Date: July 25, 2025

No. 25-1188

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joshua A. Diemert,
Plaintiff-Appellant,

v.

City of Seattle,
Defendant-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Civil Action No. 2:22-cv-01640-JNW
Hon. Jamal N. Whitehead

BRIEF OF *AMICUS CURIAE* THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF APPELLANT AND REVERSAL

Michael A. Petrino
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave NW
Suite 625
Washington, DC 20036
(202) 833-8400
petrino@cir-usa.org

Kevin Garvey
Anthony A. Pericolo
STEPTOE LLP
1330 Connecticut Ave NW
Washington, DC 20036
(202) 429-3000
kgarvey@steptoe.com
apericolo@steptoe.com

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Center for Individual Rights is a non-profit organization. It is not a publicly held corporation, has no parent corporation, and does not issue stock.

Dated: July 25, 2025

/s/ Kevin Garvey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights (CIR) is a nonprofit, public interest-law firm dedicated to defending individual rights essential to a free and flourishing society. It has a particular interest in, and has brought numerous cases concerning, unlawful and unconstitutional racial classifications by the government. CIR represented students injured by racial discrimination in higher education admissions in *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004).

More recently, CIR successfully challenged the racial and ethnic presumptions in the Small Business Administration's Section 8(a) program, which awards government contracts on a preferential basis to firms owned and operated by "socially disadvantaged" individuals by presuming members of certain races and ethnicities are "socially disadvantaged." *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023).

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Reflecting a highly controversial academic "anti-racism" theory, the City of Seattle's official Race and Social Justice Initiative ("RSJI") teaches that "[a]ll white people are racist," that "people of color cannot be racists," and therefore that "it is impossible to be racist to a white person." Dkt. 68-16 at 3; Dkt. 68-8 at 4; Dkt. 68-6 at 17; Dkt. 68-33 at 4. The City incorporated these principles into City-directed trainings to "lead with race" and "de-center whiteness" and empowered Seattle's managers to implement and enforce RSJI's discriminatory premise. The results were predictable. The policies advanced by the RJSI led to workplace discrimination against Plaintiff Joshua Diemert, a White male city employee.

The extraordinary facts about Seattle's RSJI trainings, the way in which Seattle employees conducted them, and the RSJI's effect on Mr. Diemert are more than enough to create triable issues of fact regarding a racially hostile work environment and workplace discrimination under Title VII and the Equal Protection Clause. As but one example, Mr. Diemert's colleagues denied benefits to eligible White homeless applicants because of their "White privilege," but when Mr. Diemert objected

to this practice, his manager reprimanded *him* as being racist and noted on his official performance evaluations to complete RSJI training. City employees were scornful of Mr. Diemert's civil rights protections under federal law and viewed them as tools of white supremacy and impediments to the RSJI.

The District Court nonetheless disposed of Mr. Diemert's case on summary judgment, incorrectly framing this case as a challenge to *all* Diversity, Equity, and Inclusion (DEI) training. Even more concerning, the District Court's reasoning makes it difficult for future litigants, who are victims of the same extraordinary conduct taught and officially encouraged by employer-sponsored anti-racism training, to vindicate their civil rights.

This appeal presents an important opportunity to clarify the law on DEI policies while holding that Seattle's RSJI goes too far. DEI policies and race-conscious workplace training are recent developments in the workplace that present novel legal issues. Originally, employers used workplace sensitivity trainings to teach employees communication skills and strategies for creating a respectful and inclusive environment. Over time, employers felt workplace sensitivity trainings did not go far

enough. Employers restructured such trainings into "anti-racist" DEI trainings that employ race conscious measures, including but not limiting to, hosting racially segregated trainings and casting blame on Whites for not doing enough to stop racism. The race conscious nature of DEI programming seeks, but often fails, to strike a balance between legally permissible discourse on race and illegal racial stereotyping and segregation. Their legality under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause remains subject to evolving interpretation and enforcement.[2] But extreme programs, like the ones employed by the City here, go well beyond permissible race sensitivity training and instead encourage unlawful discrimination.

All employers are likely to claim that their anti-racist DEI programs are properly structured. To avoid liability for unlawful stereotyping, those employers argue that they are educating their employees and that their methods are supported by academia. To escape liability for

[2] *See, e.g.*, *What You Should Know About DEI-Related Discrimination at Work*, EEOC, bit.ly/44JLDrh (last visited July 25, 2025) ("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.")

racially segregated trainings, employers insist that their programming is "optional," "open to all," or racially separated with good intent.

Here, Seattle argues all of these things. But the record presents a troubling account of RSJI training material teaching City employees that White people cannot be victims of racism, while arming them with tools that actively promote such discrimination. In this case, City employees used the RSJI's teachings to harass Mr. Diemert and other White employees in the workplace *because of their race*—precisely what federal law prohibits. Simply put, the District Court wrongly disposed of Mr. Diemert's Title VII and Equal Protection claims. And if the District Court's reasoning stands on appeal, employees will have no recourse against illegal training programs like the RSJI.

SUMMARY OF THE ARGUMENT

CIR submits this brief of *amicus curiae* to emphasize three corresponding reasons for this Court to reverse the District Court's grant of summary judgment in favor of the City. Reversal is necessary to ensure that Mr. Diemert—and future litigants—can vindicate their rights to be free from unlawful race-conscious government conduct under Title VII and the Equal Protection Clause.

First, the District Court should have assessed Mr. Diemert's hostile work environment claim by considering the discriminatory content of the City-mandated anti-racism training together with the acts of discrimination at issue, as the totality of the circumstances test requires. The City-mandated workplace-wide training disseminated, as a City-endorsed policy, precisely the kinds of racial stereotypes that, when pervasive, as they were here, create a hostile work environment under Title VII. Indeed, the discriminatory conduct at issue mirrors the discrimination in the training materials. If District Courts do not look at the totality of the circumstances, then employers will be able to shield themselves by claiming that DEI trainings are meant to prevent harassment—even when the evidence shows they contributed to it.

Second, the District Court's should not have relied on Seattle's self-serving testimony—that City-directed workplace trainings are open to all employees—as sufficient to dispose of an Equal Protection Claim on summary judgment. The Court, instead, must examine whether racially segregated trainings are *in practice* open to all. Indeed, examples in the record below demonstrate that crucial evidence can get ignored by such a government-friendly standard. If this standard survives, employers can

defeat Equal Protection claims simply by invoking the right language—regardless of how their programs function in practice.

Third, the District Court should not have held that racially segregated training is legal so long as no "benefits" or "consequences" flowed from participating or failing to participate, or that the government has good intent in designing such trainings. Dkt. 90 at 43–44. The illegality of racially segregated training under the Equal Protection Clause does not depend on whether specific "benefits" or "consequences" flow from racial separation. This is true even if the City can show it had good intentions when discriminating on the basis of race. To hold otherwise, would allow government employers to justify racial separation based on subjective intent. In the end, Seattle's race-conscious conduct cannot be justified by the long-rejected concept of "benign discrimination." Seattle must justify its conduct under strict scrutiny, and it cannot.

ARGUMENT

I. The District Court Should Have Analyzed Whether The City's Training, When Combined With The Discriminatory Conduct, Created A Hostile Work Environment.

The District Court analyzed Mr. Diemert's hostile work environment claim by separating its analysis of the City's "anti-racism" training

materials implementing RSJI, Dkt. 90 at 20–25, from the discriminatory conduct by his managers and colleagues, *Id.* at 26–32. The Court then found that the various incidents were insufficient to state a claim of discrimination. *Id.* at 31–32. But the district court failed to consider the evidence that the workplace training, in design and as applied, taught Mr. Diemert's managers and colleagues to spread and enforce racial stereotypes, which Title VII clearly prohibits. When the two are considered together, the discriminatory conduct at issue mirrored the content of the RSJI.

A. Title VII Prohibits Severe and Pervasive Discrimination On The Basis Of Stereotypes.

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). This protection extends to everyone equally, including to majority groups. *Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 1540, 1546 (2025) ("Title VII does not vary based on whether or not the plaintiff is a member of a majority group.").

Among its protections, Title VII prohibits an employer from creating a hostile work environment—one where harassment is "both

objectively and subjectively offensive," *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001), is "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment," *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994). Although "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) are not sufficient to create an actionable claim," *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 687 (9th Cir. 2017) (citation modified), the "***cumulative effect*** of individual acts" can create a hostile work environment, *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115, (2002) (emphasis added).

Severe and pervasive racial stereotyping in the workplace is precisely the kind of prohibited conduct that creates a hostile work environment. *E.g.*, *Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (comparing African Americans "to slaves and monkeys" among other harassment created a jury question with respect to a racially hostile work environment). For example, in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), this Court found triable issues of fact on a hostile work environment claim based on supervisor's repeated offensive comments and stereotypes of women.

One hostile work environment case, related to workplace anti-racism training, is particularly relevant. In *Mais v. Albemarle Cnty. Sch. Bd.*, 657 F. Supp. 3d 813 (W.D. Va. 2023), an assistant principal in a Charlottesville, Virginia, elementary school complained that the School Board's four mandatory anti-racism training sessions, and the related training materials, created a "racially hostile environment" and led to "hurtful and pejorative comments made by other staff members, which demonized them for being white." *Id.* at 819. The plaintiff alleged that the training was having a "detrimental effect … on staff morale" and was the subject of such repeated demonizing comments by her coworkers, including being called a "white racist bitch" and being criticized for "acting in a racist fashion like a typical defensive white person." *Id.* at 820–821. The court denied the motion to dismiss the hostile work environment claim, *id.* at 830, and after discovery held the plaintiff alleged sufficient facts to present the claim to a jury, *Mais v. Albemarle Cnty. Sch. Bd.*, No. 3:22-CV-51, 2024 WL 4126076, at *9 (W.D. Va. Sept. 9, 2024).

Just as in *Mais*, Seattle's workplace-wide training taught and encouraged employees to express and act on negative stereotypes of White people and created a hostile work environment.

B. RSJI Teaches City Employees To Discriminate Against White People Based On Racial Stereotypes.

The District Court wrongly assumed that the RSJI is an example of a "proactive approach to harassment prevention, including by implementing training." Dkt. 90 at 23. The RSJI is far from an ordinary workplace sensitivity training. Its source material demonstrates that it is designed to teach the very kind of stereotyping that Title VII prohibits.

The RSJI handouts and trainings were created using texts including *Undoing Racism*, by Ronald Chisom and Michael Washington, published by the People's Institute for Survival and Beyond. *E.g.*, Dkt. 68-8 at 11. That book states, for example, that "[n]ormal whites in today's society suffer high-anxiety" about racial political policies "[l]ike the slave-master who could not sleep at night unless his gun was close by his bedside." Dkt. 63-3 at 10. *Undoing Racism* also alleges that White people have a "genocidal relationship with the rest of humanity," (*Id.)*, and another book referenced in the trainings, *Dismantling Racism*, by Rev. Dr. Curry Avery, argues that Whites must accept that their coworkers "of color will have a reason to be angry" at them because of this genocidal relationship. *Id.* at 11.

Using these materials, RSJI redefines racism in an unconventional way. According to Seattle-approved RSJI training materials, a racist is someone who is both "privileged and socialized." Dkt. 68-8 at 4. "The term applies to *all* white people." *Id.* (emphasis added). Another training document states that, "[a]ll white people are racist." Dkt. 68-16 at 3. Racism is therefore defined as something that only White people can inflict on non-White people. Indeed, official RSJI materials on Seattle's website define "interpersonal racism" as "Prejudgment, bias or discrimination by a white individual toward a person of color." *Four Types of Racism*, City of Seattle (Aug. 2021), http://bit.ly/4eMdNVT. The apparent corollary to this redefinition of racism is that non-White people *cannot* be racist. RSJI training materials proclaim: "By this definition [of racism] people of color cannot be racists." Dkt. 68-8 at 4. As another example, material given to non-White Asian Pacific Islander Undoing Racism Groups of Seattle say that "[n]o persons of color can be a racist." *Id.* at 3.

Unfortunately, Seattle's leadership believed—or came to believe through their RSJI training—that White people cannot experience racism. One of Seattle's Rule 30(b)(6) witnesses, Mr. Jason Johnson, a human resources manager in Mr. Diemert's department, testified that it is

impossible for White people to experience racial discrimination and that only White people can be racist. Dkt. 68-33 at 4. So did another of Mr. Diemert's supervisors, Gloria Hatcher-Mayes. Dkt. 73-2 at 14; Dkt. 68-13 at 3. Indeed, Mr. Johnson also testified that he regularly overheard derogatory comments against White people by the RSJI leadership, such as that "all White people are racist." Dkt. 63-3 at 30 (citing Johnson Dep. at 36-7:6-12, 38:7-14).

C. The Pervasive Racially Hostile Conduct That Mr. Diemert Experienced Mirrors The Stereotypes In The Training Materials.

Because Seattle mandates that its employees implement RSJI's teachings, anti-White racism became a "daily occurrence" in Mr. Diemert's work environment as did "racially pejorative comment[s] against white people." Dkt. 69 at 22. The District Court should have analyzed those incidents of discriminatory conduct in the totality of the circumstances, *see, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000), which include the discriminatory nature of the workplace-wide trainings. Had the Court done so, it would have seen how the training contributed to the hostile workplace environment.

For example, RSJI teachings spilled outside of the City workforce and detrimentally affected White Seattle residents who sought City services. City workers such as Sabrina Budner and Gloria Hatcher-Mayes denied eligible White homeless applicants for government benefits because of their "White privilege." Dkt. 68-32 ¶ 20; Dkt. 68-6 at 3, 17, 28; Dkt. 68-7 at 91. When Mr. Diemert spoke out against this denial, Ms. Hatcher-Mayes verbally reprimanded him, calling his actions racist because "it is impossible to be racist to a white person." Dkt. 68-6 at 17. Moreover, City employees frequently called Mr. Diemert a "racist" because RSJI teaches that "all white people are racist." Dkt. 69 at 42. In the context of the RSJI principles, frequently being branded a racist by managers and colleagues—based not on conduct, but solely on skin color—can contribute to a hostile work environment.

As another example, RSJI materials present White people, white culture and white supremacy, as violent. The RSJI characterizes white supremacy as a millennial struggle "intertwined with the cultural expressions of … conquest and violence as proofs of manhood and nationhood that goes back thousands of years." Dkt. 68-8 at 7. Other RSJI

material presents white culture as a supernatural curse, a "deadly brew" of "greed, guys, guns, gods, and white power." *Id.*

City employees internalized these lessons to respond to White people with force. One employee wrote inaction against white people or white supremacy is a "continuance of violence and apathy." Dkt. 68-4 at 1. Likewise, Mr. Diemert's manager, Mr. Shamsu Said, actually resorted to physical violence by chest bumping Mr. Diemert over Mr. Diemert's objections to Mr. Said's denial of government aid to a White homeless man. Dkt. 22 at 7; Dkt. 74-1 at 3. Mr. Diemert was the subject of several violent comments fantasizing about much worse. One employee wrote on an email thread that he "will cut [Mr. Diemert's] nuts off for fun." Dkt. 68-39 at 30. Another asked for "a guy to swing by when Josh is in the restroom and beat him bloody." Dkt. 68-39 at 17.

As a final example, Mr. Diemert's supervisors, channeling RSJI principles, expressed that it was improper for a White person to hold a position of leadership. RSJI materials profess that White people engage in the "[e]xtraction" of "others' cultural, emotional, intellectual, spiritual and/or physical labor without their permission and/or without crediting them." Dkt. 1-7 at 14. In particular, RSJI training materials accuse

Whites of "exploitation and oppression of continents, nations, and Black, Indigenous, and people of color." One way that Whites do this, according to RSJI, is by using their "hierarchical or positional power[] for one's personal or professional-benefit."

In March 2017, Mr. Diemert was asked to step down from his position as Senior Program Intake Representative by his supervisor Tina Inay because he was told that he was "acting as a gatekeeper holding back a POC [person of color] from getting a chance to promote." Dkt. 68-6 at 13. This action reflects RSJI's influence on management, which teaches that White individuals in leadership roles inherently obstruct opportunities for people of color.

By not considering the content of the workplace-wide trainings together with the related conduct, the District Court failed to identify the very type of pervasive, workplace stereotyping that are a consequential result of a training that violates Title VII. If such an error persists, courts will dismiss similar racially hostile conduct and stereotypes as isolated incidents, rather than institutionally approved practices supported by anti-racist DEI trainings.

II. The District Court's Equal Protection Analysis Applies The Wrong Standards And Ignores The Record.

The District Court rejected Mr. Diemert's claim that racially separated trainings violated the Equal Protection Clause, Dkt. 90 at 41–45, because, the Court held, the trainings were open to any City employee, *id.* at 43. The District Court based this ruling solely on the testimony of Seattle's Rule 30(b)(6) witness—not on any evidence of how that purported policy was applied in practice. *Id.* at 43–44 (citing Dkt. 59 at 125–26). But *every* employer has an incentive to say that, as a policy, its training geared to specific races are open to all employees. That is why Courts examine whether a facially neutral policy was applied, in practice, in a neutral manner. The District Court did not do that here, and key facts highlighted below show why Seattle's purported policy is not actually race neutral. The District Court, therefore, applied the wrong legal standard to Seattle's race-conscious conduct, which must (but does not) pass strict scrutiny.

A. Courts Must Examine Policy Together With Actual Practice.

The District Court held that Seattle's policies were race neutral, citing only Seattle's Rule 30(b)(6) testimony that trainings were open to

any City employee. Dkt. 90 at 43. As an initial matter, the District Court's standard of taking an employer at its word makes the remainder of the record irrelevant, which is itself a legal error. *See Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1035–37 (9th Cir. 2005) (reversing grant of summary judgment in Title VII case where the district court disregarded evidence).[3] More pointedly, an employer's claim that racially separated training is open to all employees should not be sufficient to dispose of Equal Protection Claims. The District Court should have considered whether, in practice, Seattle actually followed its purportedly race-neutral policy.

To assess whether a facially neutral policy is racially discriminatory, courts often examine the policy together with its practical implementation. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 338 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). For example, in *Yick Wo*, the Supreme Court found that a facially neutral San Francisco

[3] In a different context, the District Court disregarded testimony in Mr. Diemert's declaration, citing *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 498 (9th Cir. 2015) (explaining when a "self-serving" and "uncorroborated" affidavit creates a genuine dispute of material fact). Dkt. 90 at 32. Seattle's Rule 30(b)(6) testimony is both self-serving and uncorroborated. The District Court nonetheless credited that testimony.

ordinance requiring a permit to operate a laundry, unless the laundry was located in a brick or stone building, was applied "with an evil eye and an unequal hand" to unlawfully discriminate against people with Chinese heritage in violation of the Equal Protection Clause. *Id.* at 373–74. Similarly in *Teamsters*, the Court described specific testimony that facially neutral union rules were being applied in a discriminatory matter in violation of Title VII. 431 U.S. at 338; *see id.* at 339 (describing how the discrimination claim did not rely on "statistics alone").

Here, the District Court should have, but did not, assess whether Seattle was, in practice, applying its purported open-to-all policy "with an unequal hand." Had it conducted that inquiry, the District Court would have found, at the very least, a jury question regarding whether Seattle's trainings were conducted on a race-neutral basis.

B. Evidence Shows That Seattle Did, In Practice, Conduct Race-Separated Training.

The record provides compelling evidence that Seattle's litigation position is incorrect. Here are just three illustrative examples. *First*, four screenshots from Seattle's website listing available RSJI trainings show entries specifying who can or should attend various trainings. Dkt. 68-8 at 40–42. They all specify the targeted races of attendees — White, White

allies, and persons of color. For example, "Who can attend: City employees that identify as a person of color." *Id.* at 41.

Second, a City-employed trainer recounts in an email that, at a training for non-White employees, the three White employees attended and "were asked from [*sic*] POC co-workers to remove themselves from the training." Dkt. 68-8 at 43. The City-employed trainer directed them to "reconcile with their coworkers and apologize for their action from the December training." *Id.*

Third, in response to an EEOC inquiry, the Human Services Department asked an RSJI manager in the Office of Civil Rights whether a White person could attend a training called Internalizing Racial Inferiority (IRI). The response: "A white person could attend IRI—we wouldn't turn them away. I would imagine that it would be an uncomfortable and unsafe experience for all the participants though." Dkt. 68-19 at 2. This response raises serious concerns. If a segregated training is so racially charged that a White employee would feel "unsafe" attending, it calls into question whether the space is truly open to all in practice.

These facts underscore the evident purpose of racially separate trainings. Seattle's expert explains—after confirming that Seattle did

conduct such trainings, Dkt. 57 at 23–24—that racially separated trainings "are premised on the idea the by engaging in intra-group dialogues, it becomes easier to come back together with others from different groups." *Id.* at 24. Accordingly, when a White person tried to attend a training that was designated for people of color only, one participant described the experience as "oppression" because "white people [are] taking away our spaces away from us." Dkt. 68 Ex. 36 at 9. Trainings geared to White employees, by contrast, are structured around self-critique and accountability to "deal with issues of internalized superiority," build "an anti-racist White collective working together with POC," Dkt. 68-8 at 15, and "hold[] white people accountable for their racism," Dkt. 63-3 at 27.

This evidence, and more, calls into question the District Court's holding that Seattle, as an undisputed material fact, had a race-neutral policy regarding training. Accepting the City's self-serving characterization at face value, without interrogating its actual practice, as the District Court does, insulates discriminatory practices from judicial scrutiny.

C. The District Court's Legal Standards For Assessing Race-Separated Trainings Are Contrary To Law.

If, as the evidence suggests, Seattle used race-conscious measures to separate its employees, those measures must satisfy strict scrutiny—by showing the racial separation furthers a compelling government interest and that the means used were necessary to achieving that goal. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023) [hereinafter *SFFA*]. But the District Court discards Mr. Diemert's Equal Protection Clause claim because, it held: (1) there were allegedly no benefits or harms to employment from participation or failure to participate in the RSJI trainings; and (2) Seattle had good intentions when designing its trainings. In the end, Seattle appears to take the position that whatever race-conscious conduct did occur was benign. But race-conscious government measures, even those with arguably good intentions, must satisfy strict scrutiny.

1. Government-Sponsored Racial Separation Is "Harm" Under The Equal Protection Clause.

The District Court misapprehends what constitutes "harm" under the Equal Protection Clause. After erroneously holding that Seattle's programming was open to all employees, the District Court held that "[t]hose

who chose to participate received no additional employment benefits; those who chose *not* to participate faced no consequences." Dkt. 90 at 43-44 (emphasis in original). In other words, the District Court held that, even if Seattle did separate employees by race, Mr. Diemert has not identified a sufficient harm flowing from that separation.

But harm under the Equal Protection Clause does not require showing a reduction in benefits or other economic harm. The racial discrimination *is* the harm. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation modified). Accordingly, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA.*, 600 U.S. 181, 208 (2023) (citing and quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Against this legal backdrop, the Supreme Court has held that state action reinforcing racial stereotypes is sufficient to violate the Equal

Protection Clause. *See Shaw v. Reno*, 509 U.S. 630, 650 (1993). This is because the "mere equal application" of a "racial classification" is within "the Fourteenth Amendment's proscription of all invidious racial discrimination." *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (citation modified). And the Supreme Court held, in admittedly far more consequential context, that "separate but equal" is unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

The District Court's standard creates a nearly insurmountable barrier for future plaintiffs like Mr. Diemert. To avoid liability, all employers need to say is that trainings directed at a specific race are "optional" or open to all employees. Title VII contemplates such a loophole and prohibits race discrimination based on "incidents of employment" and "privileges" of employment. *E.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a 'privileg[e]' of employment under Title VII.").

Mr. Diemert, or any future litigant in his position, therefore does not have to show that Seattle's racial separation denied him

"employment benefits" or caused other "consequences," merely that it discriminated against him on the basis of his race.

2. Seattle's "Discriminatory Intent" Is Not Relevant.

The District Court held that "no reasonable jury could find that Seattle acted with a discriminatory purpose." Dkt. 90 at 44. Of course, employers have an incentive to argue that its DEI policies lack discriminatory intent, as here, Seattle's expert opines that Seattle's racial separation is not based in "hostility" or "bias." Dkt. 59 at 235. This holding is misplaced and threatens to confuse the issues before the Court. Mr. Diemert does not have to show that Seattle acted with bad intent or with a malevolent view toward White people. All Mr. Diemert needs to show is that Seattle discriminated against him because of his race.

Perhaps because the District Court incorrectly found that Seattle's conduct was race neutral, it cited cases that are inapplicable to race-conscious conduct. Dkt. 90 at 44. Both cases cited addressed an alleged discriminatory *purpose* to a facially neutral law. *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir. 1995). In *Navarro*, the plaintiffs challenged Los Angeles County's custom of "treating domestic violence 911 calls differently from non-domestic violence calls" as "impermissibl[e] discriminat[ion]

against abused women." *Id.* *Feeney* addressed whether a state law providing preferences for veterans unlawfully discriminated against women. *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 259 (1979). There, the Supreme Court considered whether the legislature had a "discriminatory purpose" when enacting a facially neutral law. *Id.* at 276–79; *see id.* at 275 (citing *Washington v. Davis,* 426 U.S. 229, 242 (1976), and then citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

But neither the Equal Protection Clause nor Title VII *requires* showing "racial animus" or some other bad intent where there is an express race-based policy. *Feeney* itself explains this: "A racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification." 442 U.S. at 272 (emphasis added). For example, in *SFFA*, the Supreme Court invalidated race-based admissions policies under the Equal Protection Clause "however well intentioned and implemented in good faith." *SFFA*, 600 U.S. at 213; *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."). And in the Title VII

hiring context, "unnecessary barriers to employment must fall, even if neutral on their face and neutral in terms of intent." *Ricci v. DeStefano*, 557 U.S. 557, 621 (2009).[4]

Seattle's stated intentions are, therefore, irrelevant to assessing whether its race-conscious conduct is unlawful.

3. Seattle's Policies Must Satisfy Strict Scrutiny And Cannot Be Justified As "Benign Discrimination."

Seattle's policies of racial stereotyping and race-separated training are race-conscious policies that must satisfy strict scrutiny. *SFFA*, 600 U.S. 181, 206–07 (2023). Only two interests are sufficiently compelling to justify a race-conscious policy: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" and,

---

4 *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70, (1993) ("We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex ...."); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers Of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (Under Title VII, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (Section 1981 liability found against unions for failing to pursue claims of racial discrimination on the part of their members even though "there was no suggestion below that the [u]nions held any racial animus against or denigrated blacks generally").

inapplicable here, "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Id.* at 207.

Seattle has not identified any *specific* instances of discrimination that its RSJI-driven workplace training is designed to remediate. RSJI is a broad, City-wide effort at "ending racial disparities and achieving racial equity." *See About the Race and Social Justice Initiative*, City of Seattle, https://www.seattle.gov/rsji/about (last visited July 25, 2025). But remedying the effects of societal discrimination cannot justify explicitly race-based measures. *See SFFA*, 600 U.S. at 226. "A generalized assertion that there has been past discrimination in an entire industry," or relevant here, across an entire city (or city government), "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498. As a result, the Supreme Court has repeatedly rejected this society-wide aim as "an amorphous concept of injury that may be ageless in its reach into the past." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., plurality opinion); *see also SFFA*, 600 U.S. at 260 (Thomas, J., concurring).

Seattle instead appears to rely on the concept of "benign discrimination." As the District Court found, DEI purports to have good intentions "promot[ing] fairness and inclusion." Dkt. 90 at 21.

But the Supreme Court has long rejected the concept of benign discrimination because "it may not always be clear that a so-called preference is in fact benign." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Bakke*, 438 U.S. at 298 (Powell, J.)). That is especially true for instances of discrimination involving anti-racist DEI training, where defendants will hide behind "good intentions" to avoid liability. Seattle does so here, despite troublesome materials with anti-White stereotypes and an institutional disregard for the civil rights of White employees. "The mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U.S. at 500; *see also Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307 (2013) ("It is therefore irrelevant that a system of racial preferences in admissions may seem benign."). Instead, "[a]ny exception to the Constitution's demand for equal protection must survive … strict scrutiny." *SFFA*, 600 U.S. at 206; *see also Fisher*, 570 U.S. at 307.

Seattle cannot avoid strict scrutiny. Because the racial stereotypes and the racial classifications of the workplace training program at issue here cannot satisfy that "daunting two-step examination," *SFFA*, 600 U.S. at 206, they violate the Equal Protection Clause.

The District Court nonetheless downplayed Seattle's racial separation by caricaturing Mr. Diemert's argument: "Like his broader arguments about D.E.I., Diemert starts from the premise that recognizing race in the workplace or establishing affinity groups ***inherently*** violates the law." Dkt. 90 at 41 (emphasis added). Mr. Diemert never argued that DEI writ large or "recognizing race in the workplace" is *per se* unlawful, and in any event, the Equal Protection Clause does not require employers to ignore race entirely. But the Equal Protection Clause does prohibit Seattle's practice of separating employees based on race—unless Seattle can demonstrate, which it cannot, that its conduct passes strict scrutiny.

CONCLUSION

For the reasons set forth above, and in Mr. Diemert's opening brief, this Court should reverse the judgment below.

Dated: July 25, 2025

Respectfully Submitted,

/s/ Kevin Garvey

Kevin Garvey
Anthony A. Pericolo
STEPTOE LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000
kgarvey@steptoe.com
apericolo@steptoe.com

Michael A. Petrino
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave, NW
Suite 625
Washington, DC 20036
(202) 833-8400
petrino@cir-usa.org

Counsel for *Amicus Curiae*
Center for Individual Rights

Form 8. Certificate of Compliance for Briefs

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

I am the attorney or self-represented party.

This brief contains **5,583**, words, including **0** words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.
[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
[**X**] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  [ ] it is a joint brief submitted by separately represented parties.
  [ ] a party or parties are filing a single brief in response to multiple briefs.
  [ ] a party or parties are filing a single brief in response to a longer joint brief.
[ ] complies with the length limit designated by court order dated _____.
[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Kevin Garvey **Date** July 25, 2025