No. 22-60670

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SANDRAH ACHE TEGWI,

Petitioner

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

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On petition from the Board of Immigration Appeals

Agency No. A213-315-740

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BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, BLACK ALLIANCE FOR JUST IMMIGRATION, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, DOLORES STREET COMMUNITY SERVICES, AND THE REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES

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Maria R. Osornio
Supervising Attorney
RAICES
5121 Crestway Drive, #105
San Antonio, Texas 78239
(210) 226-7722
maria.osornio@raicestexas.org

Hayley Hahn
Murnaghan Appellate Advocacy Fellow
Public Justice Center
201 N. Charles Street, Suite 1200
Baltimore, Maryland 21201
T: 410-625-9409
F: 410-625-9423
hahnh@publicjustice.org

Counsel for *Amici Curiae*

March 30, 2023

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the Petitioner's Certificate of Interested Persons—the following persons and entities have an interest in the outcome of this case, as described in the fourth sentence of Rule 28.2.1. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Petitioner

1. Sandrah Ache Tegwi

Attorneys for Petitioner

1. Estelle M. McKee
    Clinical Professor of Law
    Cornell Law School Clinical Program
    133 Hughes Hall
    Ithaca, New York 14853
    Telephone: (607) 255-5135
    Emm28@cornell.edu

2. Neethu Puta
    Cornell Asylum and Convention Against Torture Appellate Clinic
    Myron Taylor Hall
    Ithaca, New York 14853
    Telephone: (607) 280-7665
    nsp56@cornell.edu

Attorneys for the Respondent

1. Jennifer Singer
   U.S. Department of Justice
   Civil Division
   P.O. Box 878
   Ben Franklin Station
   Washington, D.C. 20044-0878
   Telephone: 202-532-4232
   jennifer.a.singer@usdoj.gov

Amici Curiae

1. Public Justice Center
   201 N. Charles Street, Suite 1200
   Baltimore, Maryland 21201
   410-625-9409

2. Black Alliance for Just Immigration
   1368 Fulton St Suite 311
   Brooklyn, New York 11216
   (347) 464-5422

3. Capital Area Immigrants' Rights Coalition
   1025 Connecticut Avenue NW
   Suite 701
   Washington, D.C. 20036
   (202) 331-3320

4. Dolores Street Community Services
   938 Valencia St
   San Francisco, California 94110
   (415) 282-6209

5. RAICES
   5121 Crestway Drive, #105
   San Antonio, Texas 78239
   (210) 226-7722

Attorneys for Amici Curiae

1. Maria Osornio
   Supervising Attorney
   RAICES
   5121 Crestway Drive, #105
   San Antonio, Texas 78239
   (210) 226-7722
   maria.osornio@raicestexas.org

2. Hayley Hahn
   Murnaghan Appellate Advocacy Fellow
   Public Justice Center
   201 N. Charles Street, Suite 1200
   Baltimore, Maryland 21201
   (410) 625-9409
   hahnh@publicjustice.org

Pursuant to Fed. R. App. P. 26.1, Prospective *Amici* state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the *Amici*.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The **Public Justice Center (PJC)** is a non-profit civil rights legal services organization dedicated to protecting the rights of the under-represented. The PJC's Appellate Advocacy Project expands and improves the representation of civil rights issues before state and federal appellate courts. Its Race Equity Project focuses 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.*, *Mayor & City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452 (D. Md. 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 non-profit racial justice and migrant rights organization which engages in legal representation, advocacy, community organizing, education, and cross-cultural alliance-building to end the racism, criminalization, and economic disenfranchisement of African American and Black immigrant communities. BAJI was founded in Oakland,

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[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.

California, by veteran civil rights activists and clergy who were concerned about a wave of unjust immigration enforcement laws. BAJI expanded its mission to include advocacy on behalf of all Black immigrants and refugees. BAJI has an interest in this case because of its extensive experience dealing directly with asylum seekers pursuing protection in the United States, and its 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. The Coalition has an interest in the fair application of credibility determinations in asylum cases.

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 languages

and/or minority 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.

The Refugee and Immigration Center for Education and Legal Services (RAICES) is a 501(c)(3) immigrant rights non-profit founded in 1986 and headquartered in San Antonio, Texas. RAICES serves tens of thousands of non-citizens each year through direct immigration legal services, social services, advocacy, community engagement, refugee resettlement, and impact litigation. With operations throughout Texas and over 300 staff members, RAICES is one of the largest legal service providers for low-income immigrants, asylum seekers, and refugees in the country. RAICES provides direct legal representation to survivors of trauma, like Ms. Tegwi, the Petitioner in this case, before the Asylum Office, in Immigration Courts, and in federal court litigation across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

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 anxious, their affect is flat. Their story 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. 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

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[2] This Brief is based on an *Amicus* brief filed by Dena Elizabeth Robinson, the Public Justice Center's 2019-2020 Murnaghan Appellate Advocacy Fellow, in *B.C. v. Barr*, 12 F.4th 306 (3d Cir. 2021) (holding, where petitioner spoke a "pidgin" English and was found not credible, that the failure to adequately consider whether an interpreter was necessary violated petitioner's Due Process rights).

narrative. Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez 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.

Such consistency may 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.

The asylum process itself raises the threat of implicit bias. This is especially true in the credibility assessment. Understanding 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); 8 C.F.R. § 1208.13(b)(2). These definitions invoke credibility, as "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 RRGC 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 INA, 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 statement;

- the consistency of the applicant's statements with other record
  evidence; and

- any "inaccuracies or falsehoods" in the applicant's statements,

without regard to whether an inconsistency, inaccuracy, or falsehood goes to the

heart of the applicant's claim, or any other relevant factor. *See* 8 U.S.C. §

1158(b)(iii).

These definitions are vague and subjective. 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; 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. 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. Therefore, demeanor is an ineffective way of determining truthfulness. 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).

Language barriers, trauma, or implicit bias render credibility determinations unreliable. 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 told in a linear narrative. Mosley, *supra*, at 315. If an applicant's story changes over multiple retellings, an immigration judge may deem that person dishonest. Paskey, *supra*, at 478. 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 research on how trauma impacts storytelling.

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

Ms. Tegwi suffered several traumatic events: the murder of her father; the beating, mutilation, and rape of her mother; her own beating and rape; and the flight from Bamenda to Batibo and back to evade future attacks. Many asylum seekers are trauma survivors. 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 content and form of an applicant's story, which can lead to inaccurate credibility determinations by the judge.

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 memories by activating the right side of the brain and deactivating the left. *Id.* at 230. 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. L. 1079, 1085 (1998). When this occurs, the person may be unable to verbalize the trauma they have experienced. Ayres, *supra*, at 230. Because relaying trauma activates right side of the brain, which is responsible for emotional, visual, spatial, and tactile skills, a person retelling a traumatic experience may relive 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). 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, inconsistent, incoherent, or chronologically fractured. Paskey, *supra*, at 487–89. The impact of trauma combined with the psychological stress of legal proceedings likely alters applicants' demeanor. Uli

Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc.

Just. Res. 313, 316 (2002). Immigration judges frequently deny asylum because of

the way an asylum seeker tells their story, including their demeanor or degree of

detail. Pasky, *supra* at 476 (describing immigration judge's denial of asylum due

to internal inconsistencies in an applicant's story, demeanor and concerns

regarding vagueness and perceived inconsistency); *see also* Mosley, *supra*, at 317–

18.

Sexual assault can lead to particularly severe trauma. "Rape is more than a

violent crime; it can be described as 'soul murder.'" Sarah Deer, *The Beginning*

and the End of Rape 124 (2015). Rape "has been used as a means to control and

subjugate women." *Id.* at 131. Sexual assault survivors often face "complex

trauma, including societal trauma." Thema Bryant-Davis, Heewoon Chung &

Shaquita Tillman, *From the Margins to the Center: Ethnic Minority Women and*

the Mental Health Effects of Sexual Assault, 10 Violence & Abuse 330, 331

(2009). For racialized women, such as Black women, "societal traumas" can

include "racism and sexism;" therefore, "it is likely that ethnic minority sexual

assault survivors are affected by mental health effects that predate the sexual

assault trauma." *Id.* at 331. Survivors can experience issues pertaining to

"memory," and "other factors such as shame, fear, and post-traumatic avoidance,"

which impact the "consistency of account in relation to sexual assault." Jane

Herlihy & Stuart Turner, *Untested assumptions: psychological research and credibility assessments in legal decision-making*, 6 Eur. J. Psychotraumatology 1, 4 (2015).

The potential impact of trauma on this case is clear. Ms. Tegwi's underlying story—one involving the murder of her father, flight from one locality to another to escape violence, the rape and mutilation of her mother, and her own sexual assault and hospitalization, all consistent with reports of human rights violations in Cameroon—evidences the trauma she experienced. The Agency's adverse credibility decision rests not on the content of Ms. Tegwi's story, but how she told it. The amount of detail she included and omitted. Her lack of eye contact while answering the judge's questions. Her explanation regarding why her family moved back from Bamenda to Batibo. Each of these characteristics is common in trauma victims' narratives. *See* Paskey, *supra*, at 486–88. "Due to this difficulty of (1) reconciling the event for themselves and (2) conveying this trauma to someone who may have never experienced something similar, a survivor's story may tend to shift or be revised with each narration as they attempt to compile all of the images and sensations into their own linear narrative of the event." Mosley, *supra*, at 322.

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

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

Ms. Tegwi likely faced an additional barrier during her asylum proceeding: the immigration judge's implicit biases. Judges are frequently portrayed as 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). But scholarship demonstrates that implicit biases are deeply entrenched in and perpetuated by legal systems, institutions, and actors. *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).

We *all* have biases. We all make decisions based on our value systems, our professional experiences, and our lived experiences. Breger, *supra*, at 1063. Judges, however, "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)). Immigration judges' belief that they are immune from implicit bias imperils the rights of 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

Stock stories about honesty and demeanor permeate the asylum process.

They create and entrench implicit biases, impacting both the way an asylum

applicant tells their story, and the story an immigration judge actually hears.[3] A

common stock story is that sexual assault survivors should cry when retelling the

details of their sexual 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

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[3] 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 Cases, 31 Hamline J. Pub. L. & Pol'y 569, 588 (2010). A judge may

disbelieve a sexual assault survivor who self-presents as numbed instead of

emotional. 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 someone trying to claim victimhood. *Id.* at

293. These stereotypes can create implicit biases that impact how an immigration

judge views an asylum applicant.

Immigration judges may also have biases related to conceptions of time 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). 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 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). 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 deemphasize when a specific

event happened. Schroeder, *supra*, at 332. They may tell stories where events are

organized with a standard other than time, such as telling a story where the last

chronological event is told first because of its emotional significance. *Id.* at 334.

When this occurs during an asylum seeker's credibility assessment, the judge may

interpret the deemphasis of when a specific event happened as a marker of

dishonesty. *See* Marks, *supra*, at 21. The judge may also disbelieve an asylum

applicant who fails to tell a story in chronological order. Thus, cultural norms

regarding chronology can lead to an erroneous not-credible determination.

     An immigration judge may also hold implicit cultural biases regarding how a

person communicates essential information. *See* Carol Kinsey Goman,

Communicating Across Cultures, ASME (Nov. 22, 2010), https://www.asme.org
/topics-resources/content/communicating-across-culture (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 individuals may not verbalize
key points. *Id.* at 57. People may not directly state important issues. Countries in
Africa, Asia, South America and the Middle East are high-context cultures.
Marlien Herselman & Darelle Van Greunen, Global Survey on Culture Differences
and Context in Using E-Government Systems: A Pilot Study 4 (2012),
https://eudl.eu/doi/10.1007/978-3-642-23828-4_6. 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, expecting direct communication, may
misunderstand someone from a high-context culture who engages in implicit
communication and nonverbal cues. When immigration judges look for
chronological, direct stories, they may deem an asylum applicant from a "high-
context" culture not credible simply because of the details omitted from the

narrative. This can lead to application of heuristics, 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). Race and language play a central role in heuristics' formation, especially when the asylum seeker is a person of color.

Here, the Agency demonstrated an implicit bias in favor of low-context communication when it faulted Ms. Tegwi for failing to include details during her asylum hearing. But Ms. Tegwi is from Cameroon, an African country with a high-context culture. As a member of this culture, Ms. Tegwi did not provide specific details on important events in her story—for example, not specifying how her father's murder motivated her return to Batibo, but instead saying she and her mother fled because "the military was after us." ROA.487. The judge faulted Ms. Tegwi for this, urging that it "doesn't make any sense." ROA.489. Ms. Tegwi's culture, however, communicates through implied information and context. Ms. Tegwi's omission of detail when initially describing her persecution in Cameroon does not indicate a lack of credibility—it indicates her membership in a high-context culture.

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 have 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, . . . "'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.'") (quoting *Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 644 (1819)). 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 immigration and naturalization exclusion was the Chinese Exclusion Act of 1882. Later, Congress sought to limit the number of people from eastern and southern Europe, then racialized as non-white. *See* the Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5 (1921). The racialization of immigration laws shapes who is deemed a credible immigrant, who is worthy of citizenship, and who is a threat. 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, although 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 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.* Courtroom proceedings, including

asylum proceedings, often implicate stereotypes impacting 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 untrustworthy,

which bears on questions of credibility. During the asylum process, racial

stereotypes may subconsciously, yet determinatively, influence an immigration

judge's perception. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection,*

and the Jury, 33 Conn. L. Rev. 1, 44 (2000).

Because these unconscious racial stereotypes are so deeply rooted in our

institutions, immigration judges may be more skeptical, generally, of Black asylum

applicants. *Id.* at 45. Researchers have repeatedly found that the use of forensic

medical evidence disproportionately benefits Black applicants, as "adjudicators do

not find [Black] asylum seekers credible unless they obtain hard-to-get supporting

documentation" to corroborate their narratives. *See* Holly G. Atkinson et al.,

Impact of Forensic Medical Evaluations on Immigration Relief Grant Rates and

Correlates of Outcomes in the United States, 84 J. Forensic & L. Med. 102272

(2021). As an immigration judge listens to an asylum applicant's testimony, they

may "focus more closely on certain deception cues and become more skeptical,"

thereby "skew[ing] their credibility determinations against not only deceptive

[Black asylum applicants], but honest ones as well." *Id.* If an immigration judge

holds unconscious biases regarding Black asylum applicants, that judge will more

easily process information that is consistent with anti-Black stereotypes, and

disregard information that does not conform with the stereotype. *Id.* One such

deception cue is language.

Black women survivors of sexual assault often face additional biases. "African-American victims of rape are the least likely to be believed." Kimerblé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stanford L. Rev. 1241, 1269 (1991). Because "[s]exualized images of African Americans go all the way to Europeans' first engagement with Africans" and "Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented," "Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot." *Id.* at 1271. This context can render "Black women's rape either less believable or less important" in the eyes of judges. *Id.* "[C]ross-cultural barriers as well as culture-specific barriers" can impede a survivor's reporting and recounting of her assault. Bryant-Davis, Chung & Tillman, *supra*, at 335. Since "[e]ach measure of [an asylum-seeker's] credibility depends on officials' expectations, prior knowledge, and assumptions," Amy Shuman & Carol Bohmer, *The Stigmatized Vernacular: Political Asylum and the Politics of Visibility/ Recognition*, 49 J. Folklore Res. 199, 296 (2012), a tendency to discredit a Black woman's report of sexual assault can lead a judge to improperly conclude that she lacks credibility.

Ms. Tegwi's case reflects this. Despite Ms. Tegwi's production of hospital documents substantiating her hospitalization post-attack, the judge grilled her on

the names of the pain medications and intravenous drips she took following the

attack, ROA.484-85, as well as the name of her doctor, ROA.493. The judge also

took issue with the length of time that Ms. Tegwi spent in the hospital, opining that

"[t]he respondent has not articulated what treatment she was given that would

explain an eight-day hospitalization." ROA.408. The judge then discounted the

"medical document" substantiating the treatment as "similarly vague," despite it

listing that Ms. Tegwi "suffered vaginal bruising, abdominal pain, general body

pain, loss of appetite, and scratches." ROA.408. The judge's assessment

trivializes Ms. Tegwi's trauma. It also unduly conflates the decisions of the

hospital, the entity charged with determining Ms. Tegwi's post-rape treatment,

including her date of discharge, with Ms. Tegwi's credibility. Such treatment

evinces the judge's implicit bias against Ms. Tegwi as a Black woman survivor of

sexual assault.

In sharing their stories, asylum applicants may struggle both with

understanding a language and translating their narrative from one language to

another. *See B.C. v. Barr*, 12 F.4th 306, 308–09 (3d Cir. 2021) (petitioner spoke a

form of "pidgin" English, "[a]nd despite persistent clues that he was less than

fluent in 'Standard' English, he was left to fend for himself in that language

without an interpreter"); *see also Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA

1987). Some of these differences in translation stem from the courtroom as a

traditionally 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, people of color,

especially Black people, have historically been perceived as dishonest and

untrustworthy. *Id.* at 467; Atkinson et al., *supra*. When a person of color shows

any marker of difference or nonconformity with whiteness, that difference can

render them noncredible. Carlin, *supra*, at 468. This "demeanor gap" explains

how and why language may impact credibility determinations. *Id.* at 472.

Likewise, the issues caused by trauma are exacerbated "when language is an

additional barrier to the process." Mosley, *supra*, at 326–27 & n.93.

This could explain why Ms. Tegwi, left to fend for herself in standard

English without an interpreter, appeared confused when the judge questioned her

about whether she knew that her mother was in the same hospital as her after the

second attack. Ms. Tegwi is an Anglophone from Cameroon, but English in

Cameroon—the kind spoken by the populace—differs significantly from American

English. *See, e.g.*, David Bellama et al., An Introduction to Cameroonian Pidgin

(2d ed. 1983), http://files.eric.ed.gov/fulltext/ED255041.pdf. For example, the

judge fixated on Ms. Tegwi referring to her father's friend as her "uncle," even

after Ms. Tegwi clarified that she called him "uncle" as a sign of "respect," not

kinship. ROA.497-98. The use of "uncle" as an honorific for non-relatives is

common in many non-Western societies, including Cameroon. *See* Eric A. Anchimbe & Richard W. Janney, *On not calling people by their names: Pragmatic undertones of sociocultural relationships in a postcolony*, 43 Postcolonial pragmatics 1451 (2011) (discussing how Cameroonians sometimes refer to non-family members using kinship terms); *see also* Ibrahim Mohammad Abushihab, *Contrastive Analysis of Politeness in Jordanian Arabic and Turkish*, 5 Theory & Prac. Language Stud. 2017, 2018 (2015); Mark Turin, *Call Me Uncle: An Outsider's Experience of Nepali Kinship*, 28 Contributions to Nepalese Studies 277 (2001). Thus, the judge's preoccupation with Ms. Tegwi's use of the word "uncle" reflected lack of cultural understanding, not credibility.

Similarly, the judge's preoccupation with whether Ms. Tegwi worked as a tutor or a teacher while in school reflects language and cultural barriers. *See* ROA.476-77. The judge also apparently took issue with Ms. Tegwi's lack of eye-contact. *See* ROA.477. ("You keep looking down as if you're looking at papers . . . Now, let me just move on because you don't seem to want to answer that question for me."). Though the judge seemed to weigh Ms. Tegwi's confusion and lack of eye contact during this line of questioning as a sign of evasion, this behavior is consistent with respectful listening by someone from a non-Western culture. *See* Reid, *supra*, at 414. Other features of the exchange captured by the transcript—such as the court reporter's use of the word "indiscernible" 34 times throughout

Ms. Tegwi's testimony, *see* ROA.455, 458, 460-63, 466, 469, 470, 472, 475-77, 480-83, 486, 492,[4] 494, 496, 498, 503, 505—reinforce that communication issues riddled the proceedings. The judge erred by construing these issues as undermining Ms. Tegwi's credibility.

Scholars believe that language and "communicative styles are marked by race and class." Carlin, *supra*, at 472. 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.[5] *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

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[4] The phrase "indiscernible" appears three times within the same paragraph. *See* ROA.492.

[5] "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 difficulty reading her deposition testimony and struggled with literacy. *See* Mikah K. Thompson, *Blackness as Character Evidence*, 20 Mich. J. Race & L. 321, 338 (2015).

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 Anglish": Language Access and Due Process in*

Asylum Proceedings, 34 Geo. Immigr. L.J. 453, 458 (2020).

Applicants who speak English with an accent or with less than native or

bilingual proficiency also face prejudice. 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 uncomfortable or nervous. 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 judges' dockets are severely backlogged. As of December 2022, the U.S. immigration court system faced a backlog of "[n]early 1.6 million asylum applications." Rosa Flores, *The US asylum backlog is nearing 1.6 million, the highest number on record*, CNN (Dec. 6, 2022, 5:05 PM), https://www.cnn.com/2022/12/26/us/asylum-backlog-highest-record/index.html. Yet, "[the Executive Office of Immigration Review] has not hired enough new immigration judges to keep pace with this increasing rate of new cases." Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, TIME (Jan. 20, 2022, 11:31 AM), https://time.com/6140280/immigration-court-backlog/.

High caseloads mean that 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)). This pushes immigration judges 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").

Such conditions impede an immigration judge's ability to engage in deliberate thinking, the very action that allow individuals to surface their implicit biases. Breger, *supra*, at 1054. The time constraints and caseloads immigration judges currently face exacerbate conditions for implicit biases and stereotypes to influence proceedings. Marouf, *supra*, at 431. These biases go unchecked due to a lack of meaningful appellate review. Less than two percent of asylum applications receiving appellate consideration. Gupta, *supra*, at 41.

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 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 request that this Court reverse

the BIA's determination.

Respectfully submitted,

/s/ Maria R. Osornio
Maria R. Osornio
Supervising Attorney
RAICES
5121 Crestway Drive, #105
San Antonio, Texas 78239
(210) 226-7722
maria.osornio@raicestexas.org

Hayley Hahn
Murnaghan Appellate Advocacy Fellow
Public Justice Center
201 N. Charles Street, Suite 1200
Baltimore, Maryland 21201
T: (410) 625-9409
F: (410) 625-9423
hahnh@publicjustice.org

Counsel for Amici Curiae

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,459 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 proportionally spaced typeface using Times New Roman in 14-point type.

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/s/ Maria R. Osornio
Maria R. Osornio

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CERTIFICATE OF SERVICE

I certify that on March 30, 2023, I served a copy of the foregoing motion and attached brief via the Court's ECF filing system, which will automatically send an email notification of such filing to the attorneys of record, who are registered CM/ECF users.

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Maria R. Osornio

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