Appellate Division — Third Department Case No. 532176

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

BYUNG CHOON JOE,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK,

Defendant-Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT BYUNG CHOO JOE

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New York State Court of Claims OAG No. 13-163244-0

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

Byung Choo Joe, Plaintiff-Appellant, v. State of New York, Defendant-Respondent.	**NOTICE OF MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT** Appeal No: 532176 New York State Court of Claims OAG No. 13-163244-0

PLEASE TAKE NOTICE that upon the affirmation of REBECCA ANN CECCHINI, an attorney duly admitted to practice law before the courts of the State of New York dated December 22, 2021, Asian American Bar Association of New York and Korean American Lawyers Association of Greater New York, by and through their attorneys, Allen & Overy LLP, will move this Court, at the Supreme Court, Appellate Division, Third Department, Robert Abrams Building for the Law and Justice, State Street, Albany, New York 12223, on Monday, January 3, 2022 at 10:00AM, or as soon thereafter as counsel may be heard, for an order permitting them to serve and file a brief as *Amici Curiae* in support of Plaintiff-Appellant Byung Choon Joe in the above-captioned case. This motion is filed pursuant to CPLR § 2214 and 22 NYCRR § 1250.4, and relates to the appeal filed by Plaintiff-Appellant Byung Choon Joe.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served at least two days before the return date.

Date: December 22, 2021

Respectfully submitted,

Allen & Overy LLP

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

Byung Choo Joe, Plaintiff-Appellant, v. State of New York, Defendant-Respondent.	**AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT** Appeal No: 532176 New York State Court of Claims OAG No. 13-163244-0

REBECCA ANN CECCHINI, an attorney duly admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, pursuant to CPLR § 2106:

1. I am an associate at the law firm of Allen & Overy LLP, attorneys for Asian American Bar Association of New York ("AABANY") and Korean American Lawyers Association of Greater New York ("KALAGNY") (together, the "Proposed *Amici*"). I have personal knowledge of the facts set forth in this Affirmation, which I make in support of the motion of the Proposed *Amici* for leave to file a brief *Amici Curiae* in support of Plaintiff-Appellant Byung Choo Joe ("Plaintiff-Appellant") in this case.

2. I respectfully submit that the Proposed *Amici* have demonstrated that they have a substantial interest in the issues in this matter, and that they will be of special assistance to the Court. A copy of the proposed brief *Amici Curiae* is attached as **Exhibit A.**

3. Proposed *Amici* are attorney bar associations whose membership includes Asian-American and Korean-American members of the legal community, including judges, practicing attorneys in the private and public sectors, in-house lawyers, paralegals, professors, and law students. Both AABANY and KALAGNY have an interest in this appeal because they seek to ensure that their members benefit from a more equitable and fair legal system.

4. Proposed *Amici* hope to provide the Court with information to assist in its consideration of this appeal, specifically their firsthand, deep knowledge of implicit bias and the effects of such on legal decisions and opinions.

5. Although this case concerns Plaintiff-Appellant's injuries and any damages resulting from his injuries, the detrimental impact of the trial court's findings relating to Plaintiff-Appellant's ethnicity is an issue of great importance to the New York State court system generally, not just this one litigation. Proposed *Amici* present this brief to focus on the role implicit bias plays in the New York State court system and the possible effect implicit bias may have had on the trial court's ruling.

6. The trial court found "Korean born" Plaintiff-Appellant's testimony to be "untrustworthy." The trial court's reference to Plaintiff-Appellant's ethnicity was irrelevant to the facts at issue at the trial.

7. Proposed *Amici* have a substantial interest in the issues before the Court and in the outcome of this appeal and are in a position to provide arguments that will be of special assistance to the Court. Detailed descriptions of Proposed *Amici* appear as Appendix A to the proposed brief *Amici Curiae.*

8. Proposed *Amici* have the consent of Plaintiff-Appellant for the submission of this brief *Amici Curiae.*

9. No party or party's counsel has contributed money intended to fund the preparation and submission of this brief.

10. On September 17, 2021, Proposed *Amicus* KALAGNY previously moved for leave to file an *Amicus Curiae* brief in support of Plaintiff-Appellant. That motion was withdrawn on September 22, 2021.

WHEREFORE, Asian American Bar Association of New York and Korean American Lawyers Association of Greater New York respectfully requests an order granting them leave to file the attached brief *Amici Curiae* in support of Plaintiff-Appellant.

Date: December 22, 2021

Rebecca Ann Cecchini

Rebecca Ann Cecchini

Exhibit A

To Be Submitted

Appellate Division — Third Department Case No. 532176

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

BYUNG CHOON JOE,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK,

Defendant-Respondent.

BRIEF OF ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK AND KOREAN AMERICAN LAWYERS ASSOCIATION OF GREATER NEW YORK AS *AMICI CURIAE*

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New York State Court of Claims OAG No. 13-163244-0

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities **Page(s)**

The Asian American Bar Association of New York (AABANY) and Korean American Lawyers Association of Greater New York (KALAGNY) respectfully submit this brief, as *amici curiae*, in support of Plaintiff-Appellant Byung Choon Joe.

INTERESTS OF AMICI

Amici are attorney bar associations whose membership includes Asian-American and Korean-American members of the legal community, including judges, practicing attorneys in the private and public sectors, in-house lawyers, paralegals, professors, and law students. Both AABANY and KALAGNY have an interest in this appeal because they seek to ensure that their members benefit from a more equitable and fair legal system.

Through their brief, *Amici* seek to raise the important issue of implicit bias in the legal profession and in particular, as implicit bias affects the judiciary. *Amici* submit this brief to bring awareness to the New York State court system that implicit bias may adversely affect judicial outcomes and urge this Court to review the record closely under de novo review to ensure that implicit bias has not led to an unfair result here. *Amici* do not seek to weigh in on the merits of the underlying personal injury litigation; *Amici* are concerned only about the possibility of implicit bias leading to an unjust verdict.

Amicus AABANY's interest in this appeal is rooted in its mission statement. "The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian-Americans in the legal profession." *About AABANY*, The Asian American Bar Association of New York, https://www.aabany.org/page/A1 (last visited Dec. 16, 2021). Plaintiff-Appellant argues that he was the victim of implicit bias at the lower court because he is Asian-American. *See* Brief of Plaintiff-Appellant at 61-64; Reply Brief of Plaintiff-Appellant at 10-11. *Amicus* AABANY has an interest in Plaintiff-Appellant's case because AABANY has an interest in ridding the legal profession of implicit bias and ensuring the fair administration of justice for all, including those from the Asian-American community.

Amicus KALAGNY's interest in this appeal is similarly rooted in its mission. Among other things, KALAGNY seeks to "provide legal support for the Korean American community." *Who We Are*, Korean American Lawyers Association of Greater New York, https://www.kalagny.org/page-1588827 (last visited Dec. 16, 2021). To support these goals, KALAGNY, among other ways, "provides a forum for the expression and exchange of opinions concerning social, political, economic, legal and other issues of concern to [its] members." *Id.* Among those issues, is the interest of ridding the judicial system of implicit bias, including against the Asian-American community.

In its opinion, the trial court specifically noted that Plaintiff-Appellant was "Korean born" and utilized a Korean language interpreter at trial. R. at 1596. In evaluating his testimony, the trial court found that Plaintiff-Appellant's testimony was "unpersuasive and, in great measure, incredible and unworthy of belief[,]" "riddled with exaggerations, inconsistencies and lapses of memory," and in contrast to the medical records and expert testimony. R. at 1601. The trial court found his testimony to be "untrustworthy" which, it found was reinforced by Plaintiff-Appellant's "apparent dishonesty or disingenuousness in representations he made, or in behavior he exhibited[.]" *Id.* The trial court, as the fact finder is, of course, best positioned to challenge a witness's credibility. And *Amici* do not seek to challenge that long-standing tenet of the American judicial system. However, *Amici* urge this Court on de novo review to consider what, if any, role implicit bias may have played in the trial court's analysis. In particular, *Amici* urge this Court to consider why the trial court in its opinion specifically referred to the fact that Plaintiff-Appellant was "Korean born," a fact that was completely irrelevant to the underlying personal injury lawsuit.

Amici hope to provide the Court with information to assist in its consideration of this appeal, specifically their firsthand, deep knowledge of implicit bias and the effects of such on legal decisions and opinions. *Amici* respectfully request that this Court on de novo review evaluate the trial court's

statements and consider whether implicit bias may have negatively affected the trial court's decision in this case.

A description of each *Amicus* is set forth in Appendix A.

ARGUMENT

> *"Judges are not above the reach of the implicit racial and cultural biases that pervade our society, yet equality before the law requires them to be."*[1]

THE COURT SHOULD CONSIDER WHAT, IF ANY, ROLE IMPLICIT BIAS PLAYED IN THE TRIAL COURT'S DECISION

Sadly, it is no secret that litigants across New York State face implicit biases in our courtrooms. In fact, in 2020, Chief Judge Janet DiFiore commissioned Secretary Jeh Charles Johnson, the Special Adviser on Equal Justice in the New York State courts, to conduct a review into racial bias in the New York State court system (the "Johnson Report"). The results of the Johnson Report were grim: "The sad picture that emerge[d] [wa]s, in effect, a second-class system of justice for people of color in New York State." Johnson Report at 3. Secretary Johnson found that "explicit and implicit racial bias has existed throughout the New York State court system[,]" and that while "today's New York State judiciary is more diverse than it was 30 years ago . . . the accounts of explicit and implicit racial bias

[1] Jeh Charles Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts*, New York State Unified Court System, 81 (October 1, 2020), http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf (last visited Dec. 16, 2021) (hereinafter "Johnson Report").

[they] heard as part of this review were strikingly similar to the testimony from decades ago." *Id.* at 27.

The New York State court system faces a difficult challenge ahead in confronting racial bias and ensuring that every court across New York State meets its "solemn obligation" to treat all who appear before it "with equal justice, dignity and respect." Chief Judge Janet DiFiore, *Equal Justice in the New York State Courts: 2020-2021 Year In Review*, New York State Unified Court System, 2 (Nov. 17, 2021), https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf(last visited Dec. 16, 2021) (hereinafter "2021 Equal Justice Report"). But every judge can and should take the first step in his or her own courtroom. *Amici* respectfully urge this Court to take this first step on de novo review[2] and not allow implicit bias to play any role in the review of the evidence in support of Plaintiff-Appellant's claim.

In this brief, *Amici* will discuss the presence of implicit bias in the New York State judiciary and explain how it can manifest to the detriment of litigants like Plaintiff-Appellant. *Amici* will further present strategies that the New York State court system and this Court, in particular, can use to interrupt implicit biases

[2] One legal scholar has opined that de novo review may be one way to reduce implicit bias, particularly "in cases in which particular trial court findings of fact might be tainted by implicit bias." Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1231 (2009).

and level the playing field for all litigants, including Plaintiff-Appellant, across New York State.

A. Implicit Bias is Prevalent in the New York State Judicial System

"Implicit bias refers to the unconscious attitudes or stereotypes that affect our understanding, actions, and decisions. These biases—which can encompass both favorable and unfavorable assessments—manifest involuntarily without an individual's awareness or intentional control." Emma Bienias et. al., *Implicit Bias in the Legal Profession,* Intellectual Property Owners Association, 1, https://ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf (last visited Dec. 16, 2021). These biases can influence subjective judgments and acts of discretion, even for people who may claim to be unbiased or people who may not believe they hold any explicitly prejudiced views based on gender, race, or ethnicity. *See, e.g.* Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, 66 (2017) ("Implicit bias research has been compelling for a range of reasons—perhaps chiefly among them that individual implicit biases often diverge from people's egalitarian self-concepts.") (citations omitted); Rachlinski, *supra* at 1197 ("Researchers have found that most people, even those who embrace nondiscrimination norms, hold implicit biases that might lead them to treat black

Americans in discriminatory ways.") (citation omitted).[3] The result is a conflicted judicial system: on the one hand, our justice system is meant to treat all who come before it equally, but despite its best efforts, implicit bias results in certain litigants experiencing a different judicial system, solely because of a particular aspect of their identity.

The Johnson Report, in its larger effort to confront racial bias in the court system, addressed the question of implicit bias in the judiciary.[4] This was an

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[3] In fact, studies show that "thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases." Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1173 (2012) (hereinafter "Kang, *Implicit Bias*"). Professor Jerry Kang is a leading legal scholar on the issue of implicit bias in the law, and on October 29, 2021, was nominated by President Biden to serve as a Member of the National Council on the Humanities; the White House described Professor Kang as "[a] leading scholar on implicit bias[.]" *See President Biden Announces Key Nominations*, The White House Briefing Room, (Oct. 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/29/president-biden-announces-key-nominations-9/ (last visited Dec. 16, 2021). Professor Kang is the Distinguished Professor of Law, Distinguished Professor of Asian American Studies, and from 2010-2020 was the inaugural Korea Times – Hankook Ilbo Endowed Chair in Korean American Studies and Law at UCLA Law School, and was previously UCLA's Founding Vice Chancellor for Equity, Diversity and Inclusion from 2015-2020. *See Jerry Kang*, UCLA Law, https://law.ucla.edu/faculty/faculty-profiles/jerry-kang (last visited Dec. 16, 2021) (hereinafter "UCLA Law Website"). Professor Kang specializes in the fields of communications, civil rights, and race, but considers himself most known for his work on implicit bias. *See Home*, Jerry Kang, http://jerrykang.net/ (last visited Dec. 16, 2021). "[H]e has focused on the nexus between implicit bias and the law, with the goal of increasing 'behavioral realism' in legal analysis. He regularly collaborates with leading experimental social psychologists on various scholarly, educational, and advocacy projects. He also lectures broadly to lawyers, judges, government agencies, and corporations about implicit bias and how to counter them." UCLA Law Website. Professor Kang's full catalogue of materials relating to his work on implicit bias are available on his website. *See* Jerry Kang, *Getting Up to Speed on Implicit Bias*, Mar. 13, 2011, http://jerrykang.net/2011/03/13/getting-up-to-speed-on-implicit-bias/ (last updated Apr. 14, 2021).

[4] For purposes of this brief, *Amici* focus on the issues of implicit bias raised in the Johnson Report. Secretary Johnson raised other issues of interest to *Amici* and their members. Among

important task because once an individual matter progresses through the justice system, there are numerous moments in which officials, including judges, are asked to "exercise some measure of discretion that may decide the fate of an individual." Jud. Friends Ass'n., Inc., *Report to the New York State Court's Commission on Equal Justice in the Courts*, 23 (Aug. 31, 2020), https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf (last visited Dec. 16, 2021). At these moments, proper exercise of that discretion, as free from bias as possible, is paramount.

Ultimately, Secretary Johnson found that the judiciary is not immune from implicit bias. In frankly noting that "[j]udges are human, too," the Johnson Report found that New York State judges are susceptible to the same social pressures and

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those is the issue of litigants' access to language services, including translation and interpretation services in the New York State courts system. *See* Johnson Report at 76-77. In particular, during Johnson's review "multiple interviewees shared that judges, attorneys and court personnel treat litigants of limited English proficiency poorly. Interviewees said that some judges lack the patience to deal with any confusion or delays arising from mistranslations or the assigning of an interpreter . . . Interviewees asserted that court staff incorrectly assume that an individual's inability to speak English means that the individual is unintelligent." *Id.* at 77. Through their work throughout New York, *Amici* help bring about access to language services. In particular, AABANY recommended to Secretary Johnson that his report include a recommendation that "the Court System should provide more and better language interpreters for attorneys, parties, and jurors that appear before the Court to ensure that all Americans can meaningfully participate in the judicial process." *Asian American Bar Association of New York Calls for Immediate Implementation of Secretary Jeh Johnson's Recommendations for Improving Racial Justice in the New York Court System*, Asian American Bar Association of New York, 2 (Oct. 16, 2020), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2020/pr_101620_aabany_jj_report_f.pdf (last visited Dec. 16, 2021) (hereinafter "AABANY Press Release").

stereotypes as anyone else in society. Johnson Report at 4. In fact during the course of Johnson's investigation, multiple judges that were interviewed "were willing to acknowledge their own implicit biases[.]" *Id*. However, Secretary Johnson also found that because "there is little to no testing of judges' susceptibility to implicit bias nor any analysis of judges' own decisions, . . . 'judges are less likely to appreciate and internalize the risks of implicit bias.'" *Id.* at 81 (citation omitted).

B. Studies Show Judges are Not Immune from Implicit Bias

Legal scholars have studied implicit bias in the judiciary using the Implicit Association Test ("IAT") and have found judges to be as equally susceptible to implicit bias as non-judges. *See*, *e.g.* Rachlinski et. al., *supra* at 1221. The IAT can be thought of "as a sort of 'videogame' requiring fast sorting of stimuli representing two social categories (e.g., White faces versus Black faces) and two sets of words representing, for example, a positive versus negative attitude." Jerry Kang, *What Judges Can Do About Implicit Bias?*, 57 Ct. Rev. 78, 79 (2021) (hereinafter "Kang, *What Judges Can Do*"). The test measures biases by reviewing the differences in the time it takes for individuals to associate classes of people with certain concepts. *See* Jerry Kang, *Implicit Bias: A Primer for Courts*, National Center for State Courts, 3 (Aug. 2009), https://www.ncsc.org/__data/assets/pdf_file/0025/14875/kangibprimer.pdf (last

visited Dec. 16, 2021). This test has shown statistically significant differences in reaction time consistent with local social hierarchies both in the United States and in countries around the world, based on race, gender, age, and more. *Id.*[5]

One study of 133 judges from jurisdictions around the country applied an IAT test regarding bias towards African Americans. *See* Rachlinski et. al., *supra* at 1205-06. The study found "that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases." Rachlinski et. al., *supra* at 1195. In particular, the study found that White judges were more likely to show a bias for White people in the IAT than Black judges. *Id.* at 1210-11. It also found a correlation between results on the IAT test and a likelihood of sentencing Black defendants more harshly than White defendants in the test cases. *Id.* at 1217. A different study of 239 federal and state judges found "the judges harbored strong to moderate negative implicit stereotypes against Asian-Americans and Jews[.]" Levinson, Bennett & Hioki, *supra* at 63. These biases can affect

[5] "It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of 'career' versus 'family'), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements." *Id.*

discretionary decisions, causing different groups of people to receive different outcomes.

One challenge of addressing implicit bias is that judges, like most people, struggle to assess their own implicit bias. *See*, *e.g.* Judge 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, 149–50 (2010) ("At that time, I knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge—one with a lifelong commitment to egalitarian and anti-discrimination values—I was eager to take the test. I knew I would 'pass' with flying colors. I didn't."). In one poll, ninety-seven percent of judges polled self-assessed as being within the top half of least-biased judges. *See* Rachlinski et. al., *supra* at 1225-26. But there are more practical reasons for why judges may have implicit biases. For example, training and information concerning implicit bias is relatively limited for judges, and even when training is available, "many [judges] choose not to attend the implicit bias session." Johnson Report at 72. Further, during Johnson's review, "[s]everal Supreme Court justices pointed out that these sessions for experienced judges are administered in a way that may even discourage attendance[.]" *Id.* Unfortunately, without awareness of one's own

implicit bias, and without proper training, it can be challenging for well-meaning judges to correct for any biases they may hold.

C. Implicit Bias against Asian-Americans Exists in the Judicial System

Empirical studies show that Asian-Americans have experienced both explicit and implicit bias throughout history, and legal scholars have outlined the "various elements of injustice within American law and society, primarily focusing on the Asian-American experience" over time. Levinson, Bennett & Hioki, *supra* at 82-83 (citations omitted). But research shows that Asian-Americans today still continue to face "morality-related stereotypes, such as slyness, financial fraud, and an overall lack of trustworthiness." *Id.* at 84 (citations omitted). Notably, the trial court similarly found Plaintiff-Appellant to be "untrustworthy[.]" R. at 1601.

In a recent study, 239 judges were given an IAT test comparing two defendants of different religions—Jewish or Christian—and two defendants of different ethnicities—Asian or White—and were asked to self-report various stereotypes. *See* Levinson, Bennett & Hioki, *supra* at 97-102. The results of the study confirmed that the judges surveyed "harbored strong to moderate negative implicit biases about groups that are largely viewed not as subordinated but rather as American success stories[,]" including Asian-Americans. *Id.* at 110. After review of the statistical analysis, the authors concluded that "[f]ederal and state judges displayed strong to moderate implicit bias against Asians (relative to

Caucasians) on the stereotypes IAT, such that Asians were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming) and Caucasians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous)." *Id.* at 104 (footnote omitted). The authors also found, among other things, that "[s]tate judges, as compared to all federal judges, were more likely to self-report agreement with negative Asian attitudes and stereotypes, including the statements 'Asians are trying to control America,' 'Asians are taking more than their share of jobs,' and 'Asians are cunning.'" *Id.* at 108 (footnotes omitted).

D. <u>The New York State Court System has Taken Steps to Limit Implicit Bias</u>

The New York State court system has already taken a number of steps to eliminate implicit bias in the State court system, many of which were recommended to Chief Judge DiFiore by Secretary Johnson. Part of Secretary Johnson's mandate was to make "recommendations on 'operational issues that lie within the power of the court system to implement administratively and unilaterally'" instead of recommendations for new legislation. Johnson Report at 79. And Secretary Johnson did just that. For twenty-one pages of his report, Secretary Johnson outlined a series of recommendations geared towards eliminating racial and implicit biases in the New York State court system, including recommendations specifically focused on eliminating any implicit biases of judges. *Id.* at 79-100.

Amici were pleased to review Secretary Johnson's recommendations included in his report: in fact, *Amicus* AABANY had assisted Secretary Johnson with his report and had also made a series of recommendations to Secretary Johnson which he ultimately included in his final report. *See* AABANY Press Release at 1-2. *Amicus* AABANY has publicly "urge[d] the Court's leadership to accept and enact Secretary Johnson's recommendations." *Id.* at 1.

1. *A Commitment from the Top*

Secretary Johnson's first recommendation to Chief Judge DiFiore was to "recommend that OCA leadership embrace a 'zero tolerance' policy for racial bias, along with an expression that the duty to uphold this policy extends to all those working within the New York state court system – from judges, interpreters to court officers." Johnson Report at 80. Chief Judge DiFiore quickly adopted this recommendation, and instituted a "zero tolerance" policy across the State court system. 2021 Equal Justice Report at 5. In announcing the policy, she stated, "As judges and court professionals, we have a solemn obligation to identify and eliminate racial bias from our courts." *Id.* *Amici* respectfully urge this Court to follow Chief Judge DiFiore's example and continue to lead from the top. As judges from the Appellate Division, Third Judicial Department, any steps this Court takes to interrupt implicit bias and embrace a "zero tolerance" policy will serve as an example for the lower courts of New York State.

2. *Implicit Bias Training*

Secretary Johnson recommended that the State court system implement mandatory bias training for all court personnel, including judges, Johnson Report at 81-83, as *Amicus* AABANY had recommended Secretary Johnson do. *See* AABANY Press Release at 2. And scholars, including Professor Kang, have similarly recommended implicit bias training for both sitting judges and new judges. *See, e.g.* Kang, *Implicit Bias*, *supra* at 1176-77; Rachlinski et. al., *supra* at 1228. "Such training must acknowledge that issues of racial and cultural bias are intersectional – addressing that discrimination on the basis of race often overlaps with those relating to class, gender, sexual orientation, immigration status and beyond." Johnson Report at 82 (footnote omitted). It's important that this training "not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias[,]" and "judges should be encouraged to take the IAT or other measures of implicit bias" to aid in their training. Kang, *Implicit Bias*, *supra* at 1176-77. Encouraging judges to take the IAT may be helpful in a few ways. "First, it might help newly elected or appointed judges understand the extent to which they have implicit biases and alert them to the need to correct for those biases on the job. Second, it might enable the system to provide targeted training about bias to new judges." Rachlinski et. al., *supra* at 1228 (citation omitted). In particular, "while education regarding implicit bias as a general matter might be

useful, specific training revealing the vulnerabilities of the judges being trained would be more useful." *Id.* (citation omitted).

Secretary Johnson observed that "[e]nhanced training of judges on the nuances of racial and cultural bias is . . . a crucial step towards alleviating racial injustice throughout the court system." Johnson Report at 81. Secretary Johnson noted that previously, judges were not required to attend implicit bias training and often chose not to, despite the fact that studies show that training judges helps eliminate implicit bias. *Id.* Secretary Johnson also noted that the need for implicit bias training for judges is high since judges are less likely to acknowledge the risks of implicit bias affecting their decisions. *Id.* (citation omitted).

Earlier this year, Chief Judge DiFiore adopted Secretary Johnson's recommendation, now requiring bi-annual anti-bias training for all State court judges; the first training module was scheduled to launch in December 2021. 2021 Equal Justice Report at 15-16. In addition, a curriculum committee was established to develop specific training programs geared towards judges. *Id.* at 15. With the help of experts, these judicial focus trainings will be offered to judges over the summer to give "judges the opportunity to address issues of racial bias and cultural sensitivity among their peers." *Id.* *Amici* urge this Court and its peers to take part in the upcoming anti-bias training.

3. *Data Collection and Counting*

Secretary Johnson also made recommendations to Chief Judge DiFiore relating to data collection. Studies show that "[i]ncreasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias." Kang, *Implicit Bias*, *supra* at 1178. One way to increase accountability is through data collection. *See*, *e.g.* Jerry Kang, *What Judges Can Do*, *supra* at 89 ("If you are accountable to explain and justify publicly your decisions, for example, in a published opinion with precedential value, you will make them more carefully and more accurately. Similarly, if you know that your exercise of discretion, which historically has been invisible, will now suddenly become more visible through individual and institutional counting practices, you will start taking great care."). Unfortunately, Johnson's Report noted that the State court system lacked a transparent data collection system. *See* Johnson Report at 91.

Over the course of the last year, the Division of Technology Office of Court Research has created and released a suite of technologies and dashboards that provides the public with access to court data and allows a user to obtain statistics based on race, age, ethnicity, and gender. *See* 2021 Equal Justice Report at 26-27. These dashboards are sure to bring transparency to the State court system; however, the dashboards are new and developing, and so far the dashboards

released seem most focused on analyzing trends in the criminal justice system, where transparency is greatly needed. Given their focus, these dashboards are unlikely to expose biases in the civil context, which makes correcting these biases very challenging. *See* Kang, *Implicit Bias*, *supra* at 1178-79. *Amici* therefore urge this Court to keep its own personal statistics, on a granular level. "Just as trying to lose or gain weight without a scale is challenging, judges should engage in more qualified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions." *Id.* at 1178. In particular, *Amici* urge this Court to keep its own records, including by recording types of decisions reached, with tallies based on the race and/or ethnicity of the litigants. These records should help this Court to determine whether implicit biases are creeping into this Court's decision-making.

E. Studies Show there are Individualized Steps Judges can take to Eliminate Implicit Bias

While *Amici* applaud the steps that Chief Judge DiFiore and the New York State court system have taken in response to Secretary Johnson's recommendations, there are further steps that individual judges can take to help eliminate implicit bias in the judicial system. *Amici* respectfully urge this Court on appeal to adopt some of these recommendations to (i) help consider whether implicit bias played any role in the trial court's decision and (ii) ensure that implicit bias plays no role in this Court's decision on de novo review.

1. *Deliberate Decision-Making and Cabining Discretion*

Amici respectfully urge this court to adopt the decision-making recommendations of Professor Kang. In his article, *Implicit Bias in the Courtroom,* co-written with Judge Mark Bennett, former U.S. District Court Judge for the Northern District of Iowa, and others, Professor Kang opined that "[i]mplicit biases function automatically." *Id.* at 1177. But, "[o]ne way to counter them is to engage in effortful, deliberative processing" and to avoid quick decisions or "'snap judgments.'" *Id.* (footnote omitted). Professor Kang has suggested that the "spreadsheet model" of decision-making by judges—using checklists and rubrics to limit discretion—can also help limit implicit bias and lead to more accurate and consistent results. Kang, *What Judges Can Do*, *supra* at 85-86.

The type of thoughtful deliberating needed to eliminate implicit bias from decision-making is often hard to achieve, in an over-worked, busy courthouse, including courthouses like the Court of Claims in which Plaintiff-Appellant testified. "[I]t is precisely under such work conditions that judges need to be especially on guard against their biases." Kang, *Implicit Bias*, *supra* at 1177. This Court on appeal, however, has the ability to thoroughly analyze the evidence and carefully consider the role in which implicit bias may have played in the trial court. *Amici* respectfully urges this Court to do so.

2. *Countersteering Instructions, Perspective Taking, and Counterfactual Category Shifting*

Finally, *Amici* urge this court to adopt "countersteering instructions" and engage in "perspective-taking" and "counterfactual category shifting." Professor Kang offers a twenty-four step list of action items that judges can do to eliminate implicit bias from the courthouses. *See* Kang, *What Judges Can Do*, *supra* at 90-91. Among his recommendations, Professor Kang recommends that judges give themselves "specific countersteering instructions" and engage in "perspective-taking" and "counterfactual category switching." *Id.* at 87-88, 91. He notes that while in most cases, race is not at issue in the underlying case, race nevertheless surrounds the litigation. *Id.* at 86. He explains that this leaves judges with a predicament: do you "embrace color-blindness and reason that because race is not directly relevant, you shouldn't think about it" or do you "embrace race-consciousness?" *Id.* at 86. Professor Kang recommends that judges take the race-consciousness approach because "explicitly noticing the potential for bias is the best way to counter it." *Id.* at 86. Professor Kang refers to this race-conscious approach as "countersteering," from the specific, yet seemingly counterintuitive driving school lesson: if when driving in snow you feel your car shifting to the left, turn the wheel to the left. *Id.* at 86. "By rough analogy, if you're worried about noticing race (implicitly), why wouldn't you try extra hard to push it (explicitly) out of your mind?" *Id.* *Amici* urge this Court to explicitly take note of Plaintiff's

ethnicity, and the potential for bias, to ensure that implicit bias plays no role in its decision on de novo review.

Professor Kang also recommends that before judges make any exercise of discretion "against an outgroup member or target of implicit bias," that judges engage in "perspective-taking" or putting themselves in the shoes of the individual and consider whether that change in perspective causes them to change their judgement. *Id.* at 87-88. He and his colleagues have found "that actively contemplating the feelings and experiences of others, especially outgroups, could weaken automatic expression of bias, including implicit bias measured by the IAT." *Id.* at 87 (citation omitted). Professor Kang notes that studies are mixed regarding whether "perspective-taking" works, but some studies have found that "perspective-taking improved implicit measures of bias regarding various social groups" including Asians. *Id.* Similarly, Professor Kang recommends that judges engage in "counterfactual category switching." *Id.* at 88. That is, before making a decision, judges should ask themselves whether they would make that same decision if the litigant was of a different race or social group. *Id.*

Amici respectfully urge this Court to adopt Professor Kang's recommendations. *Amici* urge this Court to remind itself during its de novo review that Plaintiff-Appellant is of Korean descent. By acknowledging this fact, and the potential for bias, the Court can specifically ensure that his ethnicity has no role in

this Court's decision on appeal. *Amici* further urge this Court to put themselves in Plaintiff-Appellant's shoes and to consider whether this Court's decision would be different if Plaintiff-Appellant was not Korean-born.

CONCLUSION

Amici respectfully request that this Court, on de novo review, consider what, if any, role implicit bias played in the trial court's decision, and respectfully urge this Court to adopt the recommendations of implicit bias scholars, particularly Professor Kang, to ensure that implicit bias plays no further role in this litigation.

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Respectfully submitted,

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Appendix A

The Asian American Bar Association of New York (AABANY) was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian-American attorneys, judges, law professors, legal professionals, legal assistants or paralegals and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian-Americans in the legal profession.

The Korean American Lawyers Association of Greater New York (KALAGNY) is a professional membership organization of attorneys and law students engaged with the issues affecting the Korean American community in Greater New York. Incorporated in 1986, KALAGNY seeks to encourage the professional growth of its members as well as provide legal support for the Korean American community. To achieve these goals, KALAGNY provides its members with training and resources useful for professional advancement; expands access to legal services and education in greater New York's Korean American communities; identifies opportunities for its members to serve the communities in which they practice; and provides a forum for the expression and exchange of opinions concerning social, political, economic, legal and other issues of concern to our members. KALAGNY is an affiliate of the National Asian Pacific American Bar Association.