

Nos. 19-1408 and 20-2078

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

B.C.,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On appeal from the Board of Immigration Appeals

**BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, BLACK
ALLIANCE FOR JUST IMMIGRATION, CAPITAL AREA IMMIGRANTS
RIGHTS COALITION, AND DOLORES STREET COMMUNITY
SERVICES IN SUPPORT OF THE PETITIONER AND REVERSAL OF
THE BOARD OF IMMIGRATION APPEALS**

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August 31, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici* certify that *Amici Curiae* are registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
IDENTITY AND INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	4
ARGUMENT	6
I. THE ASYLUM PROCESS IS HIGHLY SUBJECTIVE AND CREATES BARRIERS FOR ASYLUM SEEKERS WHO HAVE EXPERIENCED TRAUMA	6
II. TRAUMA CAN IMPACT WHETHER AN ASYLUM SEEKER’S NARRATIVE SOUNDS “CREDIBLE”	9
III. IMPLICIT BIAS CAN IMPACT HOW AN IMMIGRATION JUDGE HEARS AN APPLICANT’S STORY	12
A. Implicit Biases Are Deeply Entrenched in Society’s Institutions	12
B. Immigration Judges’ Implicit Biases May Manifest as Cultural or Linguistic Biases.....	13
C. Stereotypes About Race and an Asylum Applicant’s Language Access Issues May Also Contribute to an Immigration Judge’s Implicit Bias.....	18
D. Immigration Judges Are Likely to Make Rushed Decisions Because of Backlogs and High Caseloads	24
CONCLUSION	27
CERTIFICATE OF COMPLIANCE	28
CERTIFICATE OF SERVICE.....	28
CERTIFICATE OF BAR ADMISSION.....	28
CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEF.....	29
CERTIFICATE OF VIRUS CHECK.....	29

TABLE OF AUTHORITIES

CASES

<i>Dartmouth Coll. v. Woodward</i> , 4 Wheat. 518 (1819)	18
<i>Kovac v. Immigration and Naturalization Serv.</i> , 407 F.2d 102 (9th Cir. 1969)	5
<i>Marcinas v. Lewis</i> , 92 F.3d 195 (3d Cir. 1996)	26
<i>Matter of Tomas</i> , 19 I. & N. Dec. 464 (BIA 1987)	20
<i>United States v. Bhagat Singh Thind</i> , 261 U.S. 204 (1923)	18
<i>Wang v. Holder</i> , 569 F.3d 531 (5th Cir. 2009)	10

STATUTES

8 C.F.R. § 208.13(b)(2)	6
8 U.S.C. § 1158(b)(iii).....	7
Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254 (1870).....	18
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Alana Mosley, <i>Re-Victimization and the Asylum Process: Jiminez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility</i> , 36 Law & Ineq. 315 (2018).....	4, 5, 8
Amanda Carlin, <i>The Courtroom as White Space: Racial Performance as Noncredibility</i> , 63 UCLA L. Rev. 450 (2016)	21, 22
Anjum Gupta, <i>Dead Silent: Heuristics, Silent Motives, and Asylum</i> , 48 Colum. Human Rights L. Rev. 1 (2016)	17, 23, 26
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Carol Kinsey Goman, <i>Communicating Across Cultures</i> , ASME (Nov. 22, 2010), https://www.asme.org/topics-resources/content/communicating-across-cultures	16
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D. Bruce Janzen, Jr., <i>First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings</i> , 67 Emory L.J. 1235 (2018)	12, 13, 24
Dana Leigh Marks, <i>Who, Me? Am I Guilty of Implicit Bias?</i> , 54 A.B.A. Judges' J. 20 (2015)	4, 16
Daniel J. Procaccini, <i>What We Have Here is a Failure to Communicate: An Approach for Evaluating Credibility in America's Multilingual Courtrooms</i> , 31 B.C. Third World L.J. 163 (2011)	7
<i>Demeanor</i> , Black's Law Dictionary (10th ed. 2014)	7
Dr. Frances E. Chapman, <i>Article: A Recipe for Wrongful Confessions: A Case Study Examining The "Reid Technique" and the Interrogation of Indigenous Suspects</i> , 28 Mich. St. Int'l L. Rev. 369 (2020)	7, 8
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Grace Benton, <i>"Speak English": Language Access and Due Process in Asylum Proceedings</i> , 34 Geo. Immigr. L.J. 453 (2020).....	22

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Hillary Gaston Walsh, <i>Unequivocally Different: The Third Civil Standard of Proof</i> , 66 U. Kan. L. Rev. 565 (2018)	25
Ilene Durst, <i>Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative</i> , 53 Rutgers L. Rev. 127 (2000).....	5
Jeanette L. Schroeder, <i>The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms</i> , 97 B.U.L. Rev. 315 (2017)	15, 16
John Barkai, <i>Article: What’s a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem</i> , 10 Cardozo J. Conflict Resol. 43 (2008)	17
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Joshua Keating, <i>Why Time Is a Social Construct</i> , Smithsonian Mag., Jan. 2013 ...	15
Julia Preston, <i>The Immigration Crisis Jeff Sessions Leaves Behind</i> , The Marshall Project (Nov. 7, 2018), https://www.themarshallproject.org/2018/11/07/the-immigration-crisis-jeff-sessions-leaves-behind	25
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Kenneth Cloke, <i>Mediating Dangerously: The Frontiers of Conflict Resolution</i> 13 (2001)	12
Laura L. Rovner, <i>Perpetuating Stigma: Client Identity in Disability Rights Litigation</i> , 2001 Utah L. Rev. 247 (2001).....	14
Marisa Silenzi Cianciarulo, <i>Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking</i> , 7 Nev. L.J. 826 (2007).....	9
Mark Snyder, <i>On the Self-Perpetuating Nature of Social Stereotypes, in Cognitive Processes in Stereotyping and Intergroup Behavior</i> 183 (1981).....	4
Melissa L. Breger, <i>Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial</i> , 53 U. Rich. L. Rev. 1039 (2019)	12, 13, 26
Michael Kagan, <i>Is Truth in the Eye of the Beholder? Objectivity Credibility Assessment in Refugee Status Determination</i> , 17 Geo. Immigr. L.J. 367 (2003) .	8

Mikah K. Thompson, <i>Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom</i> , 2018 Mich. St. L. Rev. 1243 (2018)	19
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Reagan Greenberg, <i>The “Particular Social Group” Requirement: How the Asylum Process is Consistently Failing LGB Applicants and How an Evidentiary Standard of “Self Attestation” Can Remedy These Failures</i> , 17 RRG 147 (2017)	6
Sarah J. Steimel, <i>Refugees as People: The Portrayal of Refugees in American Human Interest Stories</i> , 23 J. Refugee Stud. 219 (2010)	14
Sarah Katz, <i>Trauma-Informed Practice: The Future of Child Welfare?</i> , 28 Widener Commonwealth L. Rev. 51 (2019)	9
Sheri Lynn Johnson, <i>The Color of Truth: Race and the Assessment of Credibility</i> , 1 Mich. J. Race & L. 261 (1996).....	19
Stephen Paskey, <i>Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum</i> , 56 Santa Clara L. Rev. 457 (2016) ..	8, 10, 11
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Susan Ayres, <i>Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors</i> , 26 Wm. & Mary J. Race, Gender & Soc. Just. 225 (2020)	9, 10
Susan J. Stabile, <i>Othering and the Law</i> , 12 U. St. Thomas L.J. 381 (2016).....	22

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Victoria Yuhas, <i>¿Cómo Se Dice ‘Due Process’?: Weighing The Added Value Of Guaranteed Interpretive Services For Asylum Seekers</i> , 22 U. Pa. J. Const. L. 835 (2020)	23
Zsea Bowmani, <i>Queer Refugee: The Impacts of Homoantagonism and Racism in U.S. Asylum Law</i> , 18 Geo. J. Gender & L. 1 (2017)	19

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The **Public Justice Center (PJC)** is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the under-represented. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients and has established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before state and federal appellate courts. It has also created a Race Equity Project to focus its legal advocacy on the continuing disparities caused by our nation's long history of institutional and structural racism. The PJC is committed to guarding the rights of immigrants. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Mayor & City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452 (D. Md. 2019); *United States v. California*, 921 F.3d 865 (9th Cir. 2019); *Design Kitchen & Baths, et al., v. Lagos*, 388 Md. 718 (2005). The PJC has an interest in this case because of its commitment to ensuring a fair immigration process.

The **Black Alliance for Just Immigration (BAJI)** is a not-for-profit racial justice and migrant rights organization which engages in legal representation, advocacy, community organizing, education, and cross-cultural alliance-building in order to end the racism, criminalization, and economic disenfranchisement of African American and Black immigrant communities. BAJI was founded in

Oakland, CA by veteran civil rights activists and clergy who were concerned about a wave of unjust immigration enforcement laws. BAJI subsequently expanded its mission to include advocacy on behalf of all Black immigrants and refugees, and today has offices and/or staff in New York, NY; Los Angeles, CA; Oakland, CA; Atlanta, GA; Miami, FL; Washington, DC; Minneapolis, MN; and Houston, TX. Like all Black people living in the US, Black immigrants disproportionately experience racial discrimination in the form of criminalization, policing, detention, and deportation. The same relentless criminal legal system that targets Black people in America from arrest rates to sentencing also affects Black immigrants and makes them more vulnerable to deportation as a result. We work with local community groups to educate impacted communities in understanding their rights and organize responses to increased barriers to fair immigration processes. BAJI has an interest in this case because of our extensive experience dealing directly with asylum seekers pursuing protection in the United States, and our commitment to eradicating barriers for asylum seeking communities.

The **Capital Area Immigrants' Rights Coalition (CAIR Coalition)** is a nonprofit, legal services organization providing legal services to individuals detained by the Department of Homeland Security (DHS) throughout Virginia and Maryland. The outcome in this case is central to the Coalition's ongoing mission to advance the rights and dignity of all immigrants, particularly those who are

vulnerable to immigration detention and deportation. CAIR Coalition has dealt extensively with the issue at the heart of this case as its attorneys have represented many asylum-seekers suffering from trauma who must present testimony in immigration court trials. And while the Coalition's primary work rests in the Fourth Circuit, it has an interest in the fair application of credibility determinations in asylum cases, particularly in the neighboring Third Circuit, as CAIR Coalition has assisted several clients who were transferred to and detained in this Circuit.

Dolores Street Community Services (Dolores Street) is a non-profit organization in San Francisco, California that provides pro bono legal representation to individuals and families facing deportation. Many of Dolores Street's clients are survivors of trauma who speak rare indigenous or minority languages and dialects, and they are often denied competent interpretation in their removal proceedings. Dolores Street has an interest in ensuring that immigration proceedings are conducted with cultural humility, including appropriate translation, so that individuals may seek protection in a fair and unbiased setting.

Pursuant to Fed. R. App. P. 29(a)(2), *Amici* have requested and obtained the written consent of all parties to file this brief.¹

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel hereby certifies that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amici Curiae*, or their counsel, made a monetary contribution to fund this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

You are having a conversation with a stranger for the first time. As they speak, their eyes shift. While the person does not appear to be nervous or anxious, their affect is flat. The story this person tells is so jumbled that you do not know where it ends or begins. Something in your gut feels “off.” It would be nice if you had more time to listen to this person, but your next conversation is in five minutes. You are running out of time. If you had to determine whether this person was credible, what would be your first impression? Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 A.B.A. Judges’ J. 20, 21 (2015).

Immigration judges encounter these scenarios every day. Like other people, an immigration judge’s first impressions, informed by that judge’s culture, are often shaped by visible characteristics such as sex, age, race, bodily appearance, and often demeanor. Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in *Cognitive Processes in Stereotyping and Intergroup Behavior* 183, 193 (1981). Often, these judges must make rushed decisions. Asylum hearings, in which an applicant’s credibility is usually dispositive, boil down to gut instincts and narrative. Alana Mosley, *Re-Victimization and the Asylum Process: Jiminez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 Law & Ineq. 315, 320 (2018). An inconsistent narrative can threaten the foundation of an asylum seeker’s case. *Id.* at 321. When

seeking asylum, one must “persuade outsiders that they can, and should, be believed.” *Id.* at 327. This is a daunting task for many asylum seekers because immigration judges look for “unwavering consistency” when an applicant tells their story.

Immigration judges may be looking for something that does not exist. Many asylum seekers face insurmountable barriers due to “the inherent otherness of trauma, culture, and language.” Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 Rutgers L. Rev. 127, 128 (2000). Throughout the process, an applicant’s trauma may impact how and what story they tell. Implicit bias and institutional shortcomings may impact how an immigration judge receives that story and how they perceive an applicant’s credibility.

And the very process of asylum makes it ripe for the threat of implicit bias. This is especially true in the credibility assessment. An understanding of the impact of trauma and implicit bias on credibility determinations is essential because the stakes – deportation—are extremely high. *See Kovac v. Immigration and Naturalization Serv.*, 407 F.2d 102, 108 (9th Cir. 1969).

ARGUMENT

I. THE ASYLUM PROCESS IS HIGHLY SUBJECTIVE AND CREATES BARRIERS FOR ASYLUM SEEKERS WHO HAVE EXPERIENCED TRAUMA

To demonstrate a well-founded fear of persecution if forced to return, an asylum seeker must show:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

8 C.F.R. § 208.13(b)(2). These definitions demand credibility in that “the trier of fact must also believe the evidence and testimony submitted.” Reagan Greenberg, *The “Particular Social Group” Requirement: How the Asylum Process is Consistently Failing LGB Applicants and How an Evidentiary Standard of “Self Attestation” Can Remedy These Failures*, 17 RRG 147, 151 (2017).

Applications for immigration relief filed after May 11, 2005 are subject to the REAL ID Act of 2005, which amended the Immigration and Nationality Act’s (INA) credibility guidelines and altered the landscape for asylum seekers.

Pursuant to the Act, immigration judges should base their credibility determination on:

the demeanor, candor, or responsiveness of the [applicant], the inherent plausibility of the [applicant's] account, the consistency between the applicant's [] written and oral statements ... the internal consistency of each such statement, the consistency of such statements with other evidence of record ... and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

8 U.S.C. § 1158(b)(iii).

These definitions are vague and highly subjective. For instance, Demeanor can include any aspect of “outward appearance or behavior.” *Demeanor*, Black's Law Dictionary (10th ed. 2014). Assessing demeanor relies on culturally constructed ideas about body language and considering demeanor in cross-cultural contexts allows the asylum system's institutional bias to prejudice outcomes. *See, e.g.,* Nicholas Narbutas, *Note: The Ring of Truth: Demeanor and Due Process in U.S. Asylum Law*, 50 Colum. Human Rights L. Rev. 348, 350 (2018). Demeanor cues like intonation, pitch, body language, and nonverbal gestures differ between cultures. Daniel J. Procaccini, *What We Have Here is a Failure to Communicate: An Approach for Evaluating Credibility in America's Multilingual Courtrooms*, 31 B.C. Third World L.J. 163, 177-78 (2011). For instance, in Eastern cultures, making eye contact with an authority figure is considered rude or threatening. Dr. Frances E. Chapman, *Article: A Recipe for Wrongful Confessions: A Case Study Examining The “Reid Technique” and the Interrogation of Indigenous Suspects*, 28 Mich. St. Int'l L. Rev. 369, 414 (2020). In Western cultures, however,

maintaining eye contact is associated with honesty and candor. *Id.* Thus, someone from an Eastern culture may be considered dishonest if they avert their gaze. For this reason, demeanor is an ineffective way of determining whether someone is lying or telling the truth. Michael Kagan, *Is Truth in the Eye of the Beholder? Objectivity Credibility Assessment in Refugee Status Determination*, 17 *Geo. Immigr. L.J.* 367, 379 (2003) (explaining that most people are unable to use verbal cues to discern truth from lies accurately).

While an applicant's story must be plausible and consistent to be believed, these terms are an unreliable gauge of credibility because of language barriers, trauma, or implicit bias. An asylum officer or an immigration judge must genuinely believe an applicant's story to consider it credible. Immigration judges expect that credible applicants will tell a consistent story. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 *Santa Clara L. Rev.* 457, 477 (2016). They look for stories that are told in a linear narrative. Mosley, *supra*, at 315. If one's story changes over multiple retellings, an immigration judge may consider that person to be dishonest. Paskey, *supra*, at 478. In other words, an immigration judge may look more at how a story is told, thereby making the "applicant's credibility... a surrogate for the story's truth." *Id.* at 482. This flies in the face of everything we know about how trauma impacts storytelling.

II. TRAUMA CAN IMPACT WHETHER AN ASYLUM SEEKER'S NARRATIVE SOUNDS "CREDIBLE"

The "inciting incident" in this case was a traumatic event. The petitioner witnessed the police shoot and kill his brother in front of him while the two were filming on Facebook live. Trauma is a common occurrence for many asylum seekers who often continue to experience trauma as they flee to the United States. Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 Nev. L.J. 826, 836 (2007). Trauma can impact the story an asylum seeker tells, how they tell it, and may inaccurately determine whether an immigration judge deems their story credible.

Trauma "occurs when an individual subjectively experiences a threat to life, bodily integrity, or sanity." Susan Ayres, *Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors*, 26 Wm. & Mary J. Race, Gender & Soc. Just. 225, 252 (2020) (quoting Sarah Katz, *Trauma-Informed Practice: The Future of Child Welfare?*, 28 Widener Commonwealth L. Rev. 51, 53 (2019)). Trauma changes how the brain stores events and memories. Specifically, trauma activates the right side of the brain and deactivates the left. *Id.* at 230. The right side of the brain is responsible for emotional, visual, spatial, and tactile skills. *Id.* The left side of the brain is responsible for logic, facts, and language. *Id.* When the left hemisphere of the brain is deactivated, it impacts the ability to organize

experiences into logical sequences. *Id.* For instance, one of the brain's speech centers, the Broca's area, is in the left hemisphere. The Broca's area blacks out during trauma. Graham Davies, *Commentary: Recovered Memories in Theory and Practice*, 4 Psych. Pub. Pol. and L. 1079, 1085 (1998). When this occurs, the person may be unable to verbalize the trauma they have experienced. Ayres, *supra*, at 230. Often, because the right side of the brain is activated, a person retelling a traumatic experience may simultaneously be reliving the event in real time. *Id.* at 227 (quoting *Senate Judiciary Committee Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court, Day 5, Focusing on Allegations of Sexual Assault*, Wash. Post (Sept. 27, 2018), <https://web.archive.org/web/20190110213224/https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/>?) (internal quotation omitted). In other words, because the brain has encoded the sensations, emotions, and smells, the person may actively re-experience the trauma, while failing to remember all the details or the sequence of events. *Id.* at 232.

As the brain heals from trauma, a person may tell stories that are repetitious, stereotyped, emotionless, incomplete, incoherent, fragmented, or chronologically fractured. Paskey, *supra*, at 487-489. For an example of the unfortunate result in immigration proceedings, see *Wang v. Holder*, 569 F.3d 531, 535, 537, 538 (5th Cir. 2009) (upholding an immigration judge's adverse credibility determination

based in part on finding that the applicant’s testimony about her incarcerations and beatings lacked emotion and “seemed to the IJ more consistent with one who has rehearsed a story, rather than who lived the events”). The impact of trauma combined with the psychological stress many trauma survivors feel during legal proceedings likely alters their demeanor. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 316 (2002).

Trauma may pose dire consequences for the outcome of an applicant’s case as a “judge’s conclusions ... about the ‘truth’ of the story must rely on the story itself and how the judge believes the applicant is credible.” Paskey, *supra*, at 482.

Immigration judges frequently deny asylum because of the way an asylum seeker tells their story, including their demeanor. *Id.* at 476 (detailing immigration judges denying asylum due to internal inconsistencies in an applicant’s story, demeanor and other concerns including whether a story is too “vague” or implausible, and external consistencies between an applicant’s story and other evidence).

The potential impact of trauma on the petitioner is clear. Here, the immigration judge had “no firsthand knowledge of the reference and no other evidence of the reference,” therefore, all the judge could base his credibility determination on was how the petitioner told his story. *Id.* at 482. After witnessing his brother murdered in front of him and hurriedly fleeing the only country he had ever known, given the science of how trauma affects the brain, it

would not be a surprise if the petitioner’s voice sounded emotionless or wooden as he told his story.

III. IMPLICIT BIAS CAN IMPACT HOW AN IMMIGRATION JUDGE HEARS AN APPLICANT’S STORY

A. Implicit Biases Are Deeply Entrenched in Society’s Institutions

In addition to having experienced a traumatic event, the petitioner likely faced an additional barrier during his asylum proceeding: the immigration judge’s implicit biases. The common narrative of the legal system and judges is that both are unbiased, impartial, fair, and just. Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1053 (2019). However, scholars have found that implicit biases are deeply entrenched in and perpetuated by systems and institutions. *See, e.g.*, D. Bruce Janzen, Jr., *First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings*, 67 Emory L.J. 1235, 1260 (2018). The truth is that we *all* have biases. We all filter our decisions through our value systems, our professional experiences, and our lived experiences. Breger, *supra*, at 1063. However, judges “have the most intractable bias of all: the bias of believing they are without bias.” *Id.* at 1059 (quoting Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* 13 (2001)). Judges are not immune from implicit bias, but the belief many hold that they are without bias can spell trouble

for asylum seekers. *Id.* at 1041. Implicit bias “involves negative attitudes and stereotypes that are based on ethnicity, gender, sexuality, age, religion, political affiliation, and numerous other categories.” Janzen, Jr., *supra*, at 1259 (quoting Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835 (2018)). Implicit biases are “largely automatic and occur[] below the level of conscious awareness.” Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 418 (2011). These biases manifest as preconceived notions about groups and can form as early as three years old. Breger, *supra*, at 1044-46.

B. Immigration Judges’ Implicit Biases May Manifest as Cultural or Linguistic Biases

As mentioned above, stock stories about honesty and demeanor permeate the asylum process. Stock stories create and entrench implicit biases, which can impact both the way an asylum applicant tells their story, and the story an immigration judge actually hears.² For instance, a common stock story is that sexual assault survivors should cry when retelling the details of their sexual

² Stock stories and archetypes are dangerous because they “create[] stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story become the only story.” Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED (Oct. 2009), https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/transcript?language=en.

assault. Kaarin Long, et al., *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 Hamline J. Pub. L. & Pol’y 569, 588 (2010). When a judge encounters a sexual assault survivor who self-presents as numbed instead of emotional, a judge may disbelieve their story. Frans Willem Winkel & Leendert Koppelaar, *Rape Victims’ Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment*, 6 J. Interpersonal Violence 29, 35 (1991). The same is true of asylum applicants. Asylum applicants must often present their stories in a formulaic structure, such as the victim narrative. These narratives focus on suffering and death, “paint[ing the asylum applicant] as sympathetic figures for the American audience which receives them.” Sarah J. Steimel, *Refugees as People: The Portrayal of Refugees in American Human Interest Stories*, 23 J. Refugee Stud. 219, 227 (2010). Victim narratives can be separated into the innocent victim narrative or victim-as-manipulator narratives. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 288 (2001). The innocent victim narrative, which evokes pity, is one where a person is not responsible for their condition. *Id.* The victim-as-manipulator narrative, which evokes suspicion, paints a person as one who is trying to claim victimhood. *Id.* at 293. These

stereotypes can create implicit biases that can impact whether an immigration judge views an asylum applicant with pity or suspicion.

Immigration judges may also have biases related to conceptions of time, including whether time is linear or circular, and whether communication is explicit or implicit. Jeanette L. Schroeder, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 B.U.L. Rev. 315, 331 (2017). For instance, heavily industrialized societies, like the United States, tend to view time as “fixed and unchanging.” Joshua Keating, *Why Time Is a Social Construct*, Smithsonian Mag., Jan. 2013; Edward T. Hall, *Beyond Culture* 18 (1977) (“In fact, [the Western man’s] social and business life . . . are apt to be completely time-dominated.”). In predominantly agricultural societies there is not such strict adherence to a clock. Geri-Ann Galanti, *Caring for Patients from Different Cultures* 49 (4th ed. 2008) (“[Polychronic] cultures are usually based on agriculture, which does not require adherence to a clock.”).

In such polychronic cultures, time is fluid and events take precedence over time. Thus, when an asylum seeker from a polychronic culture tells a story, they may emphasize what occurred and who was involved, but may deemphasize when a specific event happened. Schroeder, *supra*, at 332 (“people and events naturally take precedence over time.”). When this occurs during an immigration judge’s credibility assessment of an asylum seeker, that judge may view a deemphasis of

when a specific event happened as a marker of dishonesty. *See* Marks, *supra*, at 21 (noting that immigration judges look for narratives that are “firmly grounded in a chronological timeline.”). These cultural norms may be the foundation for a finding of not credible.

The United States is a “sequential” culture. *See* Carol Kinsey Goman, *Communicating Across Cultures*, ASME (Nov. 22, 2010) [hereinafter Goman], <https://www.asme.org/topics-resources/content/communicating-across-cultures>. In sequential cultures, “time is linear and segmented like a road or a ribbon extending forward into the future and backward to the past.” Hall, *supra*, at 19. Individuals in sequential societies compartmentalize their memories according to that framework of time. Hall, *supra*, at 11-12. By contrast, largely agricultural societies are “synchronic.” In these cultures, time is circular, and past, present, and future events are interconnected. *Id.* Asylum seekers from synchronic cultures may tell stories where events are organized with a standard other than time. For instance, a person might tell a story where the last chronological event is told first because of its emotional significance. Schroeder, *supra*, at 334. If an immigration judge has a bias toward sequential cultures, they may disbelieve an asylum applicant who fails to tell a story in chronological order.

An immigration judge may also hold implicit cultural biases regarding how a person communicates essential information. *See* Goman, *supra* (classifying

cultures as “high-context” or “low-context”). “High and low context refers to how people interact and communicate with other members of their culture.” John Barkai, *Article: What’s a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 *Cardozo J. Conflict Resol.* 43, 56 (2008). “High-context” cultures rely on implicit communication and nonverbal cues. In these cultures, “the information lies in the context,” and important points may not always be verbalized. *Id.* at 57. In other words, important issues may not be stated directly. In “low-context” cultures, like the United States, context is not as important because communication is direct and everything of importance is shared explicitly. *Id.* When these two cultures meet, a listener from a low-context culture may expect direct communication but be met instead with implicit communication and nonverbal cues, i.e., context, which, for the various reasons explored above, they will miss or misunderstand. When immigration judges look for chronological, direct stories, an asylum applicant from a “high-context” culture may be deemed not credible simply because of the details they omit from their narrative. This may lead to the application of heuristics, or mental shortcuts that rely on stereotypes as an immigration judge attempts to fill the gaps in an asylum applicant’s story. Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 *Colum. Human Rights L. Rev.* 1, 12 (2016). It is impossible to understand how these

heuristics are formed, especially when the asylum seeker is a person of color, without talking about race and language.

C. Stereotypes About Race and an Asylum Applicant’s Language Access Issues May Also Contribute to an Immigration Judge’s Implicit Bias

Citizenship and immigration has always been about race. From 1790 to 1870, only “free white persons” could naturalize in the United States. *See, e.g.*, Naturalization Act of 1790, Pub. L. No. 3-1, 1 Stat. 103 (1790), *repealed by* Pub. L. No. 84-1028, 70A Stat. 644 (1956) (limiting naturalization to immigrants who were “free white persons”); *see also United States v. Bhagat Singh Thind*, 261 U.S. 204, 207 (1923) (“[T]he provision [‘free white persons’ in the Naturalization Act of 1790] is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. ‘The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.’” (citing *Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 644 (1819))). Eventually, after the Civil War, citizenship was extended to formerly enslaved Black people. Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254 (1870). The most well known form of racial and ethnic exclusions targeting immigration and naturalization was the Chinese Exclusion Act of 1882. Fast forward to the 1920s, and Congress sought to limit the number of people from eastern and southern

Europe, who were then racialized as non-white. *See* the Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5 (1921). The racialization of immigration laws has shaped who is deemed a credible immigrant, who is worthy of citizenship, and who is a threat. Thus, asylum applicants often must “perform their identities in such a way as to seem credible to the judging official, usually based on stereotypes.”

Zsea Bowmani, *Queer Refugee: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 *Geo. J. Gender & L.* 1, 32 (2017). Problems abound when an asylum applicant fails to conform to stereotypes rooted in standards of whiteness.

Race, like demeanor, often serves as a proxy for credibility. Before the abolition of slavery, enslaved Africans could not testify against white people. *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 *Mich. J. Race & L.* 261, 267 (1996). Even free Blacks were precluded from testifying against white people. *Id.* Once the Civil War ended, even though laws forbade states from depriving citizens of the right to file suits or act as parties to a suit, attorneys continued to argue that juries should discount or disbelieve the testimony of Black witnesses. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 *Mich. St. L. Rev.* 1243, 1260 (2018). These arguments were predicated on stereotypes that Black witnesses were dishonest. *Id.* Similar arguments were made about Chinese witnesses testifying on behalf of Chinese-American defendants. *Id.* In the

courtroom, and indeed during asylum proceedings, specific stereotypes may come into play that impact Black asylum applicants. These stereotypes include the belief that Black people are less intelligent than whites, which could impact Black asylum applicants who are asked to recall events accurately, or the stereotype that Black people are not trustworthy, which has obvious implications when credibility is questioned. Accordingly, during the asylum process, racial stereotypes may have a strong, subconscious influence on how an immigration judge perceives events. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 44 (2000).

Because of these unconscious racial stereotypes that are so deeply rooted in our institutions, immigration judges may be more skeptical, generally, of Black asylum applicants. *Id.* at 45. As an immigration judge listens to an asylum applicant's testimony, they may "focus more closely on certain deception cues and become more skeptical. They will skew their credibility determinations against not only deceptive [Black asylum applicants], but honest ones as well." *Id.* If an immigration judge has developed a belief that an asylum applicant acts a certain way, that judge will more easily process information that is consistent with that stereotype, and disregard information that does not conform with the stereotype. *Id.* One such deception cue is language.

In sharing their stories, asylum applicants may struggle both with understanding a language and translating their narrative from one language to another. *See Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (respondents spoke Kanjobal, could not fully communicate with the interpreter who spoke Spanish). Some of these differences in translation stem from the courtroom as a traditional white-dominated space with white cultural norms. Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. Rev. 450, 465 (2016). Because of white supremacy and racism, as referenced above, people of color, especially Black people, have historically been perceived as dishonest and untrustworthy. *Id.* at 467. When a person of color shows any marker of difference or nonconformity with whiteness, that difference can render them noncredible. *Id.* at 468. This “demeanor gap” explains how and why language may impact credibility determinations. *Id.* at 472.

Scholars believe that language and “communicative styles are marked by race and class.” *Id.* Indeed, language can and has been used to “discredit nonwhite testimony as inscrutable or inappropriate.” *Id.* at 473. English is a marker of whiteness and is considered the natural language of the United States. *Id.* Thus, deviations from speaking English are scrutinized and the boundaries of what constitutes “good” or “proper” English are rigid and racialized. *Id.* at 474. Speaking a language other than English may mark an applicant as “other” if an

immigration judge expects an applicant to speak English.³ *Id.* at 473. Even speaking a variation of the “King’s English” can mark one as different. *Id.* And being marked as “other,” especially if an asylum applicant is a person of color, may lead an immigration judge to conclude that the applicant is dishonest. Because language adds to the “deception cues” of noncredibility, “even a slight mistake . . . could result in irreparable damage to an asylum seeker’s case.” *Id.* at 473; Grace Benton, “*Speak English*”: *Language Access and Due Process in Asylum Proceedings*, 34 *Geo. Immigr. L.J.* 453, 458 (2020).

Take for example the case of Santiago Ventura Morales, who was accused of murder. See Peter Carlin, *What Becomes of the Resurrected?: Santiago Ventura Was a Poor Migrant, Convicted of Murder and Almost Cheated Out of His Life*, *L.A. Times*, (Mar. 8, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-03-08-tm-5978-story.html>. When Mr. Ventura was arrested he did not speak English or Spanish. Mr. Ventura spoke Mixtec, an Indigenous Mexican language. *Id.* So, too, did Mr. Ventura’s witnesses. Court personnel ignored this fact and

³ “Othering” is “a process by which individuals and society view and label people who are different in a way that devalues them.” Susan J. Stabile, *Othering and the Law*, 12 *U. St. Thomas L.J.* 381, 382 (2016). Take for instance the othering of Rachel Jeantel, the key witness for the prosecution in the trial of George Zimmerman for the killing of Trayvon Martin. Zimmerman’s defense team effectively “othered” Ms. Jeantel because she had difficult reading her deposition testimony and struggled with literacy. See Mikah K. Thompson, *Blackness as Character Evidence*, 20 *Mich. J. Race & L.* 321, 338 (2015).

provided both Mr. Ventura and his witnesses with a Spanish interpreter. *Id.* When these witnesses answered the Spanish interpreter's questions with "blank faces or wild non sequiturs," jurors believed they were guilty.

Scholars have argued that depriving an asylum seeker of interpretive language services and forcing them to share their story in English deprives them of dignity under the Due Process Clause. *See generally* Victoria Yuhas, *¿Cómo Se Dice 'Due Process'?: Weighing The Added Value Of Guaranteed Interpretive Services For Asylum Seekers*, 22 U. Pa. J. Const. L. 835, 865 (2020). This is also true for applicants who speak English with an accent or with less than native or bilingual proficiency. Those who speak English with an accent experience stigmatization, which can impact their sense of belonging in the United States. Agata Gluszek & John F. Dovidio, *Speaking with a Nonnative Accent: Perceptions of Bias, Communication Difficulties, and Belonging in the United States*, 29 J. Language & Soc. Psychol. 224, 228 (2010). Indeed, Courts have remanded cases because a judge exhibited a bias related to an applicant's language skills. Gupta, *supra*, at 38. If an asylum applicant cannot share their story in the language they know best, they may appear as uncomfortable or nervous, especially considering the scrutiny of language generally. Their discomfort or nervousness may have everything to do with the language barrier and nothing to do with the story they

need to tell. But this can lead an immigration judge to conclude, based on demeanor alone, that an applicant is untrustworthy. *Narbutas, supra*, at 365.

D. Immigration Judges Are Likely to Make Rushed Decisions Because of Backlogs and High Caseloads

Institutional failures exacerbate the potential for implicit bias to surface. Complicating the already discretionary standards immigration judges apply, judges must also juggle long backlogs and high caseloads. *Janzen, Jr., supra*, at 1260.

Immigration judge's dockets are severely backlogged. As of 2019, the U.S. immigration court system faced a backlog of more than 850,000 cases. Nick Miroff & Maria Sacchetti, *Burgeoning court backlog of more than 850,000 cases undercuts Trump immigration agenda*, *The Washington Post* (May 1, 2019, 6:17 PM), https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5_story.html. Meanwhile, there are fewer than 450 judges nationwide to handle these cases. *Id.* This backlog has increased since 2010, with the greatest increase occurring in the last three years. Fatma Marouf & Luz Herrera, *Technological Triage of Immigration Cases*, 72 *Fla. L. Rev.* 515, 555 (2020). This backlog has grown because of increased immigration enforcement, a lack of funding for the immigration courts, and ICE attorneys' decreased use of prosecutorial discretion. *Id.*

This ever-increasing backlog has burdened immigration judges' caseloads. Immigration judges have acknowledged that their caseloads are so high there often "is not enough time to think." Marouf, *supra*, at 417 (quoting Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Geo. Immigr. L. J. 57, 66 (2008)). Some immigration judges have as many as 6,000 cases each. Hillary Gaston Walsh, *Unequivocally Different: The Third Civil Standard of Proof*, 66 U. Kan. L. Rev. 565, 600 (2018). Immigration judges are pushed to make rushed decisions as they quickly work through these backlogs. *See, e.g.*, Eli Saslow, *In a Crowded Imm. Ct., Seven Minutes to Decide a Family's Future*, Wash. Post (Feb. 2, 2014), https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html (describing an immigration judge's "rocket docket."). Adding to this burden, in October 2018, Attorney General Jeff Sessions demanded that immigration judges complete at least 700 cases a year. Julia Preston, *The Immigration Crisis Jeff Sessions Leaves Behind*, The Marshall Project (Nov. 7, 2018), <https://www.themarshallproject.org/2018/11/07/the-immigration-crisis-jeff-sessions-leaves-behind>. Compliance with this standard has become part of immigration judges' evaluations. *Id.*

These conditions impede an immigration judge’s ability to engage in slow, deliberate thinking, the very actions that allow individuals to surface their implicit biases. Breger, *supra*, at 1054. Indeed, implicit biases and stereotypes have a stronger impact when made under the time constraints and pressures immigration judges currently face. Marouf, *supra*, at 431. Further, these biases go unchecked due to a lack of meaningful appellate review. Applicants only appeal eight percent of immigration judge’s decisions to the Board of Immigration Appeals (BIA). Gupta, *supra*, at 41. Only 23 percent of those BIA appeals make it to the federal courts of appeals. *Id.* This translates to less than two percent of asylum applications receiving appellate consideration.

One of the “most basic of due process protections” is “a hearing before a neutral immigration judge.” *Marcinas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996). An applicant’s trauma can impact how they tell their story, and an immigration judge’s implicit bias can control the judge’s reaction to that story and the resulting critical credibility determination. Given how few asylum cases make it to the federal courts of appeals, this Court has the rare opportunity to consider these factors in reviewing the credibility determination in this case.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that this Court reverse the BIA's determination.

Respectfully submitted,

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Dated: August 31, 2020

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/s/Beth Lyon _____
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