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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT ON THE LEGAL ISSUE HEREIN AND URGING VACATUR

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which involves the standard for establishing a claim of racial discrimination based on a hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. (Title VII). The Attorney General and the Equal Employment Opportunity Commission share responsibility for enforcing Title VII. *See* 42 U.S.C. 2000e-5(a) and (f)(1). Title VII also applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16.

STATEMENT OF THE ISSUE

Whether the district court erred by requiring plaintiff-appellant to satisfy a higher standard to establish a racial hostile-work-environment claim under Title VII because he is a member of a racial majority group.

STATEMENT OF THE CASE

A. Factual Background

In January 2013, plaintiff-appellant Joshua Diemert, a white employee, began working as a program intake representative for the City of Seattle's Utility Discount Program, a branch within the City's Human

Services Department (HSD). Doc. 60, at 1 ¶ 3; Doc. 69, at 1 ¶ 3.[1] In 2004, the City instituted a Race and Social Justice Initiative (RSJI) to "end institutional racism and race-based disparities in City government." Doc. 11-9, at 3; Doc. 59 at 117. As part of their employment agreements, HSD required employees to complete two RSJI activities per year. Doc. 60, at 2 ¶ 7. To fulfill this requirement, employees could complete training programs, or attend events offered by the City, or participate in outside activities the City approves for RSJI. *Ibid.* The activities were required to be social-justice oriented but could pertain to "issues other than race, such as gender, poverty, Indian affairs, [and] LGBTQ issues." *Ibid.*

Diemert attended three required RSJI classes: (1) "Race: The Power of an Illusion," on March 20, 2015; (2) "Equity Lens / Why we lead with race," on April 26, 2017; and (3) "Undoing Institutionalized Racism," presented by the People's Institute for Survival and Beyond, on November 19, 2019. Doc. 60, at 10. During one of the trainings, the facilitators said, "racism is in white people's DNA" and that "white people are like the devil." Doc. 69, at 12 ¶ 42. Diemert spoke up during and

[1] "Doc. __, at __" refers to docket entries and the corresponding page number in the district court, No. 2:22-cv-01640 (W.D. Wash.).

after the trainings regarding these comments. Diemert later heard secondhand from his supervisor that his co-workers called him a "white supremacist" and "racist" in response to his comments during the training. *Ibid.*

"On multiple occasions between 2014 and 2020, [Diemert] was forced to play 'privilege bingo'"—an activity in which all employees, notwithstanding their race, identified different "privileges" they may have, including height, religion, and gender. Doc. 59, at 45-56; Doc. 69, at 11 ¶ 38. Diemert also attended meetings where "supervisors forced their employees to identify their race" and "rank[] themselves on a defined 'continuum of racism.'" Doc. 69, at 12 ¶ 43. In 2015, an HSD manager asked Diemert "what could [he] possibly offer" HSD "being a straight white male[?]" Doc. 73-2, at 15.

In 2019 and 2020, Diemert's supervisor Shamsu Said referred to him as a "colonist." Doc. 69, at 13 ¶ 47. According to Diemert, Said also said that Diemert's race "[was] to blame for all injustices in the United States." *Ibid.* In February 2020, Diemert alleges Said "physically accosted [him and] got in [his] face." *Ibid.* On February 20, 2020, Diemert filed an ethics complaint with the Seattle Ethics and Elections

Commission, claiming that Said pressured him to approve an application made by one of Said's family members who was ineligible for the utility discount program. Doc. 60, at 4 ¶ 18. When Diemert accused Said of fraud, Said claimed that Diemert made the accusation because of his "white privilege." Doc. 69, at 14 ¶ 48; Doc. 73-2, at 30. In 2021, Diemert informed Ryan Groce—an HSD Employee & Labor Relations Manager—that he would no longer participate in RSJI trainings. Doc. 69, at 4 ¶ 14; *id.* at 113-114.

B. Procedural Background

Diemert filed an EEOC charge on December 23, 2020. He subsequently filed suit in the United States District Court for the Western District of Washington on November 16, 2022. In his Complaint, Diemert brought Title VII hostile work environment, constructive discharge, and retaliation claims against the City of Seattle. Doc. 1, at 23-25 ¶¶ 137-165. As relevant here, Diemert argues that the City's RSJI program created a hostile work environment by "infus[ing] race into all City functions" and "reduc[ing] [him] to an embodiment of his race." Doc. 67, at 1 (emphasis omitted). Diemert also alleged that he faced "severe racial harassment" through (1) the RSJI training materials and

messaging, and (2) various comments made by his coworkers and supervisors during and outside the RSJI training events. *Id.* at 2.

The City filed a motion for summary judgment on Diemert's Title VII claims, and the district court granted that motion. Doc. 90, at 2. At the outset of its opinion, the court stated that while

> [c]ontrolling precedent makes clear that the legal protections against workplace discrimination apply with equal force regardless of the plaintiff's race. . . . [W]e must acknowledge what history and common sense tell us: instances of discrimination against the majority are rare and unusual. *Diemert does not present that rare and unusual case here.*

Ibid. (emphasis added). On Diemert's hostile-work-environment claim, the court held that Diemert could not demonstrate that his allegations rose to the level of "severe or pervasive racial harassment from which a reasonable juror could conclude Diemert's work environment was objectively hostile [under] the circumstances." Doc. 90, at 26 (citing *Okonowsky v. Garland*, 109 F.4th 1166, 1179 (9th Cir. 2024)).

Diemert then filed this appeal. Doc. 92.[2]

[2] The United States takes no position on the merits of Diemert's hostile-work-environment claim or on his other claims against the City.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment on Diemert's hostile-work-environment claim to the extent the court improperly applied a heightened evidentiary standard because of his membership in a "majority" group. The district court premised its analysis on its own view as to the differences in the experience of discrimination between majority and minority group members—*i.e.*, that "discrimination against the majority [is] rare and unusual." Doc. 90, at 2. It therefore appeared to require Diemert to produce additional evidence to support an inference of discrimination under Title VII.

The Supreme Court, however, recently and unanimously rejected that approach in *Ames v. Ohio Department of Youth Services*, 145 S. Ct. 1540 (2025), which held that the evidentiary standard under Title VII "does not vary based on whether or not the plaintiff is a member of a majority group." *Id.* at 1548. Because the district court appeared to rely on a standard that is no longer good law, this Court should vacate the decision on Diemert's hostile-work-environment claim and remand the case to the district court to apply the proper standard.

ARGUMENT

I. The district court erred to the extent it applied a heightened evidentiary standard to Diemert's hostile-work-environment claim because he was a member of a racial majority group.

A. Title VII does not assign a heightened evidentiary standard for establishing a racial hostile-work-environment claim when a plaintiff is a member of a racial majority group.

A plaintiff that is a member of a racial majority group does not have a higher evidentiary standard to prevail on a hostile-work-environment claim under Title VII. The Supreme Court recently reaffirmed that "the standard for proving [race-based] disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a [racial] majority group." *Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 1540, 1544 (2025). In *Ames*, the Court unanimously reversed the Sixth Circuit's decision holding that Ames had failed to meet her prima facie burden because she had not shown "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* at 1544 (quoting *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023)).

As the Court explained, the text of "Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and

minority-group plaintiffs." *Ames*, 145 S. Ct. at 1546. Instead, that provision "focus[es] on [discrimination against] individuals rather than groups" and "establish[es] the same protections for every 'individual'" regardless of an individual's "membership in a minority or majority group." *Ibid.* The Court made clear that the text "left no room for courts to impose special requirements on majority-group plaintiffs alone." *Ibid.*

At bottom, there is no doubt that the "background circumstances" rule is no longer good law. In so holding, the Supreme Court overturned precedent in several courts of appeals applying that requirement to majority-group Title VII claims. *See, e.g.*, *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997) (requiring background circumstances for majority plaintiff); *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986) (same).

B. There is substantial doubt as to whether the district court required Diemert to show "rare and unusual" circumstances to succeed on his racial hostile-work-environment claim because he is a member of a racial majority group.

The district court committed reversible error to the extent it required Diemert, as a member of a racial majority group, to meet a heightened evidentiary standard to prevail on his hostile-work-

environment claim. For any hostile-work-environment claim, the plaintiff must show (1) that he was "subjected to verbal or physical conduct because of [his] race," (2) that the conduct was "unwelcome," and (3) that "the conduct was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment." *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003) (internal quotation marks omitted) (quoting *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)). "The working environment must both subjectively and objectively be perceived as abusive." *Id.* at 799 n.6 (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000)).

In analyzing whether Diemert had demonstrated severe or pervasive harassment, the district court appeared to wrongly hold Diemert to a higher standard because of his membership in a racial majority group. Before conducting any analysis of Diemert's Title VII claims, the district court opined that "instances of discrimination against the majority are rare and unusual," and Diemert failed to "present that rare and unusual case" in this lawsuit. Doc. 90, at 2. In doing so, the district court invoked the same premise—that discrimination against a majority group plaintiff is "rare and unusual"—animating the Sixth

Circuit's "background circumstances" test. But the Supreme Court in *Ames* made clear that this view of Title VII's requirements is no longer good law. By invoking the legal framework rejected in *Ames* at the outset, the district court appears to have applied an erroneous heightened standard to analyze Diemert's claims.

To be sure, the district court never explicitly referred to the "background circumstances" rule in its analysis of whether the harassment Diemert alleges was severe or pervasive. But its analysis suggests that it implicitly applied a heightened evidentiary standard. First, while the court stated it was not applying the "background circumstances" standard to Diemert's disparate treatment and retaliation claims (Doc. 90, at 33 n.6), it did not include a similar disclaimer covering its discussion of the hostile-work-environment claim. This omission is significant given the court's ultimate assessment—at the outset of the opinion—that Diemert had not presented "rare and unusual circumstances."

Moreover, the district court's application of a heightened evidentiary standard can also be inferred from its treatment of Diemert's allegations of a hostile work environment, including those involving RSJI

trainings. Diemert alleged that during these trainings, trainers made comments such as "white people are the devil," "racism is in white people's DNA," and about "white people being cannibals." Doc. 69, at 12. The court, however, discounted these comments by stating that "[t]raining on concepts such as 'white privilege,' 'white fragility,' implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to form a healthy and inclusive working environment." Doc. 90, at 25 (citing *De Piero v. Pennsylvania State Univ.*, 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024)). It dismissed allegations about RSJI trainings as merely "prompt[ing] discomfort or spark[ing] debate" but not violating Title VII. *Id.* at 21. It is far from clear, however, that the district court would reach the same result if a trainer during an employer-sponsored training had directed a similar race-based comment to a member of a minority group, such as stating that that "[black, Hispanic, or Asian] people are the devil."

Likewise, the court categorically dismissed alleged comments that Diemert was a "colonist" or "white people [are] cannibals" as "too infrequent to surpass the type of 'joking or teasing [the Ninth Circuit] [has] held to be part of the ordinary tribulations of the workplace." Doc.

90, at 29 (quoting *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 649 (9th Cir. 2021)). But *Fried* does not clearly support summary judgment in this case. In *Fried*, the Ninth Circuit found no hostile work environment based on "coworkers' banter" with a colleague, even though that banter was derogatory. 18 F.4th at 649. In that context, this Court held that "sporadic gender-related jokes or occasional teasing do not support a hostile work environment claim." *Ibid.* (citation omitted).

In this case, by contrast, the remark about Diemert being a "colonist" was made by a *supervisor*, not a colleague, and the district court cited no indication that the supervisor meant the comment as a joke or banter. Likewise, the comments about "white people being cannibals" or "racism is in white people's DNA" were not made as "jokes" or "teasing," but instead were part of an employer-sponsored training, in which a reasonable employee might fairly view his employer to endorse the comments absent any contrary indication. *See id.* at 648 ("An employer can create a hostile work environment by failing to take immediate and corrective action in response to a coworker's [harassment or discrimination] the employer knew or should have known about.").

When considered together, these aspects of the opinion raise a significant possibility that the district court required Diemert to prove not just "severe or pervasive" harassment as required by Title VII but also that his allegations present a "rare and unusual case" given his racial majority group status. Doc. 90, at 2. *Ames* leaves no doubt that this type of differential treatment is impermissible. Because there is substantial doubt whether the district court applied the correct legal standard in evaluating Diemert's hostile-work-environment claim, and the Supreme Court has since issued an opinion clarifying the proper standard, this Court should vacate the judgment and remand to the district court for consideration under the appropriate standard.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment on plaintiff-appellant's Title VII hostile-work-environment claim and remand to the district court for application of the proper standard.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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