that there be an opportunity to present every available defense." BIO.19. Instead, respondent fundamentally misunderstands the decision below by arguing that petitioner "has not been deprived of raising any defense at a forthcoming hearing." BIO.19.

As the petition explained at length, Pet.16-28, during the evidentiary hearing on remand, petitioner cannot argue that counsel's statements did not affect the verdict on the basis that they were "race-neutral," Pet.App.24a; did not invoke "racist stereotypes," Pet.App.21a, 24a; or were "tied to the evidence in the case," Pet.App.11a. After all,

the court assigned a different trial judge because the original judge found no racial bias in part because she accepted these arguments. Pet.App.11a, 26a. And at any likely preordained new trial, petitioner cannot raise the defenses identified by the Washington Supreme Court's opinion about witness or party (1) financial interest, (2) personal bias, or (3) conduct and demeanor. *See* Pet.App.20a-25a.[1]

Respondent's attempt to sow doubt about the basis for the Washington Supreme Court's decision undermines her insistence that due process is "simply not implicated here." BIO.19. Respondent implies in a footnote that the decision's finding of racial bias could have rested on *other* statements "unmentioned in the ruling below"—a ruling respondent claims offered just "'examples' (not an exhaustive list)" of implicit bias at trial. BIO.1 n.1. The decision did not say it rested on other "unmentioned" statements. *See* Pet.App.20a-25a. And the petition's "selective excerpts of the trial record" thoroughly quote every single statement at trial with which the Washington Supreme Court expressed concern. Respondent does not contend otherwise. BIO.1 n.1.[2] In any event, if the ruling rests on

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[1] While the concurrence below disagreed with the majority opinion and found defense counsel's financial-interest and witness-coaching arguments proper, Pet.App.34a-35a, the concurrence still joined the majority in finding counsel's other evidence-based, race-neutral statements (regarding witness bias and conduct) amount to "racial bias," Pet.App.36a. Respondent incorrectly posits that this concurrence somehow shows the majority opinion permitted "evidence-based arguments." BIO.19.

[2] Respondent suggests that the "astonishingly small award" itself provides evidence of bias. BIO.1 n.1. But as the trial court found, $9,200 was "not outside the evidence presented in the case," where

other "unmentioned" statements, that only exacerbates the unconstitutional vagueness and arbitrariness of this novel standard.

B. Equal Protection.

Respondent's statement that "[n]othing in the decision below" requires classification by race or race-based treatment, BIO.20, contradicts the decision itself. "[T]he same arguments about Henderson's motive, manner, and testimony found reversible here remain proper in Washington against a non-minority plaintiff or witness." NAMIC Br.5; *see* Pet.29-30. To determine whether these commonplace arguments are allowed, counsel must consider the race of all litigants and witnesses, consider any possible stereotypes associated with the race of any litigant or witness, and then choose either to use or avoid evidence-based, race-neutral arguments *depending on the race* of the particular litigant or witness. Pet.29. Trial courts must do the same, placing the race of litigants and witnesses front and center, to evaluate whether the common, evidence-based arguments relied on "could have evoked" stereotypes. Pet.29. And appellate courts, likewise, must now "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." NAMIC Br.19.

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the extent of respondent's injuries was "hotly disputed." Pet.App.47a. Nor did defense counsel "pe[g] damages at $60,000." BIO.3. Instead, as the trial court explained, that is the alternative figure defense counsel "suggested would be appropriate *if* the jury found *plaintiff's* calculation of damages to be appropriate." Pet.App.47a (emphases added).

Respondent's insistence that Washington "has adopted a race neutral standard" therefore rings hollow. BIO.16. States may not avoid strict scrutiny and "serious constitutional questions" by creating standards that "cause[] race to be used and considered in a pervasive and explicit manner." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Proj., Inc.*, 576 U.S. 519, 542-43 (2015); *see* NAMIC Br.14.

II. No barriers prevent this Court's review of the important constitutional questions raised in the petition.

A. The federal claims are properly presented.

Respondent's assertion that petitioner's federal claims were not properly presented, BIO.6-9, ignores established precedent: "where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar [this Court's] review." *Stop the Beach*, 560 U.S. at 712 n.4 (citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930)); *e.g.*, *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930). So when a state-court decision itself violates the U.S. Constitution, that state court cannot insulate its decision from this Court's review by declining to address federal claims raised in a rehearing motion. *Stop the Beach*, 560 U.S. at 712 n.4.

That is exactly this case. The Washington Supreme Court acknowledged that its opinion below created a new "framework *we announce today*." Pet.App.4a (emphasis added). This framework (1) announced a standard for granting a new civil trial on the basis of implicit racial bias and then (2) deemed legitimate trial arguments

sanctionable prima facie evidence of racial bias. Pet.App.19a-25a. Respondent does not dispute that petitioner raised her federal due-process and equal-protection challenges to the Washington Supreme Court's newly announced standard in a motion for reconsideration. Pet.App.50a-77a. The court below denied petitioner's motion in a one-sentence order. Pet.App.49a.

The Washington Supreme Court had "a fair opportunity to address the federal question[s] that [are] sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). This case therefore bears no resemblance to those cited by respondent, in which parties attempted to raise issues in this Court that were available but *never raised below*. *See Adams v. Robertson*, 520 U.S. 83, 87 (1997) (per curiam); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).[3]

Respondent further suggests petitioner failed to preserve the petition's claims because she did not challenge the Washington Supreme Court's preexisting "*Berhe* procedure" in her opening appellate brief below. BIO.13. But *Berhe* did not address statements by *counsel* or apply to *civil* proceedings. *See State v. Berhe*, 444 P.3d 1172, 1182 (Wash. 2019). Petitioner was not required to challenge *Berhe*'s criminal standard to preserve her constitutional challenges to the newly announced civil standard at issue here. As the petition explained, Pet.12, the *Berhe* standard (1) applies to *criminal* cases, (2) implicates *juror*

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[3] *Board of Directors of Rotary International v. Rotary of Duarte*, 481 U.S. 537, 549-50 (1987), is also inapposite. *Cf.* BIO.8. *Duarte* granted review and decided the First Amendment question raised, while refusing to address a vagueness and overbreadth argument that *had been available throughout the lower court proceedings* yet was only raised in a rehearing petition. *Duarte*, 481 U.S. at 550.

deliberations, and (3) entails *no presumption* of racial bias. Petitioner's appellate brief below thus argued: "In *Berhe*, the Court extended the principles of GR 37 [jury selection] to a *criminal* jury verdict . . . . No Washington court has applied GR 37 to alleged *attorney misconduct during closing argument* in a *civil* trial or to a *civil* jury verdict." BIO.App.39a (emphases added). The Washington Supreme Court did borrow language from *Berhe* to articulate the new standard for showing a prima facie case of implicit racial bias based on *counsel's* arguments in a *civil* trial. Pet.App.18a-19a. But it went much further than that, ordering courts to "presume" bias and place the burden on the non-moving party to conclusively "prove [bias] did not affect the verdict." Pet.App.20a, 25a. This presumption and burden language appear nowhere in *Berhe*.[4]

Before the Washington Supreme Court announced this new standard, petitioner could not possibly have challenged it. And she was not required to challenge a standard that had not been applied to her. The rehearing motion thus properly presented and preserved the important constitutional questions now raised before this Court.

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[4] Rather, this language originates in other criminal cases addressing instances of *overt* or *explicit* bias. *See State v. Monday*, 257 P.3d 551, 557 (Wash. 2011) (new criminal trial where prosecutor exaggerated the pronunciation of the word "police" as "po-leese" and argued that "[B]lack folk don't testify against [B]lack folk"); *State v. Zamora*, 512 P.3d 512, 524 (Wash. 2022) (automatic reversal where prosecutor's remarks about illegal immigration during voir dire displayed "flagrant or apparently intentional appeal to the jurors' potential racial or ethnic bias toward Latinxs").

B. The federal claims are final and reviewable.

1. *Finality*. The Washington Supreme Court's decision is final for purposes of this Court's review. Respondent barely engages with the petition's finality arguments. *See* Pet.33-36. Instead, respondent's discussion about finality, BIO.11-14, largely tracks her unavailing arguments about claim preservation. *See* BIO.11 ("lack of presentment"); BIO.12 ("not presented before the Washington Supreme Court issued its decision"); BIO.13 ("not raised until *after* the decision was issued"; "not properly presented").

When respondent does briefly address *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), she mistakenly asserts that the federal claims raised were not "finally decided" by the Washington Supreme Court. BIO.13. But these federal claims were raised in petitioner's rehearing motion after the decision below created its novel standard, and the Washington Supreme Court rejected them when it denied rehearing. Its denial order may have been short, but that does not insulate it from review. *See Stop the Beach*, 560 U.S. at 712 n.4.

Respondent cursorily states finality is lacking "because the decision remanded for additional factual development." BIO.13. But *Cox* and its progeny recognize finality even when additional state-court proceedings are yet to occur, including when, as here, the federal issue was finally decided by the state's highest court. *See* 420 U.S. at 477-80. Respondent also argues that "there is zero 'guarantee' any federal issue will require decision regardless of the outcome of future proceedings." BIO.13. This argument is not only wrong because the novel standard presumes racial bias and requires petitioner to

prove an unprovable, *see* Pet.28, it wholly ignores the petition's second basis for finality—that the Washington Supreme Court's binding restrictions placed on petitioner's arguments in the ordered evidentiary hearing and any new trial *themselves* deny due-process and equal-protection rights. *See* Pet.35-36.

2. Respondent raises a host of other arguments that do not prevent this Court's review of the questions presented. BIO.8-11, 14-18.

Ripeness. Review of petitioner's claims is not "premature" or "unripe." BIO.9. Petitioner already suffered "complete" due-process and equal-protection violations when the Washington Supreme Court unconstitutionally vacated the trial court's final judgment and jury verdict under its novel implicit-racial-bias standard. BIO.12. In doing so, the Washington Supreme Court also held that defense counsel's legitimate trial arguments are prima facie evidence of racial bias. Pet.App.20a-25a. While the Washington Supreme Court ordered an evidentiary hearing to determine whether counsel's statements "affected the verdict," its decision simultaneously prohibits petitioner from arguing—in this hearing or any new trial—that her counsel's arguments were evidence-based, legitimate, and race-neutral. Pet.App.20a-26a.[5]

This is hardly "imaginative speculation" about "contingencies." BIO.10. The Washington Supreme Court held that defense counsel could be *sanctioned* for making

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[5] *Zinermon v. Burch* does not stand for the proposition respondent asserts, BIO.12, 18, as that case dealt with the *timing* of whether a (constitutionally sufficient) hearing must be provided "before" or "after" a property deprivation in certain narrow circumstances inapplicable here. 494 U.S. 113, 127-28 (1990).

these arguments.[6] Pet.App.31a-32a & n.15. And it removed the original trial judge from the case for accepting these arguments as legitimately "tied to the evidence in the case." Pet.App.11a, 26a. Moreover, the further proceedings themselves will violate due process and equal protection. *See* Pet.35-36. As this Court recently recognized, a claim raising constitutional concerns about "subjection to an illegitimate proceeding" may be properly raised in advance of that proceeding because a "proceeding that has already happened cannot be undone." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 903-04 (2023).

Mootness. Respondent cannot "moot" the constitutional issues raised through any procedural maneuvering. BIO.7-9 & n.2, 18. Respondent says she will ask the trial court to "bifurcate the issues" of racial bias from discovery sanctions. BIO.9 n.2; *see* Pet.App.32a (ordering the trial court to decide "*whether to impose* [discovery] sanctions" (emphasis added)). Even if a new trial were ordered based solely on discovery sanctions, that would not moot petitioner's due-process and equal-protection claims. *See* Pet.36. Any new trial will be governed by the Washington Supreme Court's appellate mandate imposing these unconstitutional limits on defense counsel's arguments. At any new trial, petitioner will then object to these limits and preserve them for this Court's review, so the important federal questions presented in this petition "will

[6] Given this holding, it is hard to imagine any counsel will pursue credibility arguments, at least under certain circumstances, for fear of inviting a "*Henderson* motion" following trial, further insulating this unconstitutional standard from this Court's review.

survive and require decision regardless of the outcome of future state-court proceeding." *Cox*, 420 U.S. at 480.[7]

Respondent's further assurance that "there is no reason to assume that another trial . . . [would] raise issues of racial bias" falls flat. BIO.11. The initial damages trial below did not "raise issues of racial bias," yet the Washington Supreme Court deemed race-neutral statements from that trial prima facie evidence of racial bias. *See* NAMIC Br.6. Petitioner is not arguing that "racial bias" is likely to be present at any new trial. BIO.11. Quite the opposite: Petitioner argues that legitimate, evidence-based, *race-neutral* arguments must be available for her defense—yet the decision below unconstitutionally prohibits them.

Abstention. Respondent's reliance on abstention doctrines is also misplaced. BIO.8-9. Abstention precludes certain litigants from seeking review of an ongoing state proceeding through a *separate federal* proceeding in *district court*. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983). Abstention doctrines do not bar this Court's *direct review* of a state court's judgment on an issue of federal law deemed final under 28 U.S.C. § 1257. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975).

Comity. "Comity" concerns have no bearing on this Court's review. The parties agree that states may "'make and enforce their own laws *as long as they do not infringe on federal constitutional guarantees*.'" BIO.14 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008)

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[7] Contrary to respondent's assurances, the concern is not that there will be too *few* trials as a result of the new implicit-bias standard, BIO.17-18, but that there will be a significant expansion of new-civil-trial motions and new trials.

(emphasis added)). Here, the Washington Supreme Court's novel new-civil-trial test violates the federal Due Process and Equal Protection Clauses. States may not "violate the Federal Constitution," *Danforth*, 552 U.S. at 280, even in the name of "creative, if novel rules [ ] in this area," BIO.16. The decision below thus bears little resemblance to cases respondent relies on, BIO.14-16, which rejected federal constitutional claims on the merits. *E.g.*, *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228, 2239 (2022); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

Finally, respondent directs petitioner to the "Washington democratic process" for resolution of what she calls a "policy matter." BIO.17. But federal constitutional rights are protected by courts regardless of the availability of legislative democratic processes. That is precisely why this Court's immediate review is needed to correct the Washington Supreme Court's novel and unconstitutional standard.

CONCLUSION

The Court should summarily reverse the judgment of the Washington Supreme Court. Alternatively, the Court should grant this petition for plenary review, or hold this petition and then grant, vacate, and remand in light of *Students for Fair Admissions*, Nos. 20-1199 & 21-707; or *Haaland*, Nos. 21-376, 21-377, 21-378, & 21-380.

Respectfully submitted.

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MAY 2023