No. 20-35582

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN YU,
Plaintiff-Appellant,

v.

IDAHO STATE UNIVERSITY,
Defendant-Appellee

On Appeal from the United States District Court for the District of Idaho
Civil Case No. 4:15-CV-00430-REB
(Honorable Ronald E. Bush)

BRIEF OF *AMICI CURIAE*, THE EQUAL JUSTICE SOCIETY, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, PUBLIC JUSTICE CENTER, BERKELEY CENTER ON COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW, CHINESE FOR AFFIRMATIVE ACTION, LEGAL AID AT WORK, IN SUPPORT OF APPELLANT'S PETITION FOR PANEL REHEARING

Kass Harstad
Erika Birch
STRINDBERG SCHOLNICK BIRCH
HALLAM HARSTAD THORNE
1516 W Hays St
Boise, ID 83702
208-336-1788
kass@utahjobjustice.com
erika@idahojobjustice.com

Rau Mona Tawatao
Christina Alvernaz
EQUAL JUSTICE SOCIETY
1939 Harrison St., Suite 818
Oakland, CA 94612
415-288-8703
mtawatao@equaljusticesociety.org
calvernaz@equaljusticesociety.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Ninth Circuit Rule 26.1, *amicus curiae*, Equal Justice Society, National Employment Lawyers Association, Berkeley Center on Comparative Equality and Anti-Discrimination Law, Public Justice Center, Chinese for Affirmative Action and Legal Aid at Work, hereby state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Amici further state that neither party nor party's counsel authored this brief or contributed money to fund this brief's preparation and submission. No entity other than the undersigned *amici* funded the preparation and submission of this brief.

Date: November 14, 2021

/s/ Kass Harstad
Kass Harstad
STRINDBERG SCHOLNICK BIRCH HALLAM HARSTAD THORNE, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Berkeley Center on Comparative Equality and Anti-Discrimination Law** is a policy and advocacy center at the University of California, Berkeley School of Law. We have over 800 members from six continents. Most are scholars and/or practitioners of anti-discrimination law. The working groups we facilitate, including a group on Global Systemic Racism, are concerned with how equality law takes account of our growing understanding of implicit and unconscious bias on discriminatory decision-making. Because American court decisions have a profound influence internationally, we are particularly concerned that American courts properly recognize that unconscious or implicit bias may be relied upon in proving discrimination.

Chinese for Affirmative Action ("CAA") was founded in 1969 to protect the civil and political rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA continues its advocacy on behalf of the broader Asian American and Pacific Islander community for systemic change that protects immigrant rights, promotes language diversity, and remedies racial and social injustice. CAA's major areas of focus include language rights and combating language and linguistic-based discrimination.

Equal Justice Society ("EJS") is a national civil rights organization whose mission is to transform the nation's consciousness on race through law, social

science, and the arts. EJS combats race and other forms of discrimination in schools, higher education, the criminal justice system and other societal institutions. As an organization dedicated to fostering understanding of and education on implicit bias and its role in anti-discrimination litigation and advocacy, EJS seeks to ensure that implicit bias science and jurisprudence is recognized and properly applied in this case and in all cases in which implicit bias may be at work.

The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country focused on empowering workers' rights plaintiffs' attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA members routinely represent workers who have faced discrimination in the workplace. NELA is interested in establishing the relationship between implicit bias and intentional discrimination, and how implicit bias can be applied within the Title VI and VII proof standards. NELA is concerned that the amended opinion in this case will have be harmful to practitioners and judges, who may find themselves confused as to the true standard for considering and assessing the value of implicit bias evidence in Title VII (and Title VI) cases.

Legal Aid at Work (LAAW) is a national non-profit public interest law firm whose mission is to advocate on behalf of underrepresented low-wage workers,

including on issues having particular significance for undocumented immigrants like language discrimination. LAAW has litigated cases in both Federal and state appellate courts that have addressed similar questions of importance in this developing area of the law, including Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), Salas v. Sierra Chemical Co., 59 Cal.4th 407 (2014), and Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 2017). It has additionally participated as amicus curiae in many cases nationally involving the rights of immigrant workers. In recent years, LAAW has also collaborated extensively with Federal and state policymaking agencies to clarify the nature and scope of the employment protections available to immigrant workers, including through the development of regulations implementing Title VII of the Civil Rights Act of 1964.

The **Public Justice Center ("PJC")** is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of under-represented persons and communities. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients. The PJC's Appellate Advocacy Project seeks to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before state and federal appellate courts. The PJC has an interest in protecting historically marginalized groups from systemic institutional discrimination.

INTRODUCTION

Amici curiae submit this brief in support of the Appellant's Petition for Panel Rehearing. As set forth below, *amici* ask the Court to grant Appellant's Petition for Panel Rehearing, and during rehearing, withdraw the Opinion entered on October 20, 2021 (Dkt #57-1, "*October 20th Opinion*") and replace it with the original Opinion entered on August 31, 2021 (Dkt. #55-1, "*August 31st Opinion*"). Alternatively, *amici* ask the Court to take other steps (outlined below) to minimize the confusion that will likely be caused by the unrebutted concurrence contained in the *October 20th Opinion*.

PROCEDURAL POSTURE

On August 31, 2021, this panel issued an Opinion, holding "that evidence of unconscious bias may be probative of the factual question of intentional discrimination in a Title VI disparate treatment case." *August 31st Opinion, at 15-16*. Although the concurrence joined the Opinion in full, the concurrence wrote separately to opine that expert testimony regarding implicit or unconscious bias "will rarely, if ever, be admissible," and that if objected to, such testimony should never be presented to a jury. *Id. at 21, 26-27*.

On October 20, 2021, the panel withdrew its *August 31st Opinion*, and replaced it with an Amended Opinion. In the superseding *October 20th Opinion*, the panel stated as follows:

> We decline to address whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI because resolution of this issue is not necessary to the disposition of this appeal, and we see no benefit that would be served by commenting on it.

Id. at 16. Despite this language (deeming implicit bias analysis unnecessary and irrelevant), the *October 20th Opinion* retained the concurrence and concomitant guidance that implicit bias expert testimony is rarely admissible and should not be presented to a jury. *Id. at 17, 22*.[1]

SUMMARY OF ARGUMENT

Amici ask the panel to grant Appellant's Petition for Panel Rehearing, and during rehearing, replace the *October 20th Opinion* with the *August 31st Opinion*. In the alternative, *amici* request that the concurrence either be removed from the *October 20th Opinion*, or that majority rebut or respond thereto. Should the Court decline to do so, *amici* urge that the *October 20th Opinion* be de-published, because it no longer meets the criteria for publication.

There are several reasons why rehearing is appropriate here. First, the *October 20th Opinion* is internally inconsistent, and moreover, the specific issue raised by the concurrence – whether implicit bias expert testimony is admissible in a jury trial – was not at issue in the underlying case or the appeal. As such, the parties to the

[1] The concurrence found in the *August 31st Opinion* and the *October 20th Opinion* are almost identical.

litigation and *amici* have not had the opportunity to brief the issue, and the Court has not had the benefit of hearing countervailing arguments.

Second, Supreme Court precedent and several courts in the Ninth Circuit have determined that implicit bias expert testimony may be admissible in intentional discrimination claims. Yet, the concurrence opines that implicit bias expert testimony is generally *inadmissible* and should not be presented to a jury (without a countervailing majority opinion). The concurrence, if left to stand alone, will likely cause confusion and potentially misguide litigants and lower courts regarding the use and admissibility of implicit bias evidence in intentional discrimination cases.

Finally, the Ninth Circuit has clearly held that courts have an obligation to carefully scrutinize all evidence (including evidence regarding subconscious attitudes) to determine whether intentional discrimination has occurred. Yet, the concurrence opines that testimony relating to implicit bias should be inadmissible. This inconsistency – that all evidence (no matter how subtle) should be examined in intentional discrimination claims, but that such evidence is inadmissible – must be cured, and as such, rehearing is appropriate.

ARGUMENT

I. Amici Asks the Panel to Replace the *October 20th Opinion* with the *August 31st Opinion*, or in the Alternative, Remove or Rebut the Concurrence.

A. The *October 20th Opinion* is Internally Inconsistent, and the Parties and *Amici* have not had the Opportunity to Brief the Issue Presented by the Concurrence.

The *October 20th Opinion* should be withdrawn or amended, because it is internally inconsistent as currently written. Specifically, the majority opinion states that the issue of the probative value of implicit bias evidence is irrelevant to the determination of this appeal, and thus, there is "no benefit" to discussing it. *October 20th Opinion, at 16*. The concurrence joins the majority opinion "in full,"[2] and therefore, also presumably joins in this view. Yet, the concurrence dedicates six pages to the proposition that implicit bias evidence is inadmissible and should not be presented to the jury. This results in an opinion lacking structural integrity – either the issue of implicit bias is relevant and germane to the appeal (in which case it should be addressed in the majority opinion), or the issue is irrelevant (in which case is should neither be addressed in the majority opinion nor the concurrence).

Amici also requests that the Court grant Appellant's Petition for Rehearing because the parties and *amici* have not had the opportunity to address the issue raised by the concurrence – whether implicit bias expert testimony is admissible in a jury

[2] *October 20th Opinion, at 17.*

trial. Indeed, the case here was tried to a judge (not a jury), and the trial court admitted the testimony of Appellant's implicit bias expert. However, the court disregarded that testimony, stating that it "makes no sense" that "unconscious bias" could support an intentional discrimination claim. *October 20th Opinion, at 12.*

Because the trial court admitted the expert testimony (but discounted it as nonsensical), the issue briefed and argued by the parties was whether implicit bias may be *probative* of intentional discrimination, not whether it is *admissible* at trial. Therefore, the parties to the litigation and *amici* have not been given the opportunity to brief the issue of whether implicit bias expert testimony is admissible in intentional discrimination jury trials, and the Court has not had the benefit of hearing countervailing arguments on the issue. As such, rehearing is appropriate. *See* Fed. R. App. P. 40(a)(2) (rehearing appropriate if material point of law was overlooked in decision); *United States v. Kent*, 945 F.2d 1441, 1445 (9th Cir. 1991) (court ordered additional briefing at panel rehearing, where issue was not previously addressed by the parties).

B. Supreme Court Precedent and Courts in the Ninth Circuit Have Determined that Implicit Bias Expert Testimony may be Admissible.

In the *October 20th Opinion*, the concurrence states that expert testimony on implicit bias "will rarely, if ever, be admissible," because it supposedly does not "rest on the kind of tested scientific principles that the Supreme Court has demanded." *Id.*

at 17, 19-20. Based thereon, the concurrence concludes that "when the opposing party objects [to implicit bias expert testimony], a court should not permit testimony of this kind to be presented to a jury." *Id. at 22*.

This concurrence, if unrebutted, may cause confusion and potentially misguide litigants and lower courts regarding the use and admissibility of implicit bias evidence in intentional discrimination cases. Indeed, courts in the Ninth Circuit have held that implicit bias expert testimony is admissible in intentional discrimination cases, even over objections similar to those discussed in the concurrence. For example, in *Butler v. Home Depot*, 984 F. Supp. 1257 (N.D. Cal. 1997), plaintiffs in a gender discrimination claim offered the expert testimony of two social psychologists regarding gender stereotyping and bias. *Id*. at 1259. Defendants objected, claiming that their opinions were "not based upon a reliable methodology" and were "unsupported by a body of scientific research." *Id*. at 1262; *see also id*. at 1265. The court disagreed, stating that

> [T]he theories underlying [the experts'] testimony have been tested in the laboratory and in the field. In addition, these theories have been subjected to peer review and have been published in reputable scientific journals. Plaintiffs have furthermore presented evidence that the theories in question have been generally accepted by experts in the field of psychology. In sum, the Court concludes that the scientific basis for [the experts'] expertise is well-established.

Id. at 1263; *see also id*. at 1265. Additionally, when Home Depot contended that the experts' testimony was irrelevant because "the subconscious processes of gender

stereotyping has no bearing on the issue of [intentional discrimination]," the court again disagreed, stating that "the Supreme Court has held that evidence of stereotyped remarks can certainly be evidence that gender played a part in an adverse employment decision." *Id*. at 1264, *citing Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1989).

Similarly, in *Samaha v. Washington State Department of Transportation*, No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012), a plaintiff claiming race discrimination offered the expert testimony of a social psychologist who was going to testify about the general principles of implicit bias. Although defendants claimed that the testimony was unreliable and irrelevant, the court admitted the testimony, stating "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee." *Id*. at *4. Notably, the court was not concerned about the scientific nature of the expert's testimony or its "fit" to the case, stating this his opinions were "based on reliable methodologies and consist of relevant subject matter" and that his testimony would "provide the jury with information that it will be able to use to draw its own conclusions." *Id*. In short, many courts in the Ninth Circuit have admitted implicit bias expert testimony in intentional

discrimination claims (over the opposing party's objections),[3] as have many other courts around the country.[4]

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[3] *Chinn v. Whidbey Public Hosp. Dist.*, No. C20-995 TSZ, 2021 WL 5200171, at *3 (W.D. Wash. Nov. 9, 2021) (intentional discrimination claim) (denying motion to exclude and allowing social psychologist to testify about operation and principles of stereotyping); *Samaha*, 2012 WL 11091843, at *3-4 (E.D. Wash. Jan. 3, 2012) (intentional discrimination claim) (denying motion to exclude and allowing social psychologist to testify about general principles of implicit bias); *Apilado v. North Am. Gay Amateur Athletic All.*, No. C10-0682, 2011 WL 13100729, at *2 (W.D. Wash. July 1, 2011) (intentional discrimination claim) (denying motion to exclude and allowing social psychologist to testify about effects of implicit bias); *Merrill v. M.I.T.C.H. Charter Sch. Tigard*, No. CIV. 10-219-HA, 2011 WL 1457461, at *4-5 (D. Or. Apr. 4, 2011) (intentional discrimination claim) (denying motion to strike and allowing social psychologist to testify, to "provide a context for gender stereotyping applicable to the facts of this case"); *Beck v. Boeing Co.*, No. C00-0301P, 2004 WL 5495670, at *1 (W.D. Wash. May 14, 2004) (intentional discrimination claim) (denying motion to exclude and allowing expert to testify about implicit bias, stating "[s]everal courts have accepted expert testimony on the same or similar theories"); *Butler*, 984 F. Supp. at 1262-1265 (N.D. Cal. 1997) (intentional discrimination and disparate impact claims) (denying motion to exclude and allowing two social psychologists to testify about stereotyping and implicit bias); *Stender v. Lucky Stores, Inc.,* 803 F.Supp. 259, 301-03, 327 (N.D.Cal. 1992) (intentional discrimination and disparate impact claims) (allowing social psychologist to testify about stereotyping, stating "[t]he sociological evidence which [expert] presented to this court is consistent with evidence that has been accepted by other courts").

[4] *See*, *e.g.*, *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 93-95 (S.D.N.Y. 2010) (intentional discrimination and disparate impact claims) (denying motion to strike and allowing social psychologist to testify about stereotyping and bias); *Tuli v. Brigham & Women's Hosp., Inc.*, 592 F. Supp. 2d 208, 214-215 (D. Mass. 2009) (intentional discrimination claim) (denying motion to exclude and allowing social psychologist to testify about stereotyping, stating, "It is an area that the jury may well not have common knowledge"); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 880-83 (D. Minn. 1993) (intentional discrimination and disparate impact claims) (allowing expert to testify about "sexual stereotyping and its relationship to

The U.S. Supreme Court has also indicated that implicit bias expert testimony is admissible in intentional discrimination claims. In *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.D.C. 1987), Ms. Hopkins offered the testimony of Susan Fiske, a social psychologist and an expert in the field of stereotyping. *Id*. at 465. Although defendants objected to the testimony (calling it "sheer speculation" of "no evidentiary value"), the D.C. Circuit found no error in the District Court's decision "to rely on that testimony as evidence of sexual stereotyping at Price Waterhouse." *Id*. at 467. The U.S. Supreme Court affirmed the decision vis-à-vis Dr. Fiske's testimony, stating that it was not inclined to accept defendant's "unsubstantiated

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acts of sexual harassment which occurred at [the workplace]"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-1505 (M.D. Fla. 1991) (intentional discrimination claim) (allowing social psychologist to testify about gender stereotyping, stating that expert's testimony "provided a sound, credible theoretical framework") ; *Hnot v. Willis Grp. Holdings Ltd.*, No. 01 CIV 6558 GEL, 2007 WL 1599154, at *2-4 (S.D.N.Y. June 1, 2007) (intentional discrimination and disparate impact claims) (denying motion to exclude and allowing expert to testify about stereotyping, because "expert testimony grounded in academic study and practical experience not available to the average layperson can be helpful to the jury"); *Hurst v. F.W. Woolworth Co.,* No. 95 Civ. 6584, 1997 WL 685341, at *1-2 (S.D.N.Y. Nov. 3, 1997) (intentional discrimination claim) (denying motion to exclude and allowing expert to testify about "presence and effect of age stereotypes in the workplace"); *Flavel v. Svedala Indus., Inc.,* No. 92-C-1095, 1994 WL 761447, at *1, *4 (E.D.Wis. Oct. 25, 1994) (intentional discrimination claim) (denying motion to strike and allowing expert to testify about "the study of stereotypes in the employment context"). This list is not comprehensive, and tens (if not hundreds) of federal courts across the country have admitted implicit bias expert testimony in intentional discrimination claims, over the objections of the opposing party.

characterization of Dr. Fiske's testimony as 'gossamer evidence' based only on 'intuitive hunches.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-256 (1989).

In sum, for the last three decades, the U.S. Supreme Court and courts within the Ninth Circuit and elsewhere have allowed experts to testify about implicit bias in intentional discrimination claims, frequently over the objections of the opposing party. Indeed, ten years ago, a Ninth Circuit court stated, "[c]onsistent with Daubert's requirements, the Ninth Circuit, among other courts, permits social framework testimony [*i.e.*, implicit bias testimony] to show discrimination." *Apilado v. North. Am. Gay Amateur Athletic All.*, No. C10-0682, 2011 WL 13100729, at *2 (W.D. Wash. July 1, 2011). And as recently as last week, another court held that "[s]ocial framework analysis" by experts "has become commonplace" in both the Ninth Circuit and elsewhere. *Chinn v. Whidbey Public Hosp. Dist.*, No. C20-995 TSZ, 2021 WL 5200171, at *3 (W.D. Wash. Nov. 9, 2021).

Despite this, in the *October 20th Opinion*, the concurrence states that implicit bias expert testimony "will rarely, if ever, be admissible" and that such testimony should never be "presented to a jury." *October 20th Opinion, at 17, 22*. Standing alone, this unrebutted concurrence will cause confusion and potentially misguide litigants and lower courts regarding the use and admissibility of implicit bias evidence in intentional discrimination cases. Rehearing is necessary here to prevent

such confusion. See *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (future litigants and judges "deserve the clearest guidance that the Court can provide").[5]

C. The Concurrence is Contrary to the Ninth Circuit's Guidance to Scrutinize all Relevant Evidence, No Matter how Subtle, to Determine whether Illegal Discrimination Occurred.

The concurrence opines that expert testimony regarding implicit bias is generally inadmissible and should not be presented to a jury. *October 20th Opinion, at 17, 22*. This position – that expert testimony relating to implicit bias is inadmissible – is inconsistent with Ninth Circuit guidance and will be misleading if left to stand alone.

The social science of implicit bias (and how it may contribute to intentional discrimination) is specifically within the province of social psychologists,[6] and evidence relating to it almost always is admitted at trial through an expert.[7] Indeed, lay witnesses generally have little to no knowledge regarding implicit bias or

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[5] The concurrence also opines that implicit bias expert testimony is inadmissible because it supposedly constitutes "expert assessments of credibility that courts routinely exclude." *October 20th Opinion, at 17-19*. However, this misapprehends the nature of implicit bias experts' testimony. Rather than persuading a fact-finder to disbelieve a witness (because the witness is unknowingly biased), most implicit bias experts testify about the theory's general principles or organizational circumstances (such as lack of controls, or using subjective criteria to hire or promote) that allow implicit bias to flourish. *See*, *e.g.*, *Butler*, 984 F.Supp at 1259, 1262; *Samaha*, 2012 WL 11091843, at *1; *Apilado*, 2011 WL 13100729, at *2.

[6] The term "implicit bias" was coined by two social psychologists (Mahzarin Banaji and Anthony Greenwald), who studied and initially developed the theory. *See PNAS Profile of Mahzarin R. Banaji, https://www.pnas.org/content/116/26/12590*.

[7] *See supra, fns. 3, 4*.

stereotyping,[8] and *amici* can envision no circumstances in which implicit bias evidence would come in through a lay witness (or in any way other than through an expert). Thus, stating that *expert* testimony relating to implicit bias should be inadmissible is tantamount to stating that *any* evidence regarding implicit bias should be inadmissible.

The proposition that evidence of implicit bias is inadmissible at trial does not comport with Ninth Circuit precedent. Since the 1980s, the Ninth Circuit has held that implicit and unconscious bias is probative of intentional discrimination, and in issuing these decisions, it has made it clear that the courts in this circuit have an obligation to examine and scrutinize *all relevant evidence* (no matter how subtle) to determine whether illegal discrimination occurred. *See Equal Employment Opportunity Commission v. Inland Marine Industries*, 729 F.2d 1229, 1236 (9th 1984); *Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1343 n. 5 (9th Cir. 1981). For example, in *Lynn*, the Ninth Circuit stated:

> [Certain] concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. **It serves only to make the courts' task of scrutinizing**

[8] *See*, *e.g.*, *Nat'l Ass'n for Advancement of Colored People, Inc. v. City of Myrtle Beach*, 504 F. Supp. 3d 513, 518 (D.S.C. 2020) ("[T]he sociological indicators associated with racial stereotyping and discrimination are not necessarily within the comprehension of laypersons."); *Hnot*, 2007 WL 1599154, at *2-4 (allowing expert to about stereotyping because the information is "not available to the average layperson").

> **attitudes and motivation, in order to determine the true reason for employment decisions, more exacting**.

Lynn, 656 F.2d at 1343, n.5 (emphasis added). And in *Inland Marine*, the Court held:

> In today's world, racial discrimination sometimes wears a benign mask. Current practices, though harmless in appearance, may hide subconscious attitudes, and perpetuate the effects of past discriminatory practices. Although subjective employment criteria are not illegal per se, **courts should examine such criteria very carefully to make certain that they are not vehicles for silent discrimination**.

Inland Marine, 729 F.2d at 1236 (quotations and citations omitted, emphasis added).

In sum, under Supreme Court and Ninth Circuit jurisprudence, courts must carefully scrutinize and examine all evidence (including evidence regarding subconscious attitudes) when analyzing intentional discrimination claims. Yet, the concurrence would have implicit bias evidence generally be inadmissible. The concurrence cannot stand as the sole analysis and treatment of this issue, and as such, rehearing is appropriate.

II. The *October 20th Opinion* Should, at a Minimum, be Depublished.

Pursuant to Ninth Circuit Local Rule 36-2, a decision shall be published and designated as an Opinion if it: "[e]stablishes, alters, modifies or clarifies a rule of federal law," or [i]nvolves a legal or factual issue of unique interest or substantial public importance." Ninth Cir. Loc. R. 36-2.

Here, the *August 31st Opinion* was appropriate for publication, but the *October 20th Opinion* is not. Specifically, the *August 31st Opinion* "*clarif[ied]* that evidence

of unconscious bias may be probative of the factual question of intentional discrimination in a Title VI disparate treatment case." *August 31st Opinion, at 15-16* (emphases added). However, the *October 20th Opinion* does not establish, alter, modify or clarify any such rule of federal law. To the contrary, it "decline[s] to address whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI,"[9] and there is nothing in the remainder of the decision that meets the standard of 36-2.[10]

CONCLUSION

As set forth above, *amici* request that this panel grant Appellant's Petition for Panel Rehearing, and during rehearing, withdraw the *October 20th Opinion* and replace it with the *August 31st Opinion*. In the alternative, *amici* ask that the concurrence be removed from the *October 20th Opinion*, or that the majority opinion include a rebuttal or response thereto. As a final alternative, *amici* ask that the *October 20th Opinion* be de-published.

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[9] *October 20th Opinion, at 16.*

[10] Although unpublished decisions are not supposed to be precedential, they are frequently cited and relied upon by lower courts and litigants. As such, *amici* believe de-publication is an insufficient remedy and offer it as a last resort.

DATED: November 14, 2021

Respectfully submitted,

By: /s/ Kass Harstad
Kass Harstad
Erika Birch
STRINDBERG SCHOLNICK BIRCH HALLAM HARSTAD THORNE, LLC

Rau Mona Tawatao
Christina Alvernaz
EQUAL JUSTICE SOCIETY

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Ninth Circuit Rule 29-2(c) because it contains 4,171 words according to the count of the word processing system used to compose this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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DATED: November 14, 2021

Respectfully submitted,

By: /s/ Kass Harstad
Kass Harstad
Erika Birch
STRINDBERG SCHOLNICK BIRCH HALLAM HARSTAD THORNE

Rau Mona Tawatao
Christina Alvernaz
EQUAL JUSTICE SOCIETY

Attorneys for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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