No. 25-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA A. DIEMERT,
Plaintiff-Appellant,
v.
CITY OF SEATTLE, a Municipal Corporation
Defendant-Appellee.

On Appeal from the United States Western District of Washington, Case No. 2:22-cv-01640-JNW, The Honorable Jamal N. Whitehead

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BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT[1]

The undersigned attorney certifies that *amicus curiae* Mountain States Legal Foundation ("MSLF") is a nonprofit corporation, formed and in good standing in the state of Colorado under Section 501(c)(3) of the Internal Revenue Code. MSLF is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

[1] Pursuant to Fed. R. App. P. 29, Appellant has consented to the filing of this *amicus curiae* brief, while Appellee's counsel neither consents nor opposes. Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than Mountain States Legal Foundation, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (MSLF) is a Colorado-based public interest legal foundation. For decades, MSLF has defended individual liberty, the right to own and use property, and equality under the law. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Marvin M. Brandt Revocable Tr. v. U.S.*, 572 U.S. 93 (2014) (MSLF serving as lead counsel); *Bondi v. VanDerStok*, 145 S. Ct. 857 (2025) (MSLF serving as co-counsel).

As counsel in the watershed *Adarand* case, MSLF has a particular interest in ensuring that civil rights protections apply equally to all Americans, regardless of their race. In recent years, MSLF has litigated numerous cases challenging discriminatory practices disguised as "diversity, equity, and inclusion" initiatives. For instance, MSLF serves as counsel for Joshua F. Young in his challenge to discriminatory DEI training imposed by the Colorado Department of Corrections. *See Young v. Colorado Dep't of Corr.*, 94 F.4th 1242 (10th Cir. 2024) ("*Young I*").

Here, the City of Seattle's systematic implementation of race-conscious policies threatens to undermine decades of progress toward a colorblind society. If allowed to stand, the decision below would create a two-tiered system of justice in which some victims of racial discrimination receive less protection based solely on their race. *See contra*, *Ames v. Ohio Dep't of Youth Services*, 145 S. Ct. 1540, 1546 (2025); *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600

U.S. 181, 227 (2023) (*SFFA*) ("For what one dissent denigrates as 'rhetorical flourishes about colorblindness,'… are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law.") (emphasis added). Such an outcome would betray Title VII's promise of equal treatment, and create a dangerous precedent for all American workers.

INTRODUCTION

This case arises from a comprehensive, top-down initiative by the City of Seattle to embed a specific, race-based ideology into every facet of its government. The City's "Race and Social Justice Initiative" (RSJI) is not merely a benign training program; it classifies employees by race, promotes a narrative of collective racial guilt, and creates a workplace where an individual's skin color is their defining characteristic. Joshua Diemert, a dedicated public servant, was forced to endure this racially hostile environment. He was subjected to mandatory trainings that espoused degrading stereotypes, pressured to participate in racially segregated "caucuses," and faced a workplace culture where dissent from the RSJI's orthodoxy was branded as racist. When he could no longer tolerate the discriminatory conditions, he was forced to resign.

SUMMARY OF THE ARGUMENT

The District Court's dismissal of Mr. Diemert's claims should be reversed because the City of Seattle's RSJI is a form of illegal race discrimination. The RSJI

functions as a government-sponsored system of racial classification, facilitating segregated "caucuses," and mandating a "racial equity lens" that requires employees to subordinate one race to another. This state-sponsored ideology creates a hostile work environment *per se*, where official policy subjects employees to severe racial harassment, including even being told that "white people are cannibals." By compelling ideological conformity and punishing dissent, the City also violates the First Amendment. The District Court committed reversible error by usurping the role of the jury, improperly weighing evidence, and trivializing severe, employer-sanctioned harassment. This Court should reject the decision below, which creates a judicial safe harbor for the very discrimination that our laws were enacted to prevent.

ARGUMENT

I. The RSJI's Ideological Framework Creates a Hostile Work Environment Under Title VII.

The RSJI is animated by a corrosive ideology that is irreconcilable with the principles of equality and individual dignity. This ideology, often cloaked in language of "equity" and 'social justice," posits a world of immutable racial hierarchies, collective guilt, and perpetual conflict. Concepts like "white privilege," 'systemic racism," and the mandate to "de-center whiteness" are not academic theories to be debated; in the hands of the City of Seattle, they are articles of faith to be imposed upon a captive workforce. 5-ER-0845.

This worldview is inherently hostile. It teaches employees that their colleagues are not individuals, but avatars of their racial group, laden with the sins or virtues of their ancestors. It instructs Caucasian employees like Mr. Diemert that they are the beneficiaries of, and participants in, an oppressive system, regardless of their individual actions or beliefs. It promotes a narrative of collective guilt that is both psychologically damaging and professionally demeaning. This is not a path to racial harmony in the employment setting; it is a recipe for racial antagonism. When an employer makes such an ideology the official policy of the workplace, it is not fostering diversity; it is fostering division.

The City of Seattle has cultivated a work environment so thoroughly "permeated with discriminatory intimidation, ridicule, and insult" that it is clearly actionable under Title VII as a hostile work environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). This is not a case of isolated incidents or the boorish behavior of a few rogue employees. This is a case where the employer itself has adopted and ruthlessly implemented an official ideology of racial division, where employees are taught vicious negative stereotypes about themselves that they must believe as a condition of their employment. When an employer mandates a creed of racial hostility, it violates Title VII.

Put simply, these are not "mere offensive utterances." *Harris*, 510 U.S. at 21. They are vile, degrading, and factually false statements of racial animus. That they

were delivered by trainers acting with the full authority of the City of Seattle, as opposed to offhand comments by coworkers, makes them all the more severe. "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet . . . by a supervisor." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (Kavanaugh, J., concurring). Here, the City's trainers did not use a single epithet; they unleashed a torrent of them, all aimed at Mr. Diemert and his colleagues based on their race. This alone is sufficient to create a hostile work environment.

Having mischaracterized the nature of the program, the court then proceeded to minimize the severity of the harassment it produced. The court dismissed the trainers' statements that "white people are cannibals" and have "racism is in their DNA" as insufficient to create a hostile environment. 1-ER-0006. It concluded that these comments, along with the rest of the RSJI's ideological barrage, were "too infrequent to surpass the type of 'joking or teasing...held to be part of the ordinary tribulations of the workplace.'" 1-ER-0030.

This is a stark misapplication of the law. The "ordinary tribulations of the workplace" do not include being forced by your employer to attend mandatory sessions where you are told your race makes you "like the devil." The court's attempt to analogize this to 'simple teasing" is not just wrong; it trivializes the profound psychological and professional harm that comes from being subjected to a constant

stream of state-sanctioned racial animus. Imagine the headlines and outrage that would result from an African-American employee being forced to attend training in which they are told they are "like the devil" because of the color of their skin.

The harassment was also pervasive. The RSJI was not a one-day workshop. It was an ongoing initiative that "infuse[d] race into all City functions." 1-ER-0002. The "racial equity lens" was to be applied to every decision, every meeting, every interaction. This created an environment where the hostile ideology was inescapable. The constant drumbeat of racial division and accusation is the very definition of a pervasive, abusive environment.

These were not "stray remarks" from a co-worker; they were official pronouncements from the City's designated trainers, delivered with the full weight and authority of the government. The court's analysis is devoid of any recognition that harassment from a supervisor—or, as here, from the employer itself—is far more severe than harassment from a peer. When the employer is the architect and enforcer of racial harassment, the resulting hostile environment is categorically more severe than peer-to-peer harassment. This distinction is not merely quantitative but qualitative—it transforms the very nature of the workplace into a cage of state-sanctioned discrimination.

The Supreme Court has long recognized that harassment by supervisors carries unique weight in hostile environment analysis. In *Faragher v. City of Boca*

Raton, the Court emphasized that a supervisor's actions are more threatening precisely because of the power differential:

> When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear' ...

524 U.S. 775, 803 (1998) (quoting S. Estrich, SEX AT WORK, 43 STAN. L. REV. 813, 854 (1991)). This principle applies with even greater force when the supervisor is not acting as a rogue agent, but as the faithful implementer of official employer policy.

Here, the City's supervisors did not merely tolerate racial harassment—they were mandated to perpetrate it. Every manager who enforced attendance at RSJI trainings, every supervisor who implemented the "racial equity lens" in performance evaluations, and every administrator who organized racially segregated caucuses, acted with the full authority of municipal government behind them. As *Young I* observed, "race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations

of discriminatory treatment." *Young v. Colorado Dep't of Corr.*, 94 F.4th 1242, 1245 (10th Cir. 2024).

A single racist comment from a co-worker might be dismissed or avoided; the same comment from a supervisor reverberates through every aspect of the employment relationship. In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998), the Supreme Court recognized that actions from supervisors invoke "the official power of the enterprise." Every interaction with that supervisor—every meeting, every assignment, every evaluation—becomes tainted by the discriminatory conduct. *See also Young I*, 94 F.4th at 1252 (courts in Title VII cases must analyze whether "the harassment … constituted official acts of the company").

The RSJI created precisely this type of comprehensively polluted environment. Because the City's managers were required to implement the RSJI's racial framework, Mr. Diemert could not escape to a different department, request a different supervisor, or find refuge in official channels. The harassment was not merely pervasive; it was architecturally embedded into the City's operational structure. When Diemert's supervisor subjected him to racial abuse, it was not an aberration, but the predictable consequence of a system that trained supervisors to view Caucasian employees as inherent oppressors deserving of confrontation.

The City's sham investigations into Mr. Diemert's discrimination complaints provide further, independent evidence of the hostile environment's severity and

pervasiveness. When Mr. Diemert filed formal complaints about the RSJI's discriminatory content and implementation, the City assigned investigators with blatant conflicts of interest. Kuykendall, tasked with investigating complaints about RSJI trainings, had previously worked at the very Office of Civil Rights that designed and delivered those trainings. This is akin to asking an arsonist to investigate their own fire. Mr. Diemert recognized this predetermined outcome, noting he "did not give the City much" because he correctly "perceived the investigators to be biased." 1-ER-0013.

As the Second Circuit recently recognized, an employer's failure to genuinely investigate racial harassment complaints constitutes an independent basis for liability. *Riggins v. Town of Berlin*, 2024 WL 2972896, *3 (2d Cir. 2024). Here, the City did worse than turn a blind eye—it assigned the investigations to exonerate its own discriminatory program by staffing the very people engaged in the program. By dismissing Mr. Diemert's concerns without meaningful inquiry, the City demonstrated that the RSJI's racial ideology had captured not just the workplace but the very mechanisms meant to protect employees from discrimination. This alone constitutes a basis for liability. *See Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) ("[U]nder federal law, an employer's failure to investigate may allow a jury to impose liability on the employer.").

II. Scientific Research Indicates Explains How DEI Training Itself Creates Hostile Work Environments.

It should be unsurprising that a directive to make race the paramount consideration in all workplace functions created a hostile work environment. It is an explicit instruction to subordinate the functioning of an employer's day-to-day successes with racial ideology. In the process, the interests, perspectives, and contributions of Caucasian employees are diminished *because of their race*, while other employees are elevated *because they are not Caucasian*.

Such DEI-driven frameworks inevitably create victim-and-oppressor narratives that are themselves a form of racial hostility and scapegoating. The RSJI's ideological architecture rests on a foundation of fixed racial hierarchies that assign moral worth and culpability based solely on immutable characteristics. Under this framework, individuals are not judged by their actions, character, or contributions, but are instead locked into predetermined roles as either oppressors or victims based exclusively on their race. This represents a fundamental rejection of the individualized assessment that lies at the heart of equality. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 662 (2020) ("[T]he law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII.").

The City's program employs a particularly insidious form of psychological manipulation. Caucasian employees are subjected to a catch-22: they must either

accept their assigned role as beneficiaries and perpetuators of "systemic racism," or their refusal to accept this characterization is itself treated as evidence of their racism—labeled as "white fragility" or "white defensiveness." This creates an intellectual closed loop where dissent from the program's racial orthodoxy becomes proof of the very pathology that the program purports to address. No escape exists from this circular logic; the only acceptable response, assuming an employee wants to stay employed, is submission to the City's racial ideology. *Cf. SFFA*, 600 U.S. at 277 (Thomas, J., concurring) ("Racialism simply cannot be undone by different or more racialism."); *id.* at 276 ("[T]hese policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis.").

Recent empirical research from the Network Contagion Research Institute (NCRI) and Rutgers University's Social Perception Lab demonstrates the profound psychological and organizational harm caused by such race-conscious training programs. In a groundbreaking 2024 study titled "Instructing Animosity: How DEI Pedagogy Produces the Hostile Attribution Bias," researchers examined the effects of anti-oppressive DEI materials on over 3,400 participants across multiple controlled experiments. *See* Jagdeep, A., *et al*., *Instructing Animosity: How DEI*

Pedagogy Produces the Hostile Attribution Bias, Network Contagion Research Institute & Rutgers University Social Perception Lab (2024).[2]

The findings are damning. When exposed to materials from prominent DEI scholars Ibram X. Kendi and Robin DiAngelo—whose works form the intellectual foundation for programs like Seattle's RSJI—participants developed what researchers termed a "hostile attribution bias." *Id.* at 5. Specifically, after reading excerpts containing themes identical to those promoted by the RSJI (including that "white people raised in Western society are conditioned into a white supremacist worldview" and that "racism is the norm"), participants perceived discrimination where none existed. *Id.* at 3-4.

In the controlled experiment, participants were presented with a racially neutral scenario involving a college admissions rejection that contained no racial identifiers or evidence of bias. Those exposed to the anti-racist rhetoric perceived the admissions officer as 21% more prejudiced, believed the officer was 12% more unfair, perceived 26% more harm to the applicant, and identified 35% more microaggressions—despite the complete absence of any racial content in the scenario. *Id.* at 6. These results replicated across multiple samples, including both university students and a nationally representative sample. *Id.*

[2] Available at https://networkcontagion.us/wp-content/uploads/Instructing-Animosity_11.13.24.pdf (last accessed Jul. 23, 2025).

More troubling still, the NCRI research revealed that exposure to such materials not only distorted perceptions, but actively increased punitive impulses. Participants who read the Kendi/DiAngelo materials were 16% more willing to demand a public apology from the admissions officer, 12% more willing to support suspending the officer, and 12% more likely to require the officer to undergo additional DEI training—all based on imagined discrimination that objectively did not exist. *Id.* at 7. This creates a vicious cycle: DEI training produces false perceptions of bias, which generates demand for more DEI training, which further amplifies the hostile attribution bias.

The study's examination of workplace-specific outcomes is particularly relevant here. The researchers found that anti-oppressive DEI narratives fundamentally altered how participants interpreted neutral workplace interactions. The materials "engendered a hostile attribution bias[], amplifying perceptions of prejudicial hostility where none was present." *Id.* at 2. This finding directly parallels Mr. Diemert's experience—forced to view every workplace interaction through a "racial equity lens," he operated in an environment where neutral professional exchanges became fraught with racial suspicion and potential accusations of bias.

The psychological mechanisms underlying these effects are well-documented. The NCRI study found that DEI materials emphasizing concepts like "systemic oppression" and racial guilt created measurable increases in intergroup anxiety and

decreased psychological safety. *Id.* at 2. The researchers specifically noted that "anti-oppressive pedagogy" lacks rigorous evaluation despite widespread adoption across sectors, and their findings suggest such programs "may create hostile attribution biases that negatively distort perceptions of interpersonal interactions and promote rather than ameliorate intergroup hostilities." *Id.* at 12.

Perhaps most disturbing are the study's findings regarding authoritarian tendencies. Participants exposed to anti-oppressive DEI content showed significant correlations with left-wing authoritarianism (LWA), including increased willingness to punish perceived transgressors and support for coercive control measures. *Id.* at 13-14. The researchers found a statistically significant correlation between authoritarian traits and punitive responses to imagined discrimination. *Id.* at 14. This suggests that programs like the RSJI not only fail to promote tolerance, but actively cultivate intolerance and authoritarian impulses.

The City's mandate to view all workplace interactions through a "racial equity lens" thus operates as a mechanism for producing the very racial hostility it purports to address. When employees are trained to see racism as omnipresent and to interpret neutral interactions as potentially discriminatory, they develop what the NCRI researchers identified as a self-reinforcing cycle: the training creates false perceptions of bias, which generate demand for more training, which further amplifies hostility and suspicion. *Id.* at 15.

The RSJI's requirement that employees "de-center whiteness" while "centering People of Color" establishes an explicit racial hierarchy within the workplace. This is not subtle or metaphorical; it is a direct command to subordinate the perspectives, contributions, and interests of one racial group to those of others. Such explicit racial subordination violates the most fundamental premise of Title VII: that employers must treat individuals as individuals, not as mere representatives of racial categories.

Moreover, the program's emphasis on collective racial guilt represents a return to the discredited notion of blood guilt—the idea that individuals bear responsibility for actions taken by others who share their immutable characteristics. The NCRI study documented how exposure to such narratives led participants to endorse overtly discriminatory statements at alarming rates, with significant increases in agreement with demonizing rhetoric when applied to perceived "oppressor" groups. *Id.* at 14. This concept has been consistently rejected throughout American jurisprudence as incompatible with individual dignity. The civil rights violation is compounded by the program's coercive nature and its documented psychological harm. As the NCRI research demonstrates, mandatory participation in such programs does not merely expose employees to offensive ideas—it fundamentally alters their perception of reality, creating a hostile attribution bias that poisons

workplace relationships and undermines the very goals of inclusion and mutual respect that antidiscrimination law seeks to promote

III. The Federal Government's Civil Rights Enforcement Agencies Recognize that Programs Like the RSJI Are Unlawful and Create Hostile Environments.

This Court need not analyze the City of Seattle's program in a vacuum. The federal government's expert civil rights enforcement agencies have already considered programs like the RSJI, and have concluded that they are not only illegal, but are themselves a source of prohibited workplace misconduct. While not binding, the interpretations of these agencies—reflecting a deep "body of experience and informed judgment"—are entitled to substantial persuasive weight. *See Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 388 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The consistent, cross-agency consensus on this issue is powerful evidence that the RSJI falls far outside the bounds of lawful employment practices.

First and foremost, the Equal Employment Opportunity Commission ("EEOC"), the agency responsible for interpreting and enforcing Title VII, has issued clear warnings about the illegality of programs like the RSJI. The EEOC cautions that DEI initiatives violate federal law when they "take an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic." U.S. Equal Emp. Opportunity Comm'n, *What*

You Should Know About DEI-Related Discrimination at Work (Mar. 19, 2025).[3] The Commission has explicitly recognized that, "depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context." *Id.*

The RSJI is a textbook example of what the EEOC has warned against. It is not a program that merely encourages "diversity"; it is a program that is discriminatory *in its content and application*. The RSJI's mandatory racial caucuses, its directive to "de-center whiteness," and its use of degrading racial stereotypes are precisely the types of practices that the EEOC has identified as creating an unlawful, hostile environment. The City cannot launder its discriminatory conduct by labeling it an "equity" initiative. The EEOC's expert judgment confirms that when a program requires employees to be sorted, stereotyped, and treated differently based on race, it is not promoting equity; it is perpetrating harassment.

The Department of Education's Office for Civil Rights ("OCR") has likewise found that it is unlawful for schools to segregate students or staff into "affinity groups based on race" or to employ pedagogical practices that "perpetuate the idea that students may be categorized by race" and assigned characteristics based on that

[3] https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work

race. *See* U.S. Dep't of Educ., Off. for Civ. Rts., *Annual Report to the Secretary, President, and the Congress*, at 46 (2021).[4] If facilitating segregated caucuses and the promotion of racial stereotypes are unlawful in a school, they are certainly unlawful in a municipal workplace. The standard for proving a hostile environment under Title VII is *lower* than the standard under Title VI. *See Seymore v. Tulsa Tech. Ctr.*, 2024 WL 3342452, at *4 (10th Cir. 2024) ("To allege a plausible claim of a racially hostile environment under Title VI, the plaintiff must allege…that she was subjected to harassment based on her race and that the harassment was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational benefits or opportunities provided by the school.") (emphasis added). And as the Supreme Court has affirmed, both statutes "codify a categorical rule of individual equality, without regard to race." *SFFA,* 600 U.S. at 290 (2023) (Gorsuch, J., concurring).

The unified position of the EEOC and the Department of Education's OCR demonstrates a clear executive branch consensus: government-sponsored programs that classify individuals by race, promote racial stereotypes, and require differential treatment are illegal. This Court should afford that consistent, well-reasoned, and expert judgment significant persuasive weight. The agencies charged with enforcing

[4] https://www.ed.gov/sites/ed/files/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf

our nation's civil rights laws have spoken, and their message is clear: the City of Seattle's RSJI is not a permissible path to equity, but an unlawful exercise in discrimination.

IV. Seattle's Race and Social Justice Initiative Also Violates the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment commands that the government must treat citizens as individuals, not as mere components of a racial class. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995); *Young I*, 94 F.4th at 1255 ("When a state agency treats employees on the basis of race, it engages in the offensive and demeaning assumption that employees of a particular race, because of their race, think alike.") (citing *Miller*) (cleaned up). The City of Seattle has explicitly forsaken this command.

Through its "Race and Social Justice Initiative," Seattle has erected a sprawling bureaucratic apparatus dedicated to the sorting, classifying, and differential treatment of its employees based on race. This is not a subtle or incidental feature of the RSJI; it is its central organizing principle. This program is precisely the kind of "odious" and "pernicious" racial classification that the Constitution forbids. *See SFFA*, 600 U.S. at ; *Young I*, 94 F.4th at 1255 ("So state-sanctioned training programs that import racial assumptions or promote race-based differential treatment may very well offend the Equal Protection Clause.")

The City of Seattle does not even attempt to conceal the race-based nature of its program. The RSJI is, by the City's own admission, a "citywide effort to end institutionalized racism and race-based disparities" by "lead[ing] with race." 1-ER-0004. This is not an abstract goal; it is an operational mandate that manifests in concrete, discriminatory practices that permeate every corner of the City's government.

First, the City facilitates racially segregated "affinity groups" or "caucuses" as a key component of the RSJI. 1-ER-0042. While the City claims these groups are "open to any City employee," their very names and purposes—such as the "monthly white caucus meeting"—are explicitly racial. 1-ER-0007. These are not mere social clubs; they are instruments of state policy, tasked with "forwarding the City of Seattle's [RSJI] efforts to eliminate racial disparities and achieve racial equity." 1-ER-0006. This is state-sponsored segregation, sanitized with the language of inclusivity. *Cf. SFFA*, 600 U.S. at 229-30 ("Separate but equal is "*inherently* unequal," said *Brown,* 347 U.S. at 495. It depends, says the dissent. That is a remarkable view of the judicial role—remarkably wrong.") (original emphasis) (cleaned up). The government cannot escape liability by outsourcing its racial sorting to nominally voluntary groups that exist for the sole purpose of implementing an official, race-based government policy.

And obviously, the City's stated goal of achieving "racial equity" could never survive strict scrutiny. In *SFFA*, the Supreme Court unequivocally rejected the notion that interests like "training future leaders," "promoting a robust marketplace of ideas," or even remedying broad "societal discrimination" could justify the use of race. 600 U.S. at 214-16. The City of Seattle's goal of "racial equity"—an amorphous concept that requires ongoing racial balancing and differential treatment—is even more constitutionally infirm. It is a direct repudiation of the principle of equal opportunity that undergirds the Equal Protection Clause.

V. The RSJI Violated the First Amendment by Imposing a Speech and Belief Code on Public Employees Like Diemert.

As the Tenth Circuit noted in *Young I*, DEI Training is actionable under the First Amendment when it forces employees to "either endorse a particular race-based ideological platform or risk losing their jobs." *Young*, 94 F.4th at 1251 n.2. Here, Mr. Diemert's factual circumstances match that legal framework.

Specifically, the RSJI framework is a closed intellectual loop. Disagreement with its tenets is not treated as a difference of opinion, but as a symptom of a moral failing—"white fragility" or latent racism. 1-ER-0026. Employees are forced to choose between their conscience and their career. They can either mouth the platitudes of the state-approved ideology, or they can remain silent, and risk being branded as heretics. But an environment where an employee cannot voice legitimate

concerns about being racially demeaned without being further pathologized is inherently abusive is Kafkaesque.

As this Court knows, the government cannot require employees to affirm ideological positions as a condition of keeping their jobs. *See Janus v. AFSCME*, 585 U.S. 878, 891-93 (2018). Yet that is precisely what Seattle demands through the RSJI—employees must not merely attend training, but actively implement its race-based ideology in every professional interaction.

Employees are forced to participate in exercises like "privilege bingo" and to "rank themselves on a defined 'continuum of racism.'" 1-ER-0006. These are not tools of education; they are instruments of indoctrination designed to force employees to internalize and affirm a state-approved racial hierarchy. They are coercive exercises in public confession, demanding that individuals accept a pre-ordained racial identity and an assigned level of guilt or victimhood. The City's program is a textbook example of a government entity making race "the touchstone of an individual's identity." *SFFA*, 600 U.S. at 231.

This compelled orthodoxy operates through a particularly insidious mechanism that resonates far beyond this case. Employees who question the RSJI's racial framework are labeled as exhibiting "white fragility" or "white defensiveness"—supposed psychological pathologies that themselves prove the need for more indoctrination. *See* 1-ER-0026; *see also Young*, 94 F.4th 1242 (10th

Cir. 2024). This creates what the Supreme Court of the United States condemned as "involuntary affirmation" "of a belief and an attitude of mind." *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 633 (1943).

Mr. Diemert faced an impossible choice: affirm the City's racial ideology and violate his conscience, or maintain his beliefs and risk his career. The First Amendment forbids the government from forcing such a "Hobson's choice" upon its employees. When the government conditions employment on ideological conformity, it strikes at the heart of "freedom of thought" and belief that the First Amendment exists to protect. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

VI. The District Court Erred by Usurping the Role of the Jury and Weighing Disputed Facts.

At the summary judgment stage, the District Court's role is not to weigh the evidence or make credibility determinations, but merely to determine whether a genuine dispute exists for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The District Court therefore erred by repeatedly stepping into the role of the factfinder. For instance, it improperly weighed the evidence surrounding a confrontation between Mr. Diemert and his supervisor, Shamsu Said. The District Court compared Mr. Diemert's declaration, which described being racially berated, with a contemporaneously drafted e-mail that did not contain all the same details. *Diemert v. City of Seattle*, 776 F.Supp.3d 922, 944 (W.D. Wash. 2025). Concluding that "[n]o juror could overlook the inconsistencies," and that his declaration was

therefore insufficient to "create a question of fact," the District Court engaged in a textbook credibility determination. *Id*. at 945. It is the jury's exclusive province to decide whether to believe Mr. Diemert's sworn testimony, the e-mail, or both, and to determine the significance of any inconsistencies. By resolving this factual dispute itself, the court usurped the jury's function.

Second, the court improperly judged the objective reasonableness of Mr. Diemert's experience. The court dismissed Mr. Diemert's reaction to the RSJI's teachings by concluding his perspective was not that of a "reasonable person." *Id*. at 948. But the objective test for a hostile work environment—whether a "reasonable person" would find the environment abusive—is the quintessential jury question. *See Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 687 (9th Cir. 2017). A jury, as the embodiment of the "reasonable person," is uniquely positioned to determine whether being forced to attend trainings where one's race is labeled "cannibals" and "like the devil" creates an objectively hostile environment.

Third, the court erred by substituting its own judgment for the jury's on whether the harassment was "severe or pervasive." The court analyzed the incidents as a series of disconnected, "isolated" events, and "mere offensive utterances," rather than as the cumulative result of a single, top-down, system-wide discriminatory policy. *Diemert*, 776 F.Supp.3d. at 938. This error is especially damaging in a case like this. When the employer itself is the source of the hostile ideology, individual

incidents of harassment are not random; they are the predictable consequence of official policy.

The pervasiveness comes from the inescapable nature of the policy itself, which infused race into every aspect of the workplace. A jury must be allowed to consider the totality of these circumstances—from mandatory trainings to racially segregated caucuses, to daily interactions colored by the RSJI's racial lens—to determine the full impact of the City's policy on Mr. Diemert's work environment. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) ("[D]iscrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses.").

Finally, the court's approach is in deep tension with the Supreme Court's recent decision in *Ames*, where the Court unanimously held that Title VII's protections apply with equal force to all individuals, regardless of their membership in a majority or minority group. 145 S. Ct. at 1546. The District Court's statement that DEI programs "are not by their very nature discriminatory against whites," and its observation that "instances of discrimination against the *majority* are rare and unusual," suggest it implicitly applied a heightened standard for a Caucasian plaintiff that *Ames* forbids. *Diemert*, 776 F.Supp.3d at 930 (emphasis in original); *SFFA*, 600 U.S. at 229 ("Most troubling of all is what the dissent defends by making these omissions: a judiciary that picks winners and losers based on the color of their

skin."); *Ames*, 145 S. Ct. at 1551 n.3 ("[A] number of this Nation's largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups.").

The District Court's errors in making credibility determinations, judging objective reasonableness, analyzing the evidence in isolation, and applying a heightened standard to a Caucasian plaintiff are all gravely compounded when measured against Rule 56's fundamental requirement that courts draw all justifiable inferences in favor of the nonmoving party. Under Federal Rule of Civil Procedure 56, a court must view the evidence "such that a reasonable jury could return a verdict for the nonmoving party" resolving all ambiguities in their favor. *Anderson*, 477 U.S. at 248.

The District Court began its analysis from a flawed premise: that "D.E.I. programs aimed at addressing racial inequalities against Black people and other minorities are not by their very nature discriminatory against whites." 1-ER-0003. This broad, abstract pronouncement misses the point entirely. The question before the court was not whether all DEI programs are unconstitutional, but whether *this specific program*, the City of Seattle's RSJI, is. The court never grappled with the actual mechanics of the RSJI. It ignored the mandatory racial caucuses, the directive to "de-center whiteness," and the forced participation in "privilege bingo." It treated the RSJI as a generic "anti-discrimination" training, when the record demonstrates

it is clearly a program of *pro*-discrimination, elevating certain races over others. *Accord B.W. v. Austin Indep. Sch. Dist.*, 121 F.4th 1066, at 1082 (5th Cir. 2024) (Mem.) (Ho, J., dissenting from denial of en banc review) ("It's racist to characterize whites as racist. Because it's racist to attach any negative trait to a group of people based on their race. And it's no less racist just because the victimized racial group is white.").

Most egregiously, when confronted with fundamentally conflicting characterizations of the RSJI program itself, the court wholesale adopted the City's benign description, while dismissing Mr. Diemert's extensive contrary evidence. The City claimed that the RSJI was an "anti-discrimination" initiative; Mr. Diemert presented evidence that it operated as a vehicle for racial discrimination. This is not a dispute that the court could properly resolve on summary judgment. By choosing between these competing narratives—and consistently choosing the City's version—the court violated the cardinal rule that factual disputes must be resolved by juries, not judges.

CONCLUSION

The City of Seattle's RSJI is built on the pernicious foundation of racial classification, collective guilt, and ideological compulsion. It is, in short, state-sponsored discrimination. The lower court's failure to see the RSJI for what it is represents a grave error that threatens to normalize the very tribalism and racial

antagonism that our laws are meant to extinguish. For the foregoing reasons, this Court should reverse the District Court's grant of summary judgment and remand the case for trial.

DATED this 25th day of July 2025.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that that on the 25th day of July, 2025, the foregoing Amicus Curiae Brief in Support of Plaintiff-Appellant was served on counsel for Appellee by electronically filing the same with the United States Court of Appeals for the Ninth Circuit via their CM/ECF portal.

/s/ William E. Trachman
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MOUNTAIN STATES
LEGAL FOUNDATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): 25-1188

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