No. 25-1068

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSHUA F. YOUNG,
Plaintiff-Appellant,

v.

COLORADO DEPARTMENT OF CORRECTIONS, MOSES "ANDRE" STANCIL, JILL HUNSAKER RYAN
Defendants-Appellees.

BRIEF OF MONTANA, 15 STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF APPELLANT AND REVERSAL

Appeal from the U.S. District Court for the District of Colorado
Honorable Nina Wang, District Court Judge
District Court Case No. 1:23-CV-01688-NYW-SBP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

INTRODUCTION AND INTERESTS OF AMICI

In 2023, over half of U.S. employees participated in DEI meetings or trainings at work, and U.S. employers spent an eye-watering $8 billion a year on such trainings. *See* Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, Pew Research Center (May 17, 2023).[1] DEI training, however, is actually counterproductive in its purported goal of promoting diversity in the workplace. Unsurprisingly, when employers train their employees to treat people of different races differently—or that members of a certain race, as a group, have certain negative characteristics, or that members of certain other races deserve to be given priority treatment—hostility in the workplace increases.

Employer training sets the tone for the entire workplace. When an employer officially sanctions racial scapegoating and treating individuals differently depending on their race in the workplace, that employer *per se* creates a hostile work environment. Even infrequent training can create a pervasive race-based hostility for the races singled out for negativity. Plaintiff Joshua F. Young alleges the Defendants did just that, and his complaint identifies myriad examples of how the

[1] *Available at* https://tinyurl.com/2s3hbwvb.

Defendants' training program endorsed treating and viewing Caucasians worse than other races.

The Attorneys General of Montana, Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Kansas, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Texas are their States' legal officers, and the Arizona Senate President and Speaker of the Arizona House of Representatives speak on behalf of the Arizona Legislature ("*Amici* States"). Amici are authorized to file this brief without leave of court pursuant to Fed. R. App. Proc. 29(a)(2). They submit this brief in support of Appellant and urging reversal.

Amici States' interest arises from their responsibility to protect their citizens' civil rights and ensure their citizens are free from employer-induced race-based hostility. They have an interest in ensuring the judiciary understands the empirical evidence surrounding DEI-related hostility. And, as employers of thousands of employees themselves, *Amici* States have a particular interest in and familiarity with the importance of creating workplaces free of race-based stereotypes. Several *Amici* States have formally determined that certain DEI policies violate state and/or federal law. *Amici* States submit this

brief to further those interests and to protect their citizens from employer-induced, race-based, hostile work environments

ARGUMENT

I. DEI training increases workplace hostility and division.

In sync with the rise of the Black Lives Matter movement, many employers began devoting attention to diversity training programs and related DEI initiatives. The premise was that by educating participants about their supposed prejudices and biases, employers could eliminate discrimination and create inclusive environments. So, in theory, the training was to encourage respect, cooperation, and collegiality among people of different backgrounds, cultures, and races. In practice, however, DEI training is anything but positive. It instead can *create* a pervasive hostility in the workplace, particularly for those targeted by the curriculum.

While DEI training has many variations, it commonly focuses on race, with "anti-racism" education being a common feature.[2] *See* David

2 The term "antiracism" is widely attributed to critical race theorist Ibram X. Kendi, who asserts in his best-selling book *How to Be an Antiracist* (2019): "'The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present

Millard Haskell, *What DEI research concludes about diversity training*, Aristotle Foundation for Public Policy Reality Check (Feb. 12, 2014).[3] DEI training "often depict[s] people from historically marginalized and disenfranchised groups as important and worthwhile, celebrating their heritage and culture, while criticizing the dominant culture as fundamentally depraved (racist, sexist, sadistic, etc.)." Musa al-Gharbi, *Diversity-related training: What is it good for?*, Heterodox Academy (Sept. 16, 2020)."[4]

Indeed, DEI trainings are notorious for maligning the character of the majority group as a whole through racial stereotyping and race scapegoating. Racial stereotyping occurs when DEI training ascribes

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discrimination…. The only remedy to present discrimination is future discrimination.'" Noah Rothman, *Searching for the 'Anti' in 'Antiracism,'* COMMENTARY (Dec. 21, 2020). "The 'discrimination' critical race theorists want to 'remedy,' through still more discrimination, is any failure to meet a racial quota. As Mr. Kendi puts it, 'When I see racial disparities, I see racism.'" Hans Bader, *Is the Cure for Racism Really More Racism?*, WALL ST. J. (Oct. 12, 2020).

3 *Available at* https://tinyurl.com/vb8heswm.

[4] *Available at* https://tinyurl.com/msfx845z. *See also* Juan I. Sanchez & Nohora Medkik, *The effects of diversity awareness training on differential treatment*, 29 GROUP & ORG. MGMT. 517 (Aug. 2024) ("resentful demoralization" following diversity training shows training "may not have the desired effects").

character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or to an individual because of his or her race. Race scapegoating occurs when a DEI training assigns fault, blame, or bias to a race or to members of a race because of their race. These encompass any claim that, consciously or unconsciously, and by virtue of his or her race, members of any race are inherently racist or are inherently inclined to oppress others, including separating students into "oppressors" and "oppressed" based on race. This also includes asserting that an individual's moral character is necessarily determined by his or her race or that individuals need to be "accountable" due solely to their race, or that they are "culpable" solely due to their race. These DEI programs can also include instances where individuals are instructed or compelled to apologize for their race or forced to admit privilege based on their race.

Like racial segregation, racial stereotyping and race scapegoating are antithetical to our Constitution and our values. *See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.* ("*SFFA*"), 600 U.S. 181, 208 (2023) ("'Distinctions 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.'") (quoting *Rice v.*

Cayetano, 528 U. S. 495, 517 (2000)); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (Racial labels, whether state-mandated or state-sponsored, are "inconsistent with the dignity of individuals in our society."); *Missouri v. Jenkins*, 515 U.S. 70, 120-121 (1995) (Thomas, J., concurring) ("At the heart of [Equal Protection] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("In the eyes of government, we are just one race here. It is American.").

The training to which Mr. Young was subjected exemplifies that malignity: it focused on race-related concepts such as unconscious bias, white privilege, and micro-aggressions. *See, e.g.*, First Am. Compl.

("FAC") ¶¶ 22, 36, 40, 58. Mr. Young was instructed that "all Caucasians are racist, that they perpetuate white supremacy, that the very notion of race was invented by white people to justify the oppression of people of color, that white supremacy is an ever-present feature of daily life…, and that Caucasians who deny their own racism are merely 'fragile' racists who cannot accept their own prejudice." FAC at 1-2. It advocated for employees "treating their colleagues differently based on their race." FAC ¶¶ 42, 52, 82, 112, Exh. 5. And, lest there be any doubt about the applicability of the training to the workplace, the training instructed that "[t]he intention of this course is to bring awareness of [Equity, Diversity, and Inclusion] and how it can be applied to the work you do as a state employee," and demanded that employees "integrat[e] racial equity [not equality] into *our* routine decision-making processes and development and implementation of measurable actions." FAC ¶ 25 & Exh. 5 (emphasis added).

Such training is odious. Even if it weren't, it's counterproductive.[5]

[5] In *SFAA*, Justice Thomas pointed out the danger of permitting so-called benign discrimination: "History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct." 600 U.S. at 257 (Thomas, J., concurring).

See Miller v. Johnson, 515 U.S. 900, 927 (1995) ("'If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.'") (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991); *Adarand*, 515 U.S. at 240 (Thomas, J., concurring) ("[T]he equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society.").

Studies show such training is ineffective in its purported goal of promoting diversity in the workplace. An author of one study on DEI in the workplace could "not find a single study that found that diversity training in fact leads to diversity." Iris Bohnet, *Focusing on what works for workplace diversity*, McKinsey & Company (Apr. 7, 2017).[6] Indeed, in a 2018 article, a Harvard sociologist confirmed that "hundreds of studies dating back to the 1930s suggest that antibias training does not reduce bias, alter behavior or change the workplace." Frank Dobbin & Alexandra Kalev, *Why doesn't diversity training work? The challenge for industry*

[6] *Available at* https://tinyurl.com/k393a8fy.

and academia, 10 ANTHROPOLOGY NOW 48, 48 (2018).[7] And, a Pew Research Study found that even though a majority of employees reported that their employers had policies to ensure fairness in hiring, pay, and promotion and had received trainings or meetings on DEI at work, less than one-third of them considered diversity at their workplace to be important. Minkin, *supra*.

The reality for DEI training is even worse than mere ineffectiveness. Rather, DEI training actively undermines workplace harmony, and it causes hostility, distrust, and division. As one study found, "[a]cross all groupings, instead of reducing bias, [DEI training] engendered a hostile attribution bias, amplifying perceptions of prejudicial hostility where none was present, and punitive responses to the imaginary prejudice. These results highlight the complex and often counterproductive impacts of pedagogical elements and themes prevalent in mainstream DEI training." Ankita Jagdeep, *et al.*, *Instructing Animosity: How DEI Pedagogy Produces the Hostile Attribution Bias*, Rutgers University Social Perception Lab 2.[8]

[7] *Available at* https://tinyurl.com/mpccrxra.

[8] *Available at* https://tinyurl.com/5ev2ssrp.

This effect is believed to occur because the training reminds participants of existing stereotypes and even creates new biases in participants. Mandatory trainings that focus on particular target groups—here, Caucasians—are especially prone to backfire, creating tensions rather than easing them. Lauryn Burnett & Herman Aguinis, *How to prevent and minimize DEI backfire*, SCIENCEDIRECT (2024).[9] "Field and laboratory studies find that asking people to suppress stereotypes tend[s] to reinforce them—making them more cognitively accessible to people." Dobbin, *supra*, at 50. Such trainings also cause "[w]hites generally [to] feel they will not be treated fairly." *Id.* And a University of Toronto research term determined that race-focused DEI campaigns that exert strong pressure to reduce prejudice actually result in heightened levels of bigotry. Lisa Legault, *et al.*, *Ironic effects of antiprejudice messages: how motivational interventions can reduce (but also increase) prejudice*, 22 PSYCHOLOGICAL SCIENCE 1472 (2011).[10] Much

[9] *Available at* https://tinyurl.com/ec5trnec.

[10] *Available at* https://tinyurl.com/3nu69jm5; *see also* C.N. Macrae, *et al.*, *Out of mind but back in sight: Stereotypes on the rebound*, 67 J. PERSONALITY & SOCIAL PSYCHOLOGY 808 (1994) (DEI training led participants to respond more pejoratively to a stereotyped target on a number of dependent measures).

of that is obvious. It's unsurprising that employer-sanctioned training attributing negative characteristics to a group and encouraging unfavorable treatment of that group would yield animosity and unfavorable treatment toward the targeted group.

These results broadly confirm the intuitive notion that dividing people based on their race creates hostility in the workplace. "[M]any members from the dominant group walk away from the training believing that themselves, their culture, their perspectives and interest are *not* valued at the institution—certainly not as much as those of minority team members—reducing their morale and productivity." Macrae, *supra*, at 815-16. Employees feel that have to "walk on eggshells" when engaging with members of different race populations and, as a result, "become less likely to try to build relationships or collaborate" with those of a different race. *See id.* The trainings counterproductively "reduce sympathy" and "increase blame" among people of different races. Erin Cooley, *et al.*, *Complex intersections of race and class*, 148 J. EXPERIMENTAL PSYCHOLOGY 2218, 2218 (2019).

Examining the components of the DEI acronym underscores the true nature of these programs. "Diversity" originally referred to a variety

of people, backgrounds, views, and experiences. In its modern Orwellian incarnation, "diversity" is used to racially discriminate against the majority group, *i.e.*, "a total inversion of the principles of colorblind equality and individual merit." Christopher Rufo, *How DEI Corrupts America's Universities*, CITY JOURNAL (June 23, 2024).

Likewise the other components. "Inclusion" historically connotes an environment in which everyone is welcome. In the DEI context, however, the concept is used to *exclude* anyone espousing ideas that threaten the DEI ideology. "Equity" raises visions of equality in which individuals are judged on the content of their individual characteristics and merit. But in the DEI context, the concept demands that individuals be categorized based on group identities and treated differently as groups in order to demand outcomes for favored groups.

II. An employer's training creates the workplace environment and can create a *per se* hostile work environment.

Defendants' training taught employees that white individuals, by virtue of their race, are inherently racist and oppressive. That training manifested into an employer-sanctioned environment of harassment and disrespect toward Young. When an employer provides training to its employees, the employer generally expects the employees to implement

those teachings. That's the very purpose of *training*.

The employer is taking time out of their employees' productive workday to ensure that they learn critical elements of the job. Such training is usually meant to be taken seriously, particularly in dangerous settings such as a prison. *See* FAC ¶¶ 72-75. In nearly every workplace—and especially those in a dangerous setting—an employee's failure to adhere to instructions received in training can result in discipline, negative performance reviews, and denial of promotion. *See* FAC ¶¶ 93-95. Thus imbued with the imprimatur of employer approval, workplace training can pervade the entire work environment and set the tone for how employees are to act.

A plaintiff meets the Title VII threshold "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (cleaned up). This standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* Without requiring any tangible effects on the targeted

employees, courts look at whether, subjectively and objectively, "the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race…." *Id.* at 22.

Unlike the classic "isolated" instances of hostility or harassment that courts have found do not create a hostile work environment, the DEI training here created an employer-endorsed hostile work environment that permeates all aspects of the job. *See Young v. Colo. Dep't of Corrections* ("*Young I*"), 94 F.4th 1242, 1252 (10th Cir. 2024) (holding "to be sure, the EDI training here was the official policy of the Colorado Department of Corrections"). The widespread and lasting effect of DEI training in this workplace means that it is not an "isolated" event, such as an offhand comment or occasional teasing. Instead, the racially charged DEI training at issue in this case established the working conditions and was designed to encourage harassment and disrespect toward Caucasian employees based on their race.

The district court's requirement that Young allege that his supervisors commit an "ongoing commitment" to the DEI training is flawed. His supervisors have already shown an ongoing commitment to the teachings in the training, which have taken a permanent position in

the workplace environment, *see* Mem. Op., ECF 58 at 12-13, including because how well an employee implemented "the trainings were factored into quarterly performance reviews," FAC ¶ 95.

In *Young I*, this Court explained that, "[a]s other courts have recognized, race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment." 94 F.4th at 1245. This Court then found Young had not alleged that the training had occurred more than once or that the "explicitly race-based implications" had led to "race-based harassing conduct, ridicule, or insult from either his co-workers or his supervisors" or "compromise[d] employment opportunities, workplace cohesion, and prison security." *Id.* On the latter issue, Young has since amended his complaint to include such allegations. On the former issue—that the training had not occurred more than once—such a requirement is not supported by legal precedent or by this Court's own recognition that (i) race-based training programs can create hostile workplaces; (ii) the training constituted "official acts" of the employer; and (iii) the "race-based rhetoric" included in the training at issue likely constituted "objectively and subjectively

harassing messaging" for purposes of Young's Title VII and Section 1981 claims. *Id.* at 1251. The Court observed that, based on his then-operative complaint, "we do not know … what he experienced in the workplace due to the EDI training." *Id.* Since Young amended his complaint on remand to describe "the ongoing and pervasive nature of the hostile environment created by the [DEI] training" and "specific instances of discriminatory treatment" he experienced from his co-workers, we now know the severity of the harassment and hostility. *See* FAC at 3.

Here, in particular, Young alleged that the training targeted Caucasians as being of lower status than individuals of other races and instructed that employees should protect individuals of other races from being interrupted and prioritize their speaking time at the beginning of meetings, while Caucasians were not worthy of such treatment. FAC ¶¶ 35, 37. This training instructed that this treatment should be ongoing and pervasive throughout the workplace, and certainly not isolated to a one-time event. FAC ¶¶ 37-41. The training further instructed that, as a group, Caucasians believed they were successful based on merits, when, in fact, any success was due to racism, and that Caucasians were racist against people of other races and, in response, should be discriminated

against. FAC ¶¶ 55-65. The issue is not, as the district court described it, that the training "engender[ed] offensive feelings in" Young. Rather, the issue is that the training communicated to all employees that Young—because he is a Caucasian—was responsible for racism and should be treated worse than employees of other races. This is the sort of race-based treatment the law forbids.

Our Constitution and statutory law require that individuals be treated *as individuals* without regard to race or color. Put succinctly, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748.

CONCLUSION

Abraham Lincoln described the Declaration of Independence's central proposition that all men are created equal as the "standard maxim for a free society." Abraham Lincoln, Springfield Speech (June 26, 1857), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy P. Basler ed. 1953). Even today, it remains our true north—"familiar to all … revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the

happiness and value of life to all people of all colors everywhere." *Id.* Frederick Douglass called these "saving principles." Frederick Douglas, Speech, What to the Slave Is the Fourth of July? (July 5, 1852).

These same principles guide us today. And they stand athwart any attempt to return to and glorify the sins of the past, however well-intentioned they may now appear. The Founders, as Lincoln said, "meant [these principles] to be … a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism." Lincoln, Springfield Speech, *supra*. The only viable path to a more just future and a more perfect union is to live up to our creed, not to abandon it.

This Court should reverse the district court's grant of dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 3,439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word.

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s/ *Christian B. Corrigan*

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I hereby certify that with respect to the foregoing:

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s/ *Christian B. Corrigan*

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I hereby certify that on April 30, 2025, the foregoing brief was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Christian B. Corrigan*