CASE NO. 25-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA A. DIEMERT,

Plaintiff-Appellant,

v.

CITY OF SEATTLE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:22-cv-01640-JNW

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

July 22, 2025

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Amicus curiae Manhattan Institute (MI) states it has no parent corporation and does not issue stock. Counsel certifies that MI is the only entity that has an interest in the outcome of this case that was not included in the Certificates of Interested Persons in previously filed briefs.

Dated: July 22, 2025

s/ *Ilya Shapiro*
Ilya Shapiro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting constitutionally protected liberties and opposing governmental overreach. It also files *amicus curiae* briefs to help educate courts on areas of MI's unique expertise—which includes civil rights and antidiscrimination law. This case interests MI because it highlights ongoing misinterpretations of both the Equal Protection Clause and Title VII.

INTRODUCTION AND SUMMARY OF ARGUMENT

Joshua Diemert worked for the City of Seattle's Human Services Department for eight years. Mr. Diemert experienced a hostile work environment, severe discrimination, and harassment; as a white male, he was consistently treated worse than colleagues who are members of racial groups that the City designated as "BIPOC" (black, indigenous and people of color).

Mr. Diemert took part in programming and training under the banner of the City's Race and Social Justice Initiative ("RSJI"), which featured content that

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus* sought consent to file this brief from all parties and received it from Plaintiff-Appellant. Defendant-Appellee, however, neither consented nor objected. Accordingly, a motion for leave to file accompanies this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* funded its preparation or submission.

disparaged white people and promoted segregation of employees by race. Beyond RSJI, Mr. Diemert also faced hostility from co-workers on account of his race and his disagreement with the City's approach to racial issues. He brought an equal-protection claim under the Fourteenth Amendment, racially hostile work environment and retaliation claims under Title VII and state law, as well as a claim for constructive discharge. The district court granted the City's summary judgment motion and dismissed Mr. Diemert's case.

The district court erred for two reasons.

First, it misunderstood the City's RSJI as an inoffensive, well-meaning Diversity, Equity, and Inclusion ("DEI") program, which previous rulings have countenanced. In so doing, the district court neglected the fact that RSJI entailed racial classifications, which require strict scrutiny. Under strict scrutiny, racial classifications must further compelling governmental interests and be narrowly tailored to those interests. RSJI neither serves a compelling interest nor is narrowly tailored. Therefore, it does not survive strict scrutiny.

Second, the court subjected Mr. Diemert to a higher evidentiary standard in adjudicating his discrimination claims because he is a member of a racial-majority group. A recent Supreme Court's ruling makes clear that higher evidentiary standards for majority-group plaintiffs violate Title VII of the Civil Rights Act of 1964. *Ames v. Ohio Dep't of Youth Services*, 145 S. Ct. 1540 (2025).

ARGUMENT

I. The District Court Failed to Distinguish Between the City's Race and Social Justice Initiative ("RSJI") and General DEI Programs

The district court assessed the legality of Seattle's Race and Social Justice Initiative ("RSJI") by comparing it to more typical DEI programs. The court explained that "many employers have adopted Diversity, Equity, and Inclusion ("D.E.I.") initiatives to combat discrimination and harassment in the workplace" and described RSJI as "the City's D.E.I. program." *Diemert v. City of Seattle*, No. 2:22-CV-1640, 2025 WL 446753, at *1 (W.D. Wash. Feb. 10, 2025). "Contrary to [Diemert's] claims," the court wrote, "D.E.I. programs aimed at addressing racial inequalities against Black people and other minorities are not by their very nature discriminatory against whites." *Id*. "The claim that efforts to address racism in the workplace—such as D.E.I. initiatives—are themselves racist presents a striking paradox. According to their proponents, these programs aim to promote fairness and inclusion by acknowledging and addressing racial disparities—they are designed to ensure that all individuals have access to opportunities." *Id*. at *9.

But RSJI went beyond diversity training, involving racial classifications that require strict scrutiny—and RSJI fails that scrutiny.

A. The City's RSJI Went Beyond Diversity Training and Involved Racial Classifications That Require Strict Scrutiny

The district court's discussion of DEI presents a strawman. Mr. Diemert never referenced DEI in his complaint, nor criticized general efforts to address racism. Moreover, by framing RSJI as a DEI program, the court obscured and trivialized the reality of Seattle's policies and practices. The district court cited precedential rulings holding that DEI programs do not violate antidiscrimination laws to argue that RSJI is similarly lawful, but those rulings do not authorize the full scope of activities that constituted RSJI. For example, in *Norgren v. Minn. Dep't of Hum. Servs.*, the court held that "[r]equiring all employees to undergo diversity training does not amount to abusive working conditions." No. CV 22-489 ADM/TNL, 2023 WL 35903, at *4 (D. Minn. Jan. 4, 2023). And in *De Piero v. Penn. State Univ.*, the court held that "discussing . . . the influence of racism on our society does not necessarily violate federal law" and that "providing trainings on 'implicit bias' . . . does not violate Title VII." 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024).

RSJI went far beyond "diversity training," "discussing . . . the influence of racism," and "providing trainings on 'implicit bias.'" Instead, RSJI trainers claimed that "it was impossible for white people to experience racism or discrimination, and that it was impossible for black people to be racist or to discriminate." Decl. of Pl. Joshua A. Diemert in Supp. of Pl.'s Opp'n to Mot. for Summ. J. ¶ 32, *Diemert v. City of Seattle*, No. 2:22-cv-01640-JNW (W.D. Wash. Sep. 7, 2024). RSJI pressured

white employees into "admit[ting] their own participation in the system of 'white supremacy.'" *Id.* ¶ 33. Mr. Diemert heard RSJI "trainers say that 'white people are cannibals,' that 'racism is in white people's DNA,' and that 'white people are like the devil.'" *Id.* ¶ 42.

Furthermore, RSJI involves racial classifications. For example, "RSJI posits that race is the most important factor, that employees must lead with race, 'center People of Color,' 'de-center whiteness,' that all white employees should work at undoing their 'whiteness' and 'prioritize the leadership of Black, Indigenous, and People of Color.'" *Id.* ¶ 26. Additionally, "RSJI divides people into two main categories, white and 'Black, Indigenous and People of Color' (BIPOC), or 'oppressor' and 'oppressed.' City training promotes 'BIPOC Affinity Spaces' and encourages the exclusion of 'white folks.'" First Am. Compl. for Decl. Relief & Damages ¶ 42, *Diemert v. City of Seattle*, No. 2:22-cv-01640-LK (W.D. Wash. Jan. 19, 2023).

Yet the district court did not apply strict scrutiny to those classifications, even though "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Instead, it explained that "when [identity-based] groups endorse exclusionary practices . . . they risk transgressing fundamental equal protection principles and other civil rights laws" in

a way that would require them to then survive strict scrutiny. *Diemert*, 2025 WL 446753, at *17. But the district court then rejected the notion that that risk applied here, because the City's racial-affinity groups were open to members of all races, were voluntary, and did not confer any benefits on those who participated or impose costs on those who did not participate. *Id*. at *18. This assessment contrasts with Mr. Diemert's sworn statement that "the City expected white employees to join the white affinity group" and "knew that any attempt to attend other affinity groups would result in a reprimand or further harassment." First Am. Compl. ¶¶ 83, 87.

B. The City's RSJI Does Not Survive Strict Scrutiny

Racial "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Supreme Court has identified only "two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. . . . The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Students for Fair Admissions, Inc. ("SFFA") v. President & Fellows of Harvard College,* 600 U.S. 181, 207 (2023). RSJI does not further either of these interests.

According to the City of Seattle's website, "the Race and Social Justice Initiative (RSJI) represents the City of Seattle's commitment to ending racial disparities and achieving racial equity. We challenge racism and other forms of

oppression to make Seattle a city of thriving, powerful communities that fosters healing and belonging." *Race and Social Justice Initiative (RSJI)*, Seattle.gov, https://tinyurl.com/2zp755b4 (last visited July 19, 2025). This description speaks of "ending racial disparities, "challeng[ing] racism" and "achieving equity" in the general sense, but it does not identify specific instances of past discrimination that it seeks to remediate. Moreover, the content of RSJI focuses on the dissemination of tendentious narratives about race relations in America. The training promotes ideas such as "individuals, institutions, and communities are often unconsciously and habitually rewarded for supporting white privilege and power." First Am. Compl. ¶ 3. RSJI "aggressively promotes the concept of 'white privilege' and the collective guilt that white employees like Mr. Diemert purportedly bear for societal inequality." *Id*. ¶ 62. Far from "remediating specific, identified instances of past discrimination," RSJI places burdens on individuals belonging to a racial classification for societal inequalities for which they are not responsible.

Moreover, in the context of race-based admissions programs, the Supreme Court has held that even if they serve "commendable goals," courts must be able to "measure . . . these goals," and these goals must "be subjected to meaningful judicial review" in order to be "sufficiently coherent for purposes of strict scrutiny." *SFFA,* 600 U.S. at 214. With RSJI, even if the City's stated goals passed muster, a court would have difficulty measuring whether "racism and other forms of oppression are

being challenged" or whether Seattle is becoming "a city of thriving, powerful communities that fosters healing and belonging." It follows that RSJI does not further a compelling governmental interest.

Furthermore, RSJI is not narrowly tailored to the goal it purports to serve. Saying that "'white people are cannibals,' that 'racism is in white people's DNA,' and that 'white people are like the devil'" does not address racism and racial disparities, let alone "make Seattle a city of thriving, powerful communities that fosters healing and belonging." Diemert Decl. ¶ 42; *RSJI*, Seattle.gov, https://tinyurl.com/2zp755b4 (last visited July 19, 2025).

II. The District Court Erred in Subjecting Mr. Diemert to a Higher Evidentiary Standard Because of His Membership in a Majority Group

A longstanding issue in the adjudication of claims of discrimination under Title VII is whether courts should hold majority-group plaintiffs to a heightened evidentiary standard by requiring them to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Ames v. Ohio Dep't of Youth Svcs.*, 87 F.4th 822, 825 (6th Cir. 2023) (per curiam).

Before the Supreme Court decided *Ames*, five circuit courts used the heightened-evidence standard, while others did not. *Ames*, 145 S. Ct. at 1545 n. 1. This Court took no formal position on that split, *see Zottola v. City of Oakland*, 32 F. App'x 307, 311 (9th Cir. 2002) ("We need not take sides in this inter-circuit

dispute to resolve Zottola's case."), but may have been inclined against applying heightened evidentiary standards. For example, in *Hawn v. Exec. Jet Management, Inc.*, the Court heard a case in which male airline pilots had been terminated for sexually crude conduct. 615 F.3d 1151, 1153 (9th Cir. 2010). The pilots alleged Title VII discrimination on the ground that female flight attendants engaged in similar conduct but were not terminated. *Id*. Although the Court ruled against the pilots, it did not treat them as majority-group plaintiffs or subject them to any special burden. Instead, it explained that the pilots had to show that the flight attendants were "similarly situated employees" who were "engaged in similar conduct but received more favorable treatment by Executive Jet." *Id.* at 1156. Although the Court did not explicitly address the "background circumstances" rule in *Hawn* as it did in *Zottola*, its reasoning suggested that it would disfavor the rule.

Regardless, the Supreme Court's *unanimous* holding that the "'background circumstances' requirement is not consistent with Title VII's text or our case law construing the statute," *Ames*, 145 S. Ct. at 1543-44, resolved the issue. In that case, a heterosexual woman serving as a program administrator at a state agency had lost out on a management position to a lesbian woman before being replaced in her program-administrator role by a gay man. *Id.* Ames sued the agency under Title VII for being denied promotion and demoted because of her sexual orientation. Although lower courts ruled against her, finding that she had not met the "background

circumstances" test, the Supreme Court extinguished that test. *Id*. at 1546 ("Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs.")

Although *Ames* dealt with majorities and minorities along the dimension of sexual orientation, the ruling extends to cases dealing with racial majorities and minorities. After *Ames*, Title VII's disparate-treatment provision applies equally to white employees, black employees, and employees of all other races.

Despite ruling before *Ames* came down, the district court below signaled its agreement with that understanding of Title VII, finding that "controlling precedent makes clear that the legal protections against workplace discrimination apply with equal force regardless of the plaintiff's race." *Diemert*, 2025 WL 446753, at *1.

But then the district court signaled skepticism toward Mr. Diemert's claims precisely because "instances of discrimination against the majority are rare and unusual." *Id.* "Some courts modify the requirements of the *McDonnell Douglas* test in so-called 'reverse discrimination' cases, requiring the plaintiff to demonstrate 'background circumstances,'" the court explained, concluding that "[b]ecause Diemert falls to meet the traditional *McDonnell Douglas* standard, the Court need not decide whether an extra showing is needed here." *Diemert*, 2025 WL 446753, at *13 n. 6. The district court's statement explained that its decision to grant the City's summary judgment did not turn on the "background circumstances" requirement.

But the fact that it declined to take a stance on the appropriateness of that requirement calls into question whether it treated Mr. Diemert's claims in the same manner that it would have treated those brought by a minority-group plaintiff.

The district court explained that "racially charged comments made" in RSJI trainings "while still potentially harmful, are better framed as attempts to express perspectives or challenge ideas within the training's scope." *Diemert*, 2025 WL 446753, at *12. In so doing, the court countenanced saying that "'white people are cannibals,' that 'racism is in white people's DNA,' and that 'white people are like the devil.'" Diemert Decl. ¶ 42. It is difficult to believe that the court would have applied the same standard had those comments been directed at minority groups.

Moreover, Mr. Diemert experienced discrimination beyond RSJI trainings; he was subjected to harassment and discrimination in his day-to-day work. Mr. Diemert's coworkers called him privileged and labeled him a racist. Managers told him that he was using "white privilege" to stay in his position and that his refusal to step down was preventing a "BIPOC" from being promoted, *id*. at ¶ 17; and that it was "impossible" to be racist toward white people, *id*. at ¶ 27.

When Mr. Diemert reported a supervisor's unethical conduct, the supervisor chest-bumped him and told him he had white privilege and racist motives. When Mr. Diemert complained to the U.S. Equal Employment Opportunity Commission, his employer retaliated against him by scrutinizing the applications he was processing,

cancelling his meetings, refusing to allow him to use Adobe software, giving him inaccurate information about the Family Medical Leave Act, and telling him he could no longer telework. (Instead, "BIPOCs" were given telework priority.)

A *de novo* look at the evidence in the light most favorable to the non-moving party reveals that there exist genuine issues of material fact and that the district court erred in granting summary judgment.

CONCLUSION

For the foregoing reasons, and those stated by the Plaintiff-Appellant, this Court should reverse the court below.

Respectfully submitted,

s/ *Ilya Shapiro*
Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

July 22, 2025

CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number 25-1188

I am the attorney or self-represented party.

This brief contains 2,689 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/ Ilya Shapiro **Date** July 25, 2025

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered ACMS users.

DATED: July 22, 2025

/s/ *Ilya Shapiro*
Counsel for *Amicus Curiae*