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Brief of Fred T. Korematsu Center et al. as Amici Curiae in Support of Appellants

Robert Chang

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Fred T. Korematsu Center for Law and Equality

Amici Curiae

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Chang, Robert; Bannai, Lorraine; Levin, Jessica; Ronald A. Peterson Law Clinic; Fred T. Korematsu Center for Law and Equality; and Amici Curiae, "Brief of Fred T. Korematsu Center et al. as Amici Curiae in Support of Appellants" (2014). *Fred T. Korematsu Center for Law and Equality*. 24.
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Authors
Robert S. Chang, Lorraine Bannai, Jessica Levin, Ronald A. Peterson Law Clinic, Fred T. Korematsu Center for Law and Equality, and Amici Curiae

Nos. 13-35885, 13-35886

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
ELODIA SANCHEZ, DANIELA BARAJAS, and CECILIA LUA,

Appellants,

v.

EVANS FRUIT CO., INC. and JUAN MARIN,

Appellees.

On Appeal from the United States District Court for the Eastern District of Washington, No. CV-10-3033-LRS

BRIEF OF FRED T. KOREMATSU CENTER, ASIAN BAR ASSOCIATION OF WASHINGTON, LATINA/O BAR ASSOCIATION OF WASHINGTON, LOREN MILLER BAR ASSOCIATION, SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON, AND VIETNAMESE AMERICAN BAR ASSOCIATION OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amici make the following disclosures. The Fred T. Korematsu Center for Law and Equality is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

The Asian Bar Association of Washington, the Latina/o Bar Association of Washington, the Loren Miller Bar Association, the South Asian Bar Association of Washington, and the Vietnamese American Bar Association of Washington are non-profit organizations that do not have any parent corporations or issue stock and consequently there exist no publicly held corporations which own 10 percent or more of their stock.

STATEMENT REGARDING MOTION FOR LEAVE TO FILE

Consent to file this amicus brief was sought from all parties, but some parties did not consent. This proposed amicus brief is therefore accompanied by a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a).

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring that effective remedies exist to address bias in the courtroom. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Asian Bar Association of Washington (ABAW) is the professional association of Asian Pacific American attorneys, judges, law professors, and law students that strives to be a network for its members in Washington State. Created in 1987, ABAW advocates for the legal needs and interests for the APA community and represents over 200 APA attorneys in a wide-range of practice areas. It is a local affiliate of the National Asian Pacific American Bar Association. Through its network of committees, ABAW monitors legislative developments and

[1] Amici certify that, pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

judicial appointments, rates judicial candidates and advocates for equal opportunity, and builds coalitions with other organizations within the legal profession and in the community at large. ABAW also addresses crises faced by its members and the broader Asian and Pacific Islander community in Washington.

The Latina/o Bar Association of Washington (LBAW) represents the concerns and goals of Latino attorneys and Latino people of the State of Washington. LBAW's 250 members include judges, solo practitioners, prosecutors, defense attorneys, public sector attorneys, private sector attorneys, in-house legal counsel, and law students. It encourages and promotes the active participation of all Latino attorneys throughout Washington State and seeks the involvement of Latino political, governmental, educational, and business leaders. LBAW aims to provide solutions to complex issues that confront the legal system and the Latino community.

The Loren Miller Bar Association (LMBA) is an affiliate chapter of the National Bar Association. LMBA is a nonprofit organization dedicated to defending the civil rights and constitutional freedoms consistent with the principles of a free democratic society. LMBA's 500 current and past members are primarily African-American judges, attorneys, law professors, and law students. LMBA is committed to addressing legal issues and social and economic disparities affecting

the African-American community, and increasing access to justice within Washington State.

The South Asian Bar Association of Washington (SABAW) is a professional association of attorneys, law professors, judges, and law students involved in issues impacting the South Asian community in Washington State. Created in 2001, SABAW provides pro bono legal services to the community, engages in outreach and education efforts, monitors the rights of its membership, and provides financial assistance to law students and practicing attorneys. SABAW also builds coalitions with other professional organizations sharing the goals of equal opportunity and access to justice. SABAW is strongly interested in issues surrounding the perception and economic, social, and political rights of its membership in the legal system.

The Vietnamese American Bar Association of Washington (VABAW) is a legal society that was formed in 2005 for Vietnamese American attorneys, law students, and friends who share its common vision. VABAW strives for legal excellence by facilitating and cultivating both professional and personal relationships among its members, the community, and the judiciary. VABAW's goal is to provide mutual support for attorneys in the advancement of their careers, to be a trusted guide and resource for students who aspire towards the legal

profession, to serve as a voice for the local Vietnamese American community, and to represent Vietnamese American attorneys within the state bar.

INTRODUCTION

The fair and impartial administration of justice requires counsel to refrain from making improper racial remarks. Unfortunately, courts have seen numerous instances of explicit appeals to prejudice made by counsel, and courts have responded immediately to such improper remarks by providing curative instructions, and, when appropriate, granting a new trial. Increasingly, social scientists, judges, legal scholars, and practitioners are becoming more aware of how implicit bias operates in the courtroom. Implicit bias comes in many forms, and no one is immune from it—neither judges, juries, nor advocates.

In-group favoritism, a form of implicit bias that can be defined as the association of positive stereotypes and attitudes with members of a favored group, leads to preferential treatment for those in the "in-group." In this case, defense counsel's improper remark about the white racial identity of Evans Fruit's owners invited the all-white jury to look more favorably upon Evans Fruit and its owners than on the Latina Plaintiffs. Because the court overruled Plaintiffs' objection and failed to provide a curative instruction, a new trial is warranted.

BACKGROUND AND SUMMARY OF THE ARGUMENT

The Equal Employment Opportunity Commission (EEOC) brought suit under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to vindicate the rights of a group of female employees of Evans Fruit Company, Inc., who contended that they were subjected to a hostile work environment because of sex. ER 497-98. Intervenors-Plaintiffs Elodia Sanchez, Daniela Barajas, and Cecilia Lua brought both federal and state law claims that Evans Fruit was liable for sexual harassment and for acting negligently in the company's supervision and retention of the ranch foreman who allegedly subjected the women to the sexually hostile work environment. ER 483.

During closing, defense counsel introduced the race of Mr. and Mrs. Evans, the owners of Evans Fruit, stating:

> Now, the EEOC and . . . [counsel for Intervenors-Plaintiffs] also have argued to you at the beginning and today that the Evans didn't care about their employees, they're just a bunch of ***rich white people*** who are focused on money.

ER 117 (emphasis added). As merits counsel points out, neither counsel from EEOC nor Northwest Justice Project made any mention of the Evanses' race. Intervenors-Plaintiffs-Appellants Opening Brief at 16.[2] Rather, Plaintiffs argued that Evans Fruit did not take any corrective action against Juan Marin, the ranch

[2] We refer to this *infra* as "Intervenors-Plaintiffs Op. Br." to distinguish it from Plaintiff-Appellant EEOC's Opening Brief.

foreman, until Mr. Evans discovered Marin's financial malfeasance. Intervenors-Plaintiffs Op. Br. at 22. Later in closing, defense counsel continued:

> And you may consider that that is a powerful incentive to invent or exaggerate their stories. At some level I understand that. These folks are poor. For the most part, they're uneducated, and their career paths, frankly, are not bright. This is their chance to get some extra money, and they're ***grabbing the brass ring***. However sympathetic their financial conditions may be, it is simply not fair and it's not right that they try to get money from Mr. and Mrs. Evans that they do not legally deserve.

ER 118-19 (emphasis added). Plaintiffs objected to the "rich white people" remark, but the court overruled the objection. ER 117.

The irrelevant and inflammatory racial comments offended fundamental fairness and deprived the Plaintiffs of the Constitution's guarantee of due process. U.S. Const. amend. XIV; *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148-50 (9th Cir. 2001) (holding that plaintiffs' counsel's references to the Indian corporate manager of the plaintiff corporation, the "killing" of Indian business, and Custer's massacre had no relevance to the case and were used as an attempt to incite the jury's prejudice by linking the behavior of the defendant corporation to white racism). The use of the word "white," combined with the "speaker, audience, [decision-making] process, and purpose" created a situation that likely set a racial context instead of promoting a race-neutral environment. Barbara Flagg, *Was Blind, but Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 977 (1993).

Amici encourage this Court to consider how defense counsel's emphasis on the race of the individuals involved activated the implicit, as well as explicit, biases of the jury, encouraging it to view the case through a racial frame. First, Amici discuss the legal landscape of attorney misconduct, demonstrating that courts recognize the prejudice inherent in improper reference to race in the civil, as well as criminal, context. Second, Amici provide social science and legal background explaining implicit bias in the courtroom, in contrast to the more recognizable forms of explicit bias. Third, Amici explain in-group favoritism as a manifestation of implicit bias. Fourth, Amici explore the concept of "priming"—a specific mechanism of implicit bias and in-group favoritism. Fifth, Amici summarize social science studies demonstrating how in-group favoritism leads to disparate outcomes. Amici argue that defense counsel's emphasis on Mr. and Mrs. Evanses' race could have biased the all-white jurors towards Evans Fruit, calling into question the integrity of the jury's deliberative process, and therefore the defense verdict.

ARGUMENT

I. IMPROPER REFERENCES TO RACE ARE RECOGNIZED FORMS OF ATTORNEY MISCONDUCT AND PROVIDE GROUNDS FOR A NEW TRIAL.

A. Improper References to Race that May Prejudice the Jury Against a Litigant Are Grounds for a New Trial.

Racially inflammatory comments made during opening statements and closing arguments are "beyond the limits of legitimate advocacy" when not relevant to the "facts and legal theories applicable" to the case and should not be used to "raise prejudice and inflame the jury." *Bird*, 255 F.3d at 1150-51. The invocation of race distracts the jury from considering relevant evidence and instead "draws the jury's attention to a characteristic that the Constitution generally demands they ignore." *United States v. Hernandez*, 865 F.2d 925, 928 (7th Cir. 1989). Thus, emotionally charged statements that encourage the jury to consider racial biases are never appropriate when race is not relevant to the case. *Bird*, 255 F.3d at 1151; *Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000) (stating that inflammatory prosecutorial arguments made about the violent nature of people of the Sikh faith might have motivated jury to focus upon prejudicial inferences); *Fontanello v. United States*, 19 F.2d 921, 921-22 (9th Cir. 1927) (holding that district attorney's statement regarding Italian immigrants as criminals was unwarranted because it created racial prejudice).

In both civil and criminal cases, this Court has held that inflammatory comments made by counsel during opening statements and closing argument are improper and could be sufficiently prejudicial as to warrant a new trial. *Bird*, 255 F.3d at 1136; *Cudjo v. Ayers*, 698 F.3d 752, 770 (9th Cir. 2012) (vacating conviction because prosecutor's inflammatory racial comment made in closing

argument prejudicially affected defendant's testimony); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (holding that prosecutor's inflammatory statement that "maybe the next time it won't be a little black girl from the other side of the tracks" was sufficiently prejudicial to deny the defendant a fair trial). "Fairness to parties and the need for a fair trial are important not only in criminal but also in civil proceedings, both of which require due process." *Bird*, 255 F.3d at 1151.

Courts in Washington State have similarly held since at least 1922 that appeals to racial prejudice toward a litigant in a civil case requires remedial action. *Schotis v. N. Coast Stevedoring Co.*, 1 P.2d 221, 225, 228 (Wash. 1931) (counsel's statements that the "Japanese people don't like us" in civil case involving a defendant Japanese corporation required reversal and remand for new trial); *see also Int'l Lumber Export Co. v. M. Furuya Co.*, 209 P. 858, 860 (Wash. 1922) (counsel's argument in civil trial to jury concerning credibility and integrity of Japanese probably cured by prompt instruction of court).

B. Improper References to Race that Highlight Commonalities Between a Party and the Jury May Create Bias in Favor of a Litigant and Are Also Grounds for a New Trial.

While courts have consistently recognized that fostering racial animosity by the jury against a party is improper, courts have also held that counsel may not make comments that encourage jurors to act out of bias *in favor* of a litigant. Both this Court and others have granted relief based on counsel's appeals to racial and

ethnic solidarity between a party and the jury. *Bird*, 255 F.3d at 1125; *Texas Emp'rs' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 866 (Tex. App. 1990).

In *Bird*, a few tribal members, individually and on behalf of their corporation, sued another corporation owned by non-tribal members in front of an all-Native American jury in tribal court. 255 F.3d at 1136. Plaintiffs alleged that as soon as they purchased the corporation, the defendant corporation began giving its business to non-Native American owned companies. *Id.* at 1139. In closing argument, plaintiff's counsel made inflammatory comments emphasizing the legacy of colonialism and racism against Native Americans by White Americans, including the Custer massacre. *Id.* at 1149. This Court stated the "argumentative appeals to historical racial prejudices of or against the white race" appealed to "Indian collective memory" and had "no proper purpose" in the trial. *Id.* at 1151. This Court reversed the district's court recognition of the tribal court judgment, reasoning the closing argument "offended due process by its appeal to racial enmity and bias."[3] *Id.* at 1152.

In *Guerrero*, plaintiff's counsel made subtle remarks soliciting "unity" between the Hispanic community and the plaintiff, and the court found these

[3] Because the case was tried in tribal court, this Court reversed the district court's enforcement of the tribal court judgment and instructed the trial court to enter judgment for defendant. Importantly, this Court noted: "Had this case been tried in federal court, our ruling might permit consideration of the possibility of a remand for a new trial." *Id.* at 1153.

comments were improper. The plaintiff, who had fallen from a tractor and hurt his back, sued for worker's compensation benefits. *Guerrero*, 800 S.W.2d at 860-61. Plaintiff, plaintiff's counsel, and most members of the jury, based on their surnames, were Hispanic. *Id.* at 862. During closing argument, plaintiff's counsel intimated to the jury that now was the time for "unity" and "to stick together as a community." *Id.*

The court stated this "veiled and subtle" reference to ethnicity was just as improper as an explicit reference to race. *Id.* at 864-65. To the court, these references, which were aimed at encouraging "ethnic solidarity" between the plaintiff and jury members, were "an affront to the court" and "offense…against society." *Id.* at 862, 865. Although the court noted its holding was not applicable to "incidental" or unintentional references to race, the court nevertheless recognized the impact of subtle and "slick" appeals to solidarity. *Id.* at 865, 867. The court explained:

> To permit the sophisticated ethnic plea while condemning those that are open and unabashed would simply reward counsel for ingenuity in packaging. Inevitably, lawyers representing their clients zealously within the bounds of the law would test the limits and fine-tune their arguments to avoid being too explicit. Courts would be asked to label some arguments permissible and uphold them with a wink when everyone knew that an ethnic appeal had been made. That course would demean the law and perhaps deepen the divisions from which society already suffers…***If we were to affirm the judgment before us, we would establish a precedent permitting calculated, subtle racial or ethnic arguments by all litigants in all types of cases – personal injury, family law, commercial – provided the arguments were properly dressed up and disguised***….All litigants…should

> feel free to litigate their cases before juries in all 254 counties without facing state-of-the-art ethnic pleas in closing argument. Such arguments are forbidden, and ***it matters not whether counsel suggests***—depending upon the venue—***that the jury reward or penalize a litigant for belonging or not belonging to a racial or ethnic group***.

Id. at 865 (emphasis added). The court reversed and remanded the case because the appeal to ethnic solidarity was an incurable reversible error. *Id.* at 866.

Courts' recognition of the danger inherent in arguments that call upon biases both against and in favor of litigants reflects the existence of both explicit and implicit bias.

II. IMPLICIT BIAS, NO LESS THAN EXPLICIT BIAS, IF LEFT UNCHECKED IN THE COURTROOM, COMPROMISES THE FAIR AND IMPARTIAL ADMINISTRATION OF JUSTICE.

Discrimination and bias may of course manifest in explicit ways. For example, a person who uses a racial slur or vandalizes a person of color's property acts out of explicit bias, or what some scholars refer to as "aversive" racism. Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. Soc. Issues 615, 618 (2005). However, as United States District Court Judge Mark Bennett explains, "Society in general and courts in particular have been aware of explicit bias for years….A battery of state and federal laws are aimed at eradicating intentional discrimination, that is, discrimination based on explicit bias." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in*

Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 151-52 (2010).

A. Implicit Bias

It is widely accepted that conscious racism is unacceptable, but unconscious discrimination too cuts at the very core of fundamental fairness and justice in the courtroom. Flagg, *supra*, at 989. Social psychologists have documented that bias also operates on a subconscious level. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 951 (2006). This is known as implicit bias, which is the "plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement." Bennett, *supra*, at 149. People may still have implicit biases even if they do not believe in those ideas. Greenwald & Krieger, *supra*, at 951; Bennett, *supra*, at 149-50.

One of the most common ways to measure implicit bias is through the Implicit Assessment Test (IAT). Created by social psychologists in 1998, the IAT measures "differential association" of "attitude objects" (such as racial groups) with an "evaluative dimension"; the speed of the reaction to the pairing of the attitude object and the evaluative dimension reflects the attitudes and stereotypes of that person, i.e., that person's implicit biases. *See generally* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The*

Implicit Association Test, 74 J. Personality & Soc. Psych. 1464 (1998); *see also* Bennett, *supra*, at 153.[4]

For example, in one implicit bias study, white college students were presented with 50 male names and 50 female names and were asked to categorize them as pleasant or unpleasant. Greenwald et al., *supra*, at 1474. Half of the male names and half of the female names "were more likely to belong to White Americans than to Black Americans." *Id*. at 1473. The students implicitly preferred White Americans, as judged by the quicker reaction times when choosing a White name as "pleasant." *Id*. at 1474. The IAT results were then compared with questionnaires filled out by the participants. On the explicit questionnaires, many of the participants "endorsed a position of either Black-White indifference…or Black preference." *Id*. at 1475. However, their IAT results stated differently, showing an implicit White preference. *Id*. Thus, people are often not aware of their implicit biases, because those biases contradict their otherwise egalitarian principles.[5]

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[4] The IAT was created by Anthony G. Greenwald, Debbie E. McGhee, and Jordan L. K. Schwartz. *See generally* Greenwald et al., *supra*. Greenwald, along with Mahzarin Banaji and Brian Nosek, went on to create a nonprofit called Project Implicit. Project Implicit's website is hosted by Harvard University and has an online IAT available for anyone to take. It is available at https://implicit.harvard.edu/implicit/takeatest.html.

[5] *See generally* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. Personality & Soc. Psychol. 17 (2009).

Implicit biases are particularly dangerous in the courtroom. Judge Bennett explains that "[j]urors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors." Bennett, *supra*, at 150. Judge Bennett encourages that "[l]awyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias, its role in our civil and criminal justice system, and in particular, the problems that it creates with regard to juries." *Id*. at 152.

One such implicit bias at play in this case is what social scientists and scholars refer to as "in-group favoritism."

B. In-Group Favoritism Is a Manifestation of Implicit Bias.

The theory of in-group favoritism explains "people would favor their own group at the expense of other groups in terms of their evaluations, judgments, and behavior in intergroup relations." Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 Soc. Just. Res. 143, 146 (2004). In-group favoritism is distinct from aversive racism, whose focal points are the negative beliefs about and associations with another group. Gaertner & Dovidio, *supra*, at 618. Discriminatory conduct is only partially motivated by animus against out groups; people also discriminate to "elevate the status of their own group and themselves." Catherine Smith, *The Group Dangers of Race-Based Conspiracies*, 59 Rutgers L. Rev. 55, 58, 68-72 (2006) [hereinafter

Smith, *Group Dangers*]. "Racial discrimination is as much an exercise of in-group favoritism as it is an exercise of out-group derision." *Id.* at 58. Studies have demonstrated that, as a result of this implicit favoritism toward one's own "group," people are more likely to empathize with their in-group than those in the out-group. Mina Cikara et al., *Us & Them: Intergroup Failures of Empathy*, 20 Current Directions in Psychol. Sci. 149, 150 (2011).

Additionally, many studies have shown that thinking more positively of an in-group is an automatic response. Dasgupta, *supra*, at 146 (listing studies on the automaticity of in-group favoritism). An individual who identifies with a group makes decisions and judgments to favor that in-group. *Id.* This theory links to the larger social identity theory, which states that people engage in in-group favoritism "when [they] strongly identify with their in group and when their self-esteem is linked to the perceived worthiness of their in group." *Id.*; *see also* Catherine Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 Conn. L. Rev. 1077, 1084-85 (2004) [hereinafter Smith, *Unconscious Bias*] ("This entire process [the categorization into in-groups and out-groups] stems from a quest to bolster the individual's own self image." (citations omitted)). People are biased towards an in-group because identifying with the in-group is a social norm. Social identification

along race, sex, and sexual orientation is "highly prevalent."[6] Smith, *Unconscious Bias*, *supra*, at 1085.

The existence of in-group favoritism has concrete and identifiable consequences. Depending on the degree of loyalty to one's own race, the bolstering of self translates into gains for the in-group, ranging from "positive thoughts, feeling and emotions directed toward the racial in-group member, to the allocation of resources and benefits." Smith, *Group Dangers*, *supra*, at 83 (citations omitted).

C. Priming Is a Mechanism that Invokes Implicit Bias and In-Group Favoritism.

A picture, word, or phrase can activate implicit bias, including in-group favoritism. This is referred to as "priming" in social science literature. "*Priming* refers to the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context." John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. of Personality & Soc. Psychol. 230, 230 (1996).

Social scientists distinguish between personal beliefs and stereotypes activated by priming, because each is a "conceptually distinct cognitive

[6] This form of social identification begins at an early age. Anna-Kaisa Newheiser & Kristina R. Olson, *White and Black American Children's Implicit Intergroup Bias*, 48 J. Experimental Soc. Psychol. 264 (2012) (detailing other studies about how children implicitly favor racial in-groups).

structure[].” Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5, 5 (1989).

> Automatic processes involve the unintentional or spontaneous activation of some well-learned set of associations or responses that have been developed through repeated activation in memory. They do not require conscious effort and appear to be initiated by the presence of stimulus cues in the environment. A crucial component of automatic processes is their inescapability; they occur despite deliberate attempts to bypass or ignore them. In contrast, controlled processes are intentional and require the active attention of the individual. Controlled processes, although limited by capacity, are more flexible than automatic processes. Their intentionality and flexibility makes them particularly useful for decision making, problem solving, and the initiation of new behaviors.

Id. at 6 (citations omitted).

A “prime” is a mechanism that taps into these well-learned sets of associations. When “primed” with a word or concept, a person’s brain automatically activates certain responses, associations, and biases. Devine, *supra*, at 5-6; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 877 (2004); Endel Tulving & Daniel L. Schacter, *Priming and Human Memory Systems*, 247 Sci. 301 (1990). People are often unaware of priming because it is an unconscious process that operates “independent of explicit memory.” Tulving & Schacter, *supra*, at 302 (listing studies showing that priming does not deal with explicit memory).

The responses to priming draw upon “a lifetime of socialization experiences,” with studies showing that people begin internalizing racial

preferences at a young age. Devine, *supra*, at 6 (listing studies testing how and if children identify stereotypes); *see also* Newheiser & Olson, *supra*, at 264; John A. Bargh et al., *Automaticity in Social-Cognitive Processes*, 16 Trends in Cognitive Sci. 593, 599 (2012) (detailing studies about how children have been shown to implicitly favor racial in-groups). As a result of that early socialization, racial stereotypes are easily primed. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181, 190 (2001); Eberhardt et al., *supra*, at 889; Devine, *supra*, at 7-15. *See generally* Tali Mendelberg, *Racial Priming Revived*, 6 Persps. of Pol. 109 (2008) (listing studies on priming, both generally and in the political context). In many studies, participants who have been primed are often more positive towards their in-group and more negative towards the out-group. Eberhardt et al., *supra*, at 880; Payne, *supra*, at 190.

One study primed white Americans with the words "black" or "white" to see whether, as a result of the priming, participants' implicit biases would activate. Bernd Wittenbrink et al., *Evidence for Racial Prejudice at the Implicit Level & Its Relationship with Questionnaire Measures*, 72 J. Personality & Soc. Psychol. 262 (1997).[7] Participants sat in front of a computer, where an ethnic prime ("black," or

[7] Eighty-eight participants were recruited from the introductory psychology participant pool at the University of Colorado. African American students were excluded from the sample. *Id.* at 265-66. The goal in the study was "to develop a

"white"), a foil prime (e.g., "table"), or a neutral nonword prime (e.g., "XXXXX") was flashed on the screen for about 15 milliseconds. *Id.* at 266. Two seconds following the prime, a defined set of target words, some "positively valenced"[8] and some "negatively valenced," were placed on the screen; participants then had to indicate whether the target word formed a "correct" word by selecting "yes" or "no." *Id.* at 267. The researchers found that participants more quickly indicated the target words which were positive stereotypes of white Americans were correct words when preceded by the "white" prime, and that participants more quickly indicated the target words which were negative stereotypes of black Americans were correct words when preceded by the "black" prime. *Id.* at 268, 271 ("[I]tem identification was significantly facilitated when positively valenced White American items followed the WHITE prime and when negatively valenced African American items followed the BLACK prime.").

This and other studies establish that priming facilitates existing prejudices. When the word "white" is introduced, not only is a racial context set, but racial characteristics are established as between whites and others who are nonwhite. Thus, the pursuit of colorblindness is inadequate in addressing and establishing

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completely unobtrusive measure of White American participants' associations with the social categories of African Americans and White Americans." *Id.* at 271.

[8] I.e., some of the target words were stereotypical when applied to white or black Americans. *Id.* "Valenced" refers to either the intrinsic attractiveness (positive valence) or aversiveness (negative valence) of an event, object or circumstance.

substantive racial justice because the baseline for race-neutrality is whiteness. Flagg, *supra*, at 954. These white norms are a unique form of unconscious discrimination that systematically makes whiteness transparent, starkly contrasted by nonwhites. *Id.* at 959, 970.

Recognizing the reality of implicit bias, law professors have collaborated with social scientists to examine the operation of implicit biases that jurors bring to the courtroom. Although based on mock jurors and hypothetical cases, these studies give important insight into the relationship between implicit bias and disparate outcomes.

D. Implicit Biases Affect Juror Decision Making.

One study tested the impact that race would have on in-group favoritism among jurors in a mock criminal trial. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 Personality & Soc. Psychol. Bull. 1367, 1368 (2000). Groups comprised of either all-white or all-black mock jurors were given twelve trial summaries to consider, of which five were cross-racial crimes (the remaining summaries did not mention race at all). *Id.* at 1369. Of the five involving a cross-racial crime, half of the participants read about a white defendant and the other half read about a black defendant. *Id.* After deliberating, the participants were asked to rate the guilt of the defendant and the relative strength of each defendant's case. *Id.*

In considering the cross-racial crimes, the white jurors did not express in-group favoritism and objectively sentenced both black and white defendants. *Id.* at 1369-71. The researchers concluded the white mock jurors were objective because the "salient" racial issues in those five cross-racial crimes alerted the white jurors "to the possibility of prejudice and [made] racial norms salient." *Id.* at 1371. When racial issues are "obvious in a trial, a motivation to appear nonprejudiced is activated in White jurors"; the racially charged nature of the cases motivated the white jurors to consciously combat racial prejudice. *Id.* Sommers and Ellsworth then predicted that in a case that had "no blatantly racial issues, we expected White mock jurors to be more punitive toward a Black defendant than toward a White defendant." *Id.* at 1372.

To confirm their hypothesis, Sommers and Ellsworth designed the second part of the study around an assault and battery case, in which the race of the parties was conveyed in a short case summary. *Id.* Both white and black mock jurors considered the case; in some of the case summaries, the defendant was white and the victim was black, and in the other case summaries, the defendant was black and the victim was white. *Id.* The case summary presented either a "race-salient" and "non-race-salient" version of the case. The race-salient version of the case involved the victim's testimony about what the defendant had said to her: "You know better than to talk that way about a *White* (or *Black*) man in front of his

friends." *Id.* at 1372-73. The non-race-salient version involved the same victim testimony but without the mention of defendant's race. *Id.* at 1373.

In the race-salient case, white jurors did not differ in their guilt ratings of white and black defendants. *Id.* On the other hand, in the non-race-salient version of the case, "both White and Black mock jurors demonstrated in group/out group bias."[9] *Id.* at 1374-75. White jurors gave black defendants "significantly higher guilt rating[s]" and recommended longer sentences for the black defendant than the white defendant, demonstrating in-group favoritism.[10] *Id.* at 1375. Thus, in cases where race is "not a salient trial issue," white jurors may be "influenced by racial bias" and treat their racial in-group more favorably. *Id.* at 1376. This research raises the possibility of disparate outcomes in real trials.

As this study shows, the mere reference of race in a case where race is irrelevant can significantly impact the ability of jurors to engage in impartial decision making.

Tara Mitchell and her colleagues conducted a meta-analysis of studies analyzing the impact that racial bias has on juror decision-making. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic*

[9] All of the black mock jurors exhibited in-group bias across the studies; the researchers believed this was due to the awareness of racial disparities for black communities in the criminal justice system. *Id.* at 1376.

[10] All of the black mock jurors demonstrated the same in-group favoritism for the black defendant. *Id.*

Review of Defendant Treatment, 29 Law & Hum. Behav. 621, 627-28 (2005). Mitchell's meta-analysis examined thirty-four juror verdict studies with a total of 7,397 participants, and sixteen juror sentencing studies with a total of 3,141 participants. *Id.* at 625. All of these studies involved experimental manipulation of the defendant's race; each tested whether a juror's differential treatment of a defendant who belonged to a racial out-group was impacted by racial bias. Racial bias was defined as "a juror's disparate treatment of a defendant from a racial out-group, when compared with a defendant of the juror's own-race, in verdict and sentencing decisions." *Id.* at 624-25. Each study examined had to meet the following criteria:

> (1) the study had to involve an experimental manipulation of the race of the defendant; (2) the study had to contain enough information to define racial bias as the disparate treatment of a defendant from a racial out-group, such that results from multi-race participant samples were presented separately for each race; and (3) the study had to assess guilt or sentencing in the context of a mock juror simulation.

Id. at 625.

The researchers hypothesized "that mock jurors would exhibit an in-group bias in decision-making, such that individuals would be more lenient on defendants of their own racial group than defendants of another racial group." *Id.* at 672. The results of the examination indicated "a small, but significant, effect for racial bias in both verdict and sentencing decisions." *Id.* at 629. Jurors of one race tended to show bias against defendants who belonged to another race, or out-groups. *Id.* at

627. Other researchers have found similar results. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1142-43 (2012) (finding that white jurors will treat black defendants worse than they treat comparable white defendants).

In contemplating the import of these studies on the justice system, it is crucial to recognize that "effects deemed 'small' by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society." *Id.* at 1143.

E. Courts Can Effectively Address Jurors About the Dangers of Implicit Bias.

Because implicit biases exist, judges should educate jurors about these biases and encourage strategies to combat their dangers. For example, Judge Bennett discusses implicit bias during jury selection. Kang, *supra*, at 1182. *See generally* Bennett, *supra*. Judge Bennett spends nearly thirty minutes explaining implicit bias to the jury during jury selection, and at the conclusion of jury selection he asks each potential juror to take the following pledge against bias: "I pledge I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations." Kang, *supra*, at 1182. Judge Bennett also gives a jury instruction before opening statements that specifically addresses implicit biases:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

Id. at 1182-83. A jury instruction such as this emphasizes the "universality of implicit biases [and] decreases the likelihood of insult, resentment or backlash from the jurors." *Id.* at 1183.

Additionally, "judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions." *Id.* at 1184. Thus, instead of repressing biases as irrelevant to understanding a case, "judges should make jurors comfortable with the legitimacy of raising such issues" and encourage jurors to be aware of and monitor their biases. *Id.* This perspective shifting may produce a more robust deliberation, which, evidence suggests, "can potentially decrease the amount of biased decision making." *Id.* at 1184-85.

A jury instruction such as the one used by Judge Bennett accomplishes two important goals: first, it puts jurors on notice that implicit biases exist and engages

them in an effective and meaningful discussion; second, it allows jurors to focus on the merits of the case.

III. DEFENSE COUNSEL'S INAPPROPRIATE REFERENCE TO MR. AND MRS. EVANSES' WHITENESS CREATED A RACIAL FRAME THAT MAY HAVE IMPROPERLY AFFECTED THE OUTCOME.

Race was not relevant to the merits of the Plaintiffs' case, but race was present in the courtroom. All the jurors were white, Intervenors-Plaintiffs Op. Br. at 26, as were the owners of the defendant corporation. *Id.* at 3. In contrast, all the individual Plaintiffs were Latina (and most of the Plaintiffs' lawyers were women of color). *Id.* at 3-4.

Defense counsel's reference to the owners of Evans Fruit[11] as "rich white people" subtly and improperly emphasized the shared common characteristics between the white jurors and the white owners of Evans Fruit. If intentional, defense counsel's invocation of race is certainly more subtle than what occurred over 80 years ago when counsel in a civil case told the jury that the "Japanese people don't like us, and we don't like them," *Schotis*, 1 P.2d at 225; but subtle appeals to solidarity are just as problematic. *Guerrero,* 800 S.W.2d at 865.

Even if the reference was unintentional, there is still a danger that it unfairly affected the jury's decision-making process, as social science teaches us that racial

[11] As merits counsel discusses, defense counsel improperly and repeatedly stated the Plaintiffs were suing Mr. and Mrs. Evans individually, when in fact all claims were against Evans Fruit, Inc. Intervenors-Plaintiffs Op. Br. at 3-4, 57-58.

references can operate as a priming mechanism and activate implicit biases, including in-group favoritism. Part II.C., *supra*. As the juror studies discussed in Part II.D., *supra*, indicate, jurors treated defendants from racial out-groups less favorably than they did defendants from racial in-groups. *See* Sommers & Ellsworth, *supra*, at 1376 (where race was not salient but race was used as a priming mechanism, white jurors exhibited in-group favoritism); Mitchell et al., *supra*, at 627 (meta-analysis reviewing thirty-four juror verdict studies found in-group bias at verdict and sentencing).

Whether intentional or unintentional, counsel's reference to the Evanses as "rich white people" had the potential to awaken certain biases in favor of the Evanses, distracting the jury from the merits of case. Further, the trial court overruled Plaintiffs' objection to the "rich white people" comment. Nor did the court instruct defense counsel to refrain from using racial language and failed to discuss the dangers of implicit bias with the jurors. The court's failure to address this improper invocation of race left the jury with the tacit message that the racial reference was acceptable.

Defense counsel's invocation of race, and, in particular, counsel's emphasis on the Evanses' whiteness in front of an all-white jury, calls into question the integrity of the verdict. Irrelevant and inflammatory racial comments that offend fundamental fairness and deprive litigants of due process rights cut against all

notions of fairness and justice in our legal system. A racial or ethnic plea, however subtle, should not be countenanced.

CONCLUSION

For the foregoing reasons, we ask that the Court grant the Appellants' request for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,773 words.

Dated: April 7, 2014

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CERTIFICATE OF SERVICE

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I hereby certify that on April 7, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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