

No. 20-35582

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JUN YU,

Plaintiff-Appellant,

v.

IDAHO STATE UNIVERSITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Idaho
District Court No. 4:15-CV-00430-REB
The Honorable Ronald E. Bush, District Court Chief Magistrate Judge

**BRIEF OF *AMICI CURIAE* THE PUBLIC JUSTICE CENTER, THE FRED
T. KOREMATSU CENTER FOR LAW AND EQUALITY, CHINESE
AMERICAN PROGRESSIVE ACTION, DR. RUSSELL JEUNG,
LATINOJUSTICE, AND CHINESE FOR AFFIRMATIVE ACTION IN
SUPPORT OF APPELLANT SEEKING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amici curiae The Public Justice Center, the Fred T. Korematsu Center for Law and Equality, Chinese American Progressive Action, Dr. Russell Jeung, LatinoJustice, and Chinese For Affirmative Action hereby state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*¹

The Public Justice Center (“PJC”) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of under-represented persons and communities. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients. The PJC’s Appellate Advocacy Project seeks to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before state and federal appellate courts. The PJC has an interest in protecting historically marginalized groups from systemic institutional discrimination. *See e.g., Bing v. Brivo Sys., LLC*, 959 F.3d 605 (4th Cir. 2020); *B.C. v. Barr*, Nos. 19-1408, 20-2078 (decision pending in the Third Circuit); *Livingston v. Kehagias*, 803 Fed. App’x 673 (4th Cir. 2020).

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000

¹ *Amici* certify that neither party’s counsel authored this brief in whole or in part, nor did any party or party’s counsel contribute money intended to fund preparation or submission of this brief; and no person other than *amici curiae* and their counsel contributed money intended to fund preparation or submission of this brief.

Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center has a special interest in addressing discrimination targeted at classes of persons based on race, nationality, or religion.²

Chinese American Progressive Action (“CAPA”) is an initiative of Asian-American Pacific Islander Progressive Action (“AAPIPA”), a project of The Advocacy Fund. CAPA shares with Chinese Americans and the broader U.S. public how progressive, forward-looking policies benefit our communities. CAPA lifts up Chinese American voices on the important issues that affect our country’s future and encourages Chinese Americans to take political action, lead our communities, and build coalitions to ensure a strong and diverse America. As an organization with expertise on Chinese American voices and that is committed to a social justice agenda confronting anti-Asian sentiment, anti-Black racism, and all types of discrimination, CAPA aims to ensure that individuals can pursue their educational goals without unfair barriers posed by linguistic or racial bias.

Dr. Russell M. Jeung is a Professor of Asian American Studies at San Francisco State University. He has held that post since 2002. Dr. Jeung’s research includes a focus on the Sociology of Race. He is the author of “Family Sacrifices: The Worldviews and Ethics of Chinese Americans” (Oxford University Press,

² The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

2019) among other publications on the Asian American experience. In 2020, Dr. Jeung launched Stop AAPI Hate, a project of Chinese for Affirmative Action, the Asian Pacific Policy and Planning Council, and SF State Asian American Studies. The project tracks Covid-19 related discrimination in order to develop community resources and policy interventions. Dr. Jeung is extensively engaged with his students in conducting community-based, participatory research with Asian American communities. He joins this case as an *amicus* in his individual capacity in furtherance of his mission to fight racism against Asians and Asian Americans in its many forms.

LatinoJustice PRLDEF, formerly known as the Puerto Rican Legal Defense & Education Fund, is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. LatinoJustice has directly engaged in and supported law reform litigation across the country successfully challenging discriminatory policies and practices in areas such as criminal justice, education, employment, fair housing, immigrants' rights, language rights and voting rights.

Chinese for Affirmative Action (“CAA”) was founded in 1969 to protect the civil and political rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA continues its advocacy on behalf of the broader

Asian American and Pacific Islander community for systemic change that protects immigrant rights, promotes language diversity, and remedies racial and social injustice. CAA's major areas of focus includes language rights and combating language and linguistic-based discrimination.

INTRODUCTION

Implicit bias—entrenched attitudes or stereotypes that affect an individual's understanding, actions, and decisions in an unconscious manner—is the product of decades of social conditioning. *See* Kirwan Institute, *Understanding Implicit Bias*, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>, (last visited Dec. 10, 2020). At its core, implicit bias explains why the behavior of those who mean well can still create unintended, negative consequences for those in marginalized communities. Though much of the attention in law and legal scholarship on implicit bias focuses on what has been described as the “Black-White paradigm,” persons of Asian ancestry, too, are subject to and negatively impacted by implicit bias.

Mr. Yu's experience exemplifies and exposes the pervasive ways in which implicit bias and racial discrimination against Asians can manifest in education and in the judiciary. Accent bias is a form of linguistic discrimination that courts have long held can operate as a proxy for discrimination against one's race or national origin. This case squarely confronts that issue and necessitates this Court's fulsome

examination of the subtleties and nuances of implicit bias that make it easy to be overlooked or dismissed, by those untrained or unaware, yet remain so invidious.

As this Court considers Appellant’s arguments that implicit bias may lead to intentional discrimination and should remain a factor, among others, in determining whether intentional discrimination occurred, *amici* urge the Court to recognize that implicit bias exists in higher education and in the courts as a consequence of the pervasiveness of implicit bias in our society writ large. Specifically, *amici* urge the Court to recognize the specific operation of implicit bias that negatively impacts non-standard accented English speakers, a dynamic that affected how Mr. Yu was evaluated and ultimately terminated from his program. *Amici* join Appellant in asking this Court to reverse the district court’s ruling and remand for further proceedings.

ARGUMENT

I. IMPLICIT BIAS IS PERVASIVE AND AFFECTS DECISION-MAKING.

The research on implicit bias is abundant, thorough, and compelling. One of the founders of the widely used Implicit Association Test (“IAT”),³ which is used

³ Implicit bias can be measured using a wide variety of instruments, including measuring cardiovascular responses and neuron activity, along with the IAT. *See* Jim Blascovich et al., *Perceiver Threat in Social Interactions With Stigmatized Others*, 80 J. Personality & Soc. Psychol. 253 (2001); Jason P. Mitchell et al., *Thinking about Others: The Neural*

to detect and measure a person’s implicit bias, explains that “[i]mplicit bias is formed by cultural stereotypes influencing the unconscious mental processes of perception, impression, and judgment, producing behavior that is at odds with a person’s stated principles.” Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945 (2006) (surveying implicit bias research). Because the behavior can be at odds with a person’s stated principles and commitments and is produced by unconscious mental processes, it can be hard to discern. See Brenda M. Bauges & Tenielle Fordyce-Ruff, *Avoiding Gatekeeper Bias in Hiring Decisions*, 62 Advoc. 39 (2019) (“oftentimes bias is the result of implicitly held beliefs of which a person is completely unaware”).

“The operation of [implicit] prejudice and stereotyping in social judgment and behavior does not require personal animus, hostility [,] or even awareness.”

Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice:*

Implications for Personal and Public Policy, BEHAVIORAL FOUNDATIONS OF

Substrates of Social Cognition, SOCIAL NEUROSCIENCE: PEOPLE THINKING ABOUT PEOPLE 63 (John T. Cacioppo et al. eds., 2006); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cognitive Neuroscience 729 (2000); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

PUBLIC POLICY, at 13 (Eldar Shafir ed., 2012). This is because implicit biases are developed “from the mental schemas all humans develop in learning to process the complexity of the world.” Meagan Biwer, *Implicit Bias in the Judiciary: Confronting the Problem Through Normalization*, 7 Ind. J. L. & Soc. Equal. 264, 267 (2019). These mental schemas or heuristics, as they are called in academic circles, are held by everyone, “including individuals who consciously seek to embrace equality.” Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1196 (2009). So, does this mean that people who have implicit bias are racist? Not necessarily. This simply means that our society is mostly comprised of “[p]eople who believe in equality but who act in ways that perpetuate bias and inequality.” Nicholas Kristof, Opinion, *Is Everyone a Little Bit Racist?*, N.Y. TIMES (Aug. 27, 2014), <https://nyti.ms/2kavMcg>.

Indeed, this is how racism and systemic inequality survive in a society that mandates “racial egalitarianism.” Darren Lenard Hutchinson, *Continually Reminded of Their Inferior Position: Social Dominance, Implicit Bias, Criminality, and Race*, 46 Wash. U. J. L. & Pol’y 23, 27–28 (2014). Despite laws that have, to varying degree, moved society toward a level playing field, there is still a racial hierarchy that dictates how people interact with one another. Research shows that members within a particular group treat each other one way compared to how they

treat people who do not belong to that group. *Id.* at 28. Specifically, “outgroup members” are treated worse than those within the group. *Id.*; *see also* John T. Jost, et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 Res. Org. Behav. 39 (2009). Other studies show that “members of socially marginal racial groups typically respond more positively to individuals who are privileged by racial hierarchy.” *Id.* at 28. Because of this dichotomy, since white Americans “remain the dominant social class in the United States, their ingroup preferences, if acted upon, could cause discriminatory treatment of persons of color even in the absence of conscious bias.” *Id.*

II. IMPLICIT BIAS AGAINST PERSONS OF ASIAN ANCESTRY EMERGES FROM A LONG HISTORY OF DISCRIMINATION BASED ON STEREOTYPES ABOUT ASIANS.

“It is well documented that conscious and unconscious bias ... remain alive in our land, impeding realizations of our highest values and ideals.” *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J. concurring). Indeed, an overwhelming body of social scientists and legal commentators agree that unconscious, implicit biases steeped in stereotyping and stigmas are prevalent and have “behavioral consequences that adversely affect minority and less favored groups in American society.” Anthony Kakoyanis, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most*

Significant Federal Cases, 69 Fl. L. R. 1181, 1183 (2017). Most legal scholarship related to implicit bias has focused on what is called the “Black-White paradigm,” with relatively little legal scholarship about implicit bias against non-Black racial or ethnic groups. See Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, 79–82 (2017). But the scholarly literature outside of the law consists of “hundreds of studies [that] have documented a wide range of implicit biases beyond Black and White.” *Id.*

Levinson, *et al.* attribute the relative failure to examine discrimination against Asian Americans to society’s perception of them as “model minorities.” *Id.* at 83–84. This notion of success can lead people to presume that discrimination is less of an issue for Asian Americans. This is belied by the research from cognitive sciences that “consistently shows the continuing prevailing stereotypes about these groups.” *Id.* at 84. A full understanding and appreciation of how Mr. Yu was subjected to discrimination, especially given his academic success in spite of it, requires an understanding of how stereotypes emerged and persisted, including how what may previously have been explicit bias has shifted into unconscious discrimination based on unexamined stereotypes and implicit biases.

Many scholars note that these attitudes began in the 1850s with the beginning of Chinese, followed by Japanese, immigration into the United States.

Id. at 86–87. For example, in the 1870s, the Asian-American Almanac documented that “once the new immigrants arrived[,] they faced a growing tide of bigotry fueled by white workers’ fears of economic competition,” and that those fears showed up as “widespread public rhetoric excoriating Asian immigrants” paired with excessively “restrictive policies.” *Id.* at 87 (quoting ASIAN-AMERICAN ALMANAC 265, 337 (Susan B. Gall & Irene Natividad eds., 1995)).⁴

These attitudes have persisted into this century. *See* Gilbert C. Gee et al., *A Nationwide Study of Discrimination and Chronic Health Conditions Among Asian Americans*, 97 *Am. J. Public Health* 1275, 1275 (2007) (discussing numerous studies “documenting contemporary discrimination against Asian Americans”). Gee et al. mention one survey that found “[o]ne in 4 US residents report that they believe that Chinese Americans are taking away ‘American’ jobs”. *Id.* This fear of unfair economic competition finds an interesting correspondence to a study published in 2019 in which “[o]ne quarter or more of Asian adults reported personally experience[ing] discrimination in employment—27 percent when

⁴ Idaho is not immune from anti-Asian sentiment. A 1923 Idaho law prevented aliens ineligible for citizenship (Asians) from owning certain land. *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 *Cal. L. Rev.* 7, 8 (1947). Idaho’s 1864 anti-miscegenation statute first excluded Chinese but then replaced it in 1921 with “Mongolians” as being forbidden from marrying whites. *See* Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 *L. & Soc’y* 587, 597 (2007) (Table 2).

applying to jobs, 25 percent in obtaining equal pay/promotions.” Caitlin L. McMurtry et al., *Discrimination in the United States: Experiences of Asian Americans*, 54 Health Svcs. Res. 1419, 1422 (2019), <https://doi.org/10.1111/1475-6773.13225>.

III. ACCENT BIAS DISTORTS HOW PROFESSIONAL COMPETENCE OF NON-STANDARD ACCENTED ENGLISH SPEAKERS IS MEASURED, ESPECIALLY IN HIGHER EDUCATION.

The law has long recognized that “discrimination against accent can function as the equivalent of prohibited national origin discrimination.” Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329, 1332 (1991); *see also Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) (“It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race”); *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019) (“ . . . [A] foreign accent and national origin are often intertwined, and courts can look to evidence of discrimination on the basis of one’s accent in support of a claim of national origin discrimination.”); *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 601 (9th Cir. 1993) (“accent and national origin are obviously inextricably intertwined”); *Berke v. Ohio Dep’t of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980) (per curiam) (holding that refusal to hire woman with Polish accent violated Title VII).

This is because “language practices, in general, are a medium through which social similarity and difference are articulated.” Martyna Śliwa & Marjana Johansson, *How Non-Native English-Speaking Staff are Evaluated in Linguistically Diverse Organizations: A Sociolinguistic Perspective*, 45 *J. Int’l Bus. Stud.* 1133, 1137 (2014); *see also* Megumi Hosoda et al., *Listener’s Cognitive and Affective Reactions to English Speakers with Standard American English and Asian Accents*, 104 *Perpetual & Motor Skills* 307, 309 (2007) (“Because a certain language or accent can often serve as a salient marker of a speaker’s race or ethnicity, listeners are likely to categorize a speaker on the basis of the highly salient attribute of his accent, especially when it is distinctly foreign.”).

To that point, sociolinguistic analyses show that “language practices play a role in the processes of transforming and negotiating relations of power in linguistically diverse settings.” Śliwa & Johansson, *supra*, at 1132. Native English speakers, *i.e.*, English speakers whose accent is described as “standard,” are “automatically in a position of power as compared with those who learn English as a second or foreign language” or those who are deemed to speak “non-standard” accented English. *Id.* at 1137–38. This power is created in various ways, one being that standard-accented English is deemed to be “more desirable, pleasant to listen to and prestigious than non-standard [English].” *Id.* at 1138. Additionally, standard-accented English is more predominantly used in the media in this country,

and there are direct correlations between standard accents and high socio-economic status and non-standard accents and lower socio-economic status. *Id.* Furthermore, “[t]he stronger the non-standard accent perceived, the more negative social evaluations” to which it is susceptible, such as being “perceived as less competent, less intelligent, and less loyal than standard speakers, and as speaking the language poorly.” *Id.* (internal citations omitted); *see also Hernandez*, 500 U.S. at 371 (“Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn.”). These negative perceptions and power dynamics permeate through one’s educational experiences over his lifetime.

Language-based bias can show up in a variety of ways and in education, it is more egregious because education touches so many people at earlier ages. Early childhood education is arguably one of the most important times in a person’s development because “[i]t’s a time when children learn critical social and emotional skills”. *Why is Early Childhood Education Important?*, National University, <https://www.nu.edu/resources/why-is-early-childhood-education-important/> (last visited Dec. 5, 2020). It is when these power dynamics are first introduced. When properly established, the teacher-student relationship influences the students’ ability to build trust—“studies have shown that when children are comfortable and trust the people around them, they learn more quickly and successfully.” *Id.* This is significant because “implicit biases can begin to form in

children as young as three years old” and these “biases are further reinforced through institutional bias and systemic biases in society.” Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1045 (2019). So, just as teachers can positively impact students, the opposite can also be true.

For example, in a 1997 study that evaluated high school teachers’ language attitudes, a substantial number of those teachers viewed “African American [Vernacular] English” (“AA[V]E”) as a legitimate dialect” while also considering AAVE inappropriate for the classroom and ultimately “unprofitable for its speakers.” See William Y. Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Educational Opportunities to Students of Color*, 12 SCHOLAR 355, 360 (2010) (quoting Renee Blake & Cecilia Cutler, *AAE and Variation in Teachers’ Attitudes: A Question of School Philosophy?*, 14 Linguistics & Educ. 163, 188 (2003)). These same negative attitudes extend to English speakers of other races and national origins.

In 1981, a study evaluating forty teachers’ and teacher-trainees’ attitudes towards Mexican-American English speakers or speakers of Spanish-influenced English showed that Spanish-influenced English speakers were rated as less intelligent, less effective communicators, less confident, less pleasant, and less relatable than students speaking non-Spanish-influenced English. *Id.* at 361–62.

Similarly, in a 2007 study examining linguistic bias against Asians, “Asian-accented English speakers were viewed as ‘less able to communicate well’” and speakers reported negative feelings about the Asian-accented English speakers. *Id.* at 364 n.37. Those feelings include “anxiety, uneasiness, and discomfort;” relatedly, those speakers were “not rated as being more intellectually competent” despite existing racial stereotypes of Asians as intelligent and hard-working. *Id.*

Even in the higher education context, the same is true. For example, international teaching assistants (“ITAs”) in American universities who are non-native English speakers tend to experience implicit bias at the hands of their students, despite “generally possess[ing] sufficient language proficiency” to perform their duties. *See* Okim Kang, Donald Rubin & Stephanie Lindemann, *Mitigating U.S. Undergraduates’ Attitudes Toward International Teaching Assistants*, 49 *TESOL Q.* 681, 685 (2015). And oftentimes “[s]tudents who harbor negative stereotypes of ITAs appear to be exaggerating the incidence of language interference” and tend to avoid asking non-native English speaking ITAs the necessary follow-up questions for their own proper comprehension. *Id.* at 685–86.

And sometimes, students will even perceive “foreign” accents when none exists. In one study, college students who listened to audio of a short lecture recorded by a single speaker who was a native English speaker raised in central Ohio but were shown either a picture of a Caucasian or Asian woman found that

“accent was perceived as more foreign and less standard in the case of the Asian instructor’s photograph” and that comprehension was “lower for groups exposed to an Asian visage, and higher for groups that saw a Caucasian instructor.” Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates’ Judgments of Nonnative English-Speaking Teaching Assistants*, 33 Res. Higher Educ. 511, 514-519 (1992). Simply stated, “[a]ccent [b]ias exists in the field of education.” Chin, *supra*, at 358.

The consequences that flow from implicit biases exacted upon non-standard, accented English speakers become even more disconcerting when those speakers try to apply their American-branded education in the job market. “Extant research points to the existence of three main dimensions along which listeners evaluate speakers of different accents: status, solidarity and dynamism.”⁵ Śliwa & Johansson, *supra*, at 1138. These three dimensions are interrelated, and listeners use these dimensions to make certain judgments about the non-standard accented English speaker based on that speaker’s lingual fluency. *Id.* For example, the following illustration of an interview for promotion between a Chinese academic and her supervisor demonstrates how “judgments of dynamism . . . are connected to evaluations of solidarity between the listener and the speaker, as well as the

⁵ “Status” relates to one’s “ambition, confidence, competence, education, intelligence, success[,] and social class.” Śliwa & Johansson, *supra*, at 1138. “Solidarity” relates to one’s “attractiveness, benevolence, the speaker’s similarity to the listener[,] and trustworthiness.” *Id.* Lastly, “dynamism” relates to “the speaker’s level of activity, enthusiasm, liveliness[,] and talkativeness.” *Id.*

speaker's professional competence," a likely explanation of what happened in Mr. Yu's case: A Chinese interviewee spoke English with a "recognizable Chinese accent and speech pattern" in which the interviewer said that she often exhibited many "[h]esitations, [and] long pauses" when she spoke. *Id.* at 1144. The interviewer then began to "wonder how she does in other areas of her work" and also remarked, "[h]ow she'll manage in academia long-term I really don't know, and I definitely can't see a promotion happening." *Id.* In this instance, the interviewer pointedly used the interviewee's "non-standard" variation of English to question her professional ability. *Id.* And, although in this instance "[t]here were no substantive grounds on which to judge the interviewee's subject knowledge [because] she didn't [discuss] her research . . . [n]evertheless, the lack of linguistic fluency became, to the interviewer, an indicator of the interviewee's low level of professional competence." *Id.* Similarly, Mr. Yu endured the same type of non-substantive judgments purely based on his linguistic fluency, despite his reasons for seeking admission into Idaho State's Clinical Psychology Ph.D. program and his academic capabilities and performance.

What is more concerning is that the breakdown in communication between a native English speaker and a non-standard, accented English speaker is largely attributed to the native speaker's lack of interest or disingenuous attempts to actively understand the non-native speaker. *See Kang et al., supra*, at 682

(explaining that there is a disproportionate burden placed on non-standard accented English speakers to not only be linguistically proficient but to also be adept listeners so that they can make themselves understood when interacting with and speaking to native English speakers). Research shows that a non-native English speaker's intelligibility, or lack thereof, to a native English-speaking listener does not rest solely on the non-native speaker's shoulders. *Id.* Instead, "intelligibility is jointly constructed by speaker and listener" and "a [non-native speaker]'s lack of intelligibility can also be attributed to ineffective strategies used by the native-speaking listener." *Id.* Further, a native speaker's lack of participation in the joint endeavor of understanding another "often appears to stem from [the native speaker's] negative attitudes toward non-native speech." *Id.*

Cumulatively, this research strongly indicates that Mr. Yu experienced what is called "gatekeeper bias." "Gatekeeper bias—allowing the perceived bias of co-workers to influence employment decisions—may occur even when the gatekeeper herself believes in the importance of diversity. In fact, gatekeepers may not even be aware that these considerations are factoring into the hiring, or other employment, decision." Bauges & Fordyce-Ruff, *supra*, at 39. The evidence points to university officials' gatekeeper bias manifested as a concern about Mr. Yu's ability to relate to patients.

While this did not function as gatekeeping into the Ph.D. program itself, it

was demonstrative of gatekeeping into the profession of clinical psychology. Indeed, at least one University official used the very term: “Dr. Lynch testified... about the important role of the ISU Clinical Training Committee to act as the ‘gatekeeper’ for students seeking a doctoral degree who would then go into the larger community to work with patients as clinical psychologists.”. *See Yu v. Idaho State University*, No. 4:15-CV-00430-REB, slip op. at 83–84 (D. Idaho May 31, 2020) (emphasis added). Specifically, the University repeatedly stonewalled Mr. Yu as he tried to satisfy his clinical requirements, due to his perceived inability to communicate effectively with patients. This happened despite Mr. Yu’s high score on the Test of English as a Foreign Language (“TOEFL”) exam and his completion of all the academic requirements, including dissertation defense verbally in English, in order to receive the doctoral degree. The University’s evident gatekeeper bias is further revealed and ever the more problematic in light of Mr. Yu’s stated post-degree plans to return to China as a clinical psychologist to treat Chinese-speaking patients. In that setting, Mr. Yu’s lingual fluency in the English language is irrelevant. Thus, the University’s argument that Mr. Yu’s fluency in English is a critical component to the completion of his clinical requirements is even more attenuated and is evidence of “linguistic profiling.”⁶ This tracks with

⁶ “Linguistic profiling is a term that has recently been coined to represent the auditory equivalent of ‘racial profiling.’” Dawn L. Smalls, *Linguistic Profiling and*

the example above, *supra*, at 12–13, where lingual fluency in English was a non-substantive pretext for evaluating professional competence.

IV. THE DISTRICT COURT’S RULING EVINCES DISREGARD FOR WELL-ESTABLISHED SCHOLARSHIP AND RESEARCH THAT IMPLICIT BIAS IS PRESENT IN ALL INSTITUTIONS, INCLUDING THE COURTS.

Impartiality is the hallmark of our judicial system. Indeed, “Americans view the court system as the single institution that is most unbiased, impartial, fair, and just.” *See* Breger, *supra*, at 1053. However, research increasingly shows that even our courts are not immune from subjectivity and implicit bias. *See* Biwer, *supra*, at 271.

As previously stated, implicit biases are by-products of heuristics; all humans have heuristics, and these heuristics skew the way people see and function within society. And like all human beings, judges also “succumb to ‘less tangible prejudices,’” but with potentially far greater consequences due to the power of their station. *Id.* These “misfiring heuristics” have played out in a wide variety of ways in the courtroom—some seemingly innocuous,

the Law, 15 Stan. L. & Pol’y Rev. 579, 580 (2004) (quoting John Baugh, *Linguistic Profiling*, BLACK LINGUISTICS: LANGUAGE, SOCIETY, AND POLITICS IN AFRICA AND THE AMERICAS 155, 155-63 (Sinfrey Makoni et al. eds., 2003)). “Whereas ‘racial profiling’ is based on visual cues that result in the confirmation or speculation of the racial background of an individual, or individuals, ‘linguistic profiling’ is based upon auditory cues that may include racial identification, but which can also be used to identify other linguistic subgroups within a given speech community.” *Id.*

while others very harmful, even if unintentional.

Recent studies have demonstrated that seemingly irrelevant factors have statistically had significant effects on legal outcomes. For example, judges who had recently contemplated their own deaths were more likely to make conservative decisions; appellate judges who were temporally further from their last meal were more likely to affirm; and judges in general were more likely to side on behalf of the party who argued first. Something as insignificant as an attorney's dress can also play a role in judicial decision-making. These irrational correlations are not limited to seemingly innocuous factors; studies have shown disparities in legal outcomes based on a defendant's race alone. In one study, researchers found that judges set bail at amounts twenty-five percent higher and sentences at lengths twelve percent longer for black defendants than for similarly situated white defendants.

Id. at 271–72 (internal citations omitted). In short, while judges enjoy “tremendous discretion in a vast range of legal areas,” the research is clear that judges often have their own unconscious biases and predilections when deciding cases. Levinson, et al., *supra*, at 72.

One IAT study conducted on 133 judges from three different regions of the United States showed that judges tend to harbor implicit bias at levels no different from the rest of the country. Rachlinski, et al, *supra*, at 1221. Another study conducted in 2017 by a conglomerate of legal professionals, including then-sitting federal judge Mark Bennett, found that the vast majority of federal judges and magistrate judges “ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias.” Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The*

Next Frontier, 126 Yale. L.J.F. 391, 404 (2017). Judge Bennett explains it as “cognitive blind-spot bias”—one’s ability to see another’s shortcoming in a particular area while remaining blind to one’s own shortcoming in the same area. *Id.* at 397. This means that judges grapple with “the most intractable bias of all: the bias of believing that they are without bias.” Kenneth Cloke, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 13 (Jossey-Bass 2001). Recognizing this, federal courts, including this Court, have incorporated implicit bias presentations and training into their court meetings. *See, e.g.*, Federal Judicial Center, *Federal and State Court Cooperation: Reducing Bias*, <https://www.fjc.gov/content/337735/reducing-bias> (last visited Dec. 9, 2020); National Implicit Bias Network, <https://implicitbias.net/training> (last visited Dec. 9, 2020) (showing list of past implicit bias trainings, indicating a training conducted at the Ninth Circuit Judicial Conference in Arizona in March 2018).⁷ Some states, like

⁷ Additionally, in 2016 the Ninth Circuit Judicial Conference received an implicit bias training which featured a video presentation that included a clip of the hit ABC television show, *What Would You Do?*. *See Magistrate Judges Education Program: Blind Justice? Addressing the Impact of Implicit Bias*, 2016 Ninth Circuit Judicial Conference (Sept. 22, 2016), <https://www.youtube.com/watch?v=gaoFAi1fCic>, at 6:01–8:52. In the clip, two similarly dressed actors, a white man and a black man, separately made obvious attempts to break the lock on a chained-up bike as people passed by. *See id.* For the most part, the white man was left alone with about a hundred people doing nothing, whereas the black man was repeatedly confronted and questioned by

California, have also begun mandating implicit bias trainings for their state judges. *See* Cal. Bus. & Prof. Code § 6070.5 (2019) (requiring the California State Bar to adopt regulations that will incorporate implicit bias training into its mandatory continuing legal education programs, noting that “[j]udges and lawyers harbor the same kinds of implicit biases as others”).

So, what then, are the implications of the foregoing in this case? The record shows a marked lack of understanding by the district court of implicit bias and how it operates to cause unlawful discrimination in general, let alone how it might operate in a university graduate program. This is evidenced by the Court’s conclusion that Mr. Yu’s implicit bias expert’s testimony, that “even the most egalitarian of individuals . . . can be unaware of their unconscious bias . . . but still be intentionally racist . . . simply makes no sense.” *Yu*, slip op. at 55. This determination was made without analyzing or discussing the relevant case law to the contrary. *See* Brief of Appellant, 43–45.

Further, in its factual findings, the district court adopted the same language and unsubstantiated justifications of the University in its decision against Mr. Yu.

several passers-by. When all the interactions are viewed as a whole, it is undeniable that race shaped the perceptions and behavior of the onlookers to a significant degree.

The Court harkened to the same coded language characteristic of implicit, language or national origin, bias—that Mr. Yu’s speech was “choppy” and “halting”—when forming its own view that Mr. Yu was “difficult to understand” during his testimony at trial. *Yu*, slip op. at 82. This focus on Mr. Yu’s accent, a component of Mr. Yu’s speech pattern that separates him from native English speakers, parallels the way that the University perceived and treated Mr. Yu. This strongly mitigates in favor of reversal.

Forty years ago, this Court decided a case that, factually, is strikingly similar to the instant case. *See Fragante v. City & Cty. of Honolulu*, 699 F. Supp. 1429 (D. Hawai’i 1987), *aff’d*, 888 F.2d 591 (9th Cir. 1989). Manuel Fragante was a Filipino man born and raised in the Philippines, a country that is home to many languages—including English, which, along with Filipino, is the country’s other official language, and is taught and “used in many Filipino schools, universities, business, and media.” *See Matsuda, Voices of America*, at 1334. In Manila, Fragante was taught in English and, as a result, had a greater command of the English language than many Americans. *Id.* Fragante even volunteered to serve in the U.S. Military during the Vietnam War and beyond. *Id.* at 1334–35. For the duration of his military service, Fragante never received a complaint about his speech. *Id.* at 1335. Fragante’s military experience led him to believe that he could successfully emigrate and assimilate into the United States. *Id.*

So, in 1981, Fragante and 700 others took a civil service examination designed to test specific job skills that were necessary to perform various governmental service jobs. *Id.* at 1334–35. Fragante received the highest score of all applicants who took the test. *Id.* Consequently, he was ranked first on the list of eligible candidates for a clerk job at the Division of Motor Vehicles (“DMV”). But despite this achievement, he was denied the job because of his Filipino accent. *Id.* In his short interview for the job, the interviewers did not ask Fragante specific questions but rather scored him based upon a rating sheet. *Id.* at 1337. In short, the interviewers gave Fragante’s speech a low rating, commenting: “Very pronounced accent, difficult to understand;” “Major drawback, difficult to understand. Would have problem working on counter and answering phone. Otherwise, a good candidate;” and “Heavy Filipino accent. Would be difficult to understand over telephone.” *Id.*

At trial, a linguist testified that Fragante “speaks grammatically correct, standard English, with the characteristic accent of someone raised in the Philippines.” *Id.*; *see also Fragante*, 699 F. Supp. at 1431–32. And the district court plainly stated as a factual matter that “Fragante was bypassed because of his ‘accent.’” *Id.* at 1431. But as in this case, the court followed that acknowledgment by excusing the DMV’s treatment of Fragante, explaining it away as follows: “[w]hile Plaintiff has extensive verbal communication skill in English it is

understandable why the interviewers might reach their conclusion . . . listeners stop listening to Filipino accents, resulting in a breakdown of communication. Hawaii is a socially and linguistically complex community.” *Id.* at 1431–32. This Court upheld the district court’s decision on the merits. *See Fragante v. City & Cty. of Honolulu*, 888 F.2d 591 (9th Cir. 1989).

The most recent U.S. Census data indicates that the State of Idaho today is 93% white. *QuickFacts: Idaho*, The United States Census Bureau, <https://www.census.gov/quickfacts/ID> (last visited Dec. 5, 2020). Persons identifying as only of Asian descent comprise 1.6% of the state’s population. *Id.* So what, then, does it mean when a *Fragante* scenario unfolds, but in a less socially and linguistically complex community, like Idaho, forty years later? The well-settled research on implicit bias and on language and accent bias that has developed since *Fragante* was decided would dictate a different and better outcome for Mr. Fragante, if decided today. This must also be true because of the advancements in our understanding of the pervasiveness and harm of implicit bias in education and other institutions, as well as its connection to intentional discrimination.

At bottom, a concern about someone’s accent interfering with one’s duties that arises from implicit bias is not an honest concern at all. Instead, it is but a warped and distorted perception that cannot be a legitimate basis for taking an

adverse action against someone. The same is true for Mr. Yu now. Idaho State University could not have had an honest concern about Mr. Yu's professional competency given his well-known intent to practice clinical psychology in China with Chinese-speaking patients, where his proficiency in the English language would be entirely irrelevant. Thus, the well-established scholarship on implicit bias and its numerous and nefarious modes of operation compels this Court to closely examine the role that implicit bias played in Mr. Yu's case and dictates reversal.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to reverse the district court's judgment and remand the case for further proceedings consistent with this Court's decision.

Date: December 16, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,262 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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