No. 25-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA DIEMERT,
Plaintiff-Appellant,

v.

CITY OF SEATTLE,
Defendant-Appellant.

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

BRIEF OF AMICUS CURIAE THE BUCKEYE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29 and 26.1, The Buckeye Institute states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties and civil rights, especially those liberties guaranteed by the Constitution of the United States, against government overreach. In recent years, government entities acting under the guise of DEI programs purportedly designed to promote racial equity have done exactly the opposite—they have divided Americans by race, casting some races as oppressors and others as victims and assigning collective guilt based on race or ethnicity. This is inimical to

[1] Pursuant to Rules 29, The Buckeye Institute states that all parties have given consent to file this amicus brief. Further, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

the Fourteenth Amendment, the 1964 Civil Rights Act, and the fundamental notion that the Constitution is—and ought to remain—colorblind.

SUMMARY OF THE ARGUMENT

The trial court erred by taking a cramped view of Title VII's protections of an employee exposed to a hostile work environment. The trial court overlooked that much of the hostility that Mr. Diemert testified was directed at him due to his race came from the municipal government of the City of Seattle. The City contracted with its DEI training provider to present its programs at work, during working hours, with the City's imprimatur. The racial affinity groups that Mr. Diemert complained of were likewise blessed by the City government. The trial court held that Mr. Diemert's discomfort failed to reach the level of distress—both subjectively and objectively—needed to establish a hostile work environment. The trial court, however, seemed to overlook the fundamentally flawed premise from which the City's DEI training and affinity groups arose: That is, that the government should encourage Americans to view race as a qualitative characteristic that should shape how we view one another.

In his lone dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice John Marshall Harlan articulated his view of a color-blind constitution. Plessy's argument was that the Fourteenth Amendment prohibited designations based on race, and that the majority's view that "separate but equal" facilities passed constitutional muster was, at best, window dressing for racial prejudice, and at worst, a disingenuous

attempt to justify a racial caste system. To Harlan, the damage to civil rights lay not in the separation of races inherent in Louisiana's train car statute, but in the government's recognition of any distinction between citizens of the United States based on race.

It has become fashionable of late to give lip-service to Harlan's dissent while rejecting the constitutional vision he articulated in it. Modern critics have argued that Harlan's color-blind constitution is nothing more than a fig leaf to cover for structural white supremacy. *See, e.g.*, Jamelee Bouie, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. Times (July 7, 2023), https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html. Or that Harlan's view is too naïve and fails to recognize the realities of race in America and the need for government intervention. These criticisms are logically flawed and ahistorical. To be sure, Harlan wrote in the language of 1896, which can sound strident to modern ears. He pulled no punches when describing the state of the society in which he lived. He came from a family that had owned slaves, fought for the Union, and grew up with a half-brother of mixed race. Far from naïve, his dissent was a bracing tonic in the face of a court majority determined to obfuscate the true intent and effect of the Louisiana statute challenged in *Plessy*.

Thankfully, much has changed since Harlan wrote his dissent. *Brown v. Board of Education*, 347 U.S. 483 (1954), overturned *Plessy*. Congress passed the Civil

Rights Act of 1964. Most Americans alive today cannot remember—or even conceive of—the de jure segregation that was commonplace in education, the workplace, and public spaces that existed only three generations ago. Yet Harlan's views are just as relevant now. While certain government interventions—from the affirmative action given judicial sanction in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)—to today's DEI training may spring from a desire to bring about a better and more equitable society, they ironically suffer from the same as Louisiana's noxious segregation statute: They sort American citizens by race. Judged by the standard of Harlan's *Plessy* dissent, the distinction between a segregated train car and state-sponsored racial affinity groups is meaningless. It doesn't matter whether the distinction between races is being drawn in order to provide a benefit to ameliorate either past wrongs or current lack of opportunity. The sin is in the government taking any notice of the race of a U.S. citizen. This case offers the court an opportunity to incorporate what has become a canonical dissent into today's evolving jurisprudence on race and the Fourteenth Amendment, and move towards the America that Harlan envisioned.

ARGUMENT

I. The Great Dissenter

"But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy,* 163 U.S. at 559 (1896) (Harlan, J., dissenting). The first Justice John Marshall Harlan wrote those words in 1896 in what constitutional scholars and Supreme Court Justices have identified as one of the most important dissenting opinions in American jurisprudence. *See* Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 245 fn. 14 (1998) (citing Justice William Brennan, and scholars Bruce Ackerman and Alan Barth on the canonical nature of Harlan's dissent in *Plessy*); *see also* Anita Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 Rutgers L. Rev. 781, 800 (2000).

Yet while present-day scholars, judges, and politicians often pay lip-service to Harlan's dissent, they often fail to recognize the radical nature of his words. Many of our nation's current struggles over how to cement racial equality into our society flow from our nation's failure to adopt Harlan's race-neutral constitution a century ago. Indeed, in an address to a group of Second Circuit judges, Thurgood Marshall stated that "Affirmative action is an issue today because it was not color blind in the 60 years which intervened between Plessy and Brown." Peter Canellos, *Why the*

Court's Civil Rights Hero Might Have Opposed Affirmative Action, Politico (Dec. 11, 2022), https://www.politico.com/news/magazine/2022/12/11/john-marshall-harlan-opposed-affirmative-action-00073295. As one commentator put it, "as the nation came to recognize and reject the moral iniquity of the separate but equal doctrine, Harlan and his dissenting voice became the noble and judicious symbol of how the law should have been." Krishnakumar, *supra*, at 802. This case presents the Court the opportunity to give new life to Justice Harlan's powerful dissent.

A. Harlan's Background

In reading the law, the biography of the cited jurist is often irrelevant. To the student and even the practitioner, the author of an opinion is often just another dead white male. But Justice Harlan's lived experience requires readers to take his words seriously. John Marshall Harlan was born in 1833 in Boyle County, Kentucky. Peter Canellos, *The Great Dissenter* 35–37 (2021). His family was wealthy and owned slaves. *Id.* His father named him after Chief Justice John Marshall, signaling from birth the ambitions his father held for him in law and public life. *Id.* at 38. Harlan graduated from Centre College and studied law at Transylvania University, embarking on a legal and political career that included serving as Kentucky's attorney general and saw combat as a Union Army colonel during the Civil War. *Id.* at 149–51.

Harlan's experience with the racial attitudes of his day was even more complex. He grew up in a household that enslaved people, yet one of the most significant figures in his life was his mixed-race half-brother, Robert Harlan, who was likely the son of John Harlan's father and a woman enslaved by the family. *Id.* at 13. Despite being born into slavery, Robert Harlan became a successful businessman in Cincinnati, just across the Ohio River, and became a "leading politician in Ohio," serving in the Ohio legislature during Reconstruction. Canellos, *Why the Court's Civil Rights Hero Might Have Opposed Affirmative Action, supra.* As legal historian Peter Canellos notes, "It was impossible to separate Harlan's jurisprudence from his life story—especially the quiet but powerful presence of Robert Harlan" *Id.* The post-Civil War Amendments, particularly the Fourteenth Amendment, thus had a salience to him that we, 150 years removed, cannot appreciate.

B. Harlan's View of American Jurisprudence

Historians have noted that Harlan's contemporaries often dismissed him as a "moralizing eccentric" during his time on the Court. Hannah Weiner, *The Next "Great Dissenter"? How Clarence Thomas is Using the Words & Principles of John Marshall Harlan to Craft a New Era of Civ. Rights,* 58 Duke L.J. 139, 143 (2008) (citing Jeffrey Rosen, *The Supreme Court* 77 (2006)).

Indeed, Harlan's jurisprudence was informed by his faith, which he took seriously. He very much subscribed to what we would today call "American Exceptionalism," with perhaps an evangelical edge. As Professor Davison Douglas writes, Harlan believed that "the United States Constitution was part of God's providential design to preserve the Anglo-Saxon tradition of liberty in America." Davison Douglas, *The Surprising Role of Racial Hierarchy in the Civ. Rights Jurisprudence of the First Justice John Marshall Harlan*, 15 U. Pa. J. Const. L. 1037, 1043 (2013). Other scholars have noted that he believed that "the founders and the American people were uniquely chosen by God and that everything that happened in America was meant to fulfill a divine plan" and that "God had established a moral foundation for law." Weiner, *supra*, at 151–152.

Harlan also saw the Declaration of Independence, which he referred to as "our political bible," as America's original founding document, representing "a truer expression of the founders' wishes than the Constitution." *Id.* at 152 (quoting John Marshall Harlan, Associate Justice, Supreme Court of the United States, Remarks at the Unveiling of Memorial Tablets of Former Presidents of Centre College (June 19, 1891)). To Harlan, the "Reconstruction amendments constitutionalized the universal equality that the founders promised in the Declaration of Independence." *Id.* It is from these amendments and belief in a providential hand guiding American

jurisprudence that Harlan arrived at his view of a color-blind constitutional and a citizenry of equals.

II. The *Plessy* Dissent

Harlan's dissent in *Plessy* is unusual not just for its content, but for its scope and breadth. The majority treated the case as having little constitutional import. In the majority's view—informed by the recently decided *Civil Rights Case*, 109 U.S. 3 (1883), in which Harlan was also the lone dissenter—the Louisiana statute did not conflict with the Fourteenth Amendment because it was a "reasonable regulation" that did not interfere with the "political equality of the negro . . . ." *Plessy*, 163 U.S. at 550. The *Plessy* majority held that "[i]n determining the question of reasonableness, [the state legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Id.* The majority further engaged in circular reasoning, holding that

> we cannot say a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Id. In other words, the decision was simply business as usual, affirming a reasonable regulation for the comfort and safety of citizens. Indeed, newspapers reporting on the *Plessy* decision saw it so lacking in news value, that it listed *Plessy* second in a

story reporting the decisions of the day. *Three Louisiana Cases Decided*, The Times-Picayune, May 19, 1896, at 8.

The majority went on to engage in what we would today call gaslighting—insisting that a readily observable problem simply isn't real. To the *Plessy* majority, any badge of inferiority associated with government-sanctioned classification and separation was imaginary:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy, 163 U.S. at 551.

The majority concluded by giving a nod to the legal equality required by the Fourteenth Amendment while with a wink holding that it shouldn't really be taken literally:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544.

But Justice Harlan took the Fourteenth Amendment's words seriously and literally. His genius was to read the Fourteenth Amendment as in fact prohibiting the government from making any "distinctions based on color." It—along with the

Thirteenth and Fifteenth Amendments—had "removed the race line from our governmental systems." *Id.* at 555 (Harlan, J., dissenting). This was the apotheosis of the sort of equality begun in the Declaration of Independence. The logical conclusion of this view of the Fourteenth Amendment was ludicrous to his contemporaries and still shocks today. Harlan wrote that "[i]n respect of civil rights, common to all citizens, *the constitution of the United States does not*, I think, *permit any public authority to know the race of those entitled to be protected* in the enjoyment of such rights." *Id*. at 554 (Harlan, J., dissenting) (emphasis added). Plainly, the DEI training experiences that Mr. Diemert described and the racial affinity fall far short of Harlan's vision.

And while Harlan articulated an idealism stemming from his belief that the divine hand of providence guided American law, he was nevertheless a brutal realist in acknowledging the racial attitudes of his day. This allowed him to lacerate the majority's separate-but-equal sophistry. He recognized that the wolf often comes in sheep's clothing.

> State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

Id. at 560–61 (Harlan, J., dissenting). Again, Harlan saw that the Louisiana statute's harm arose not from relegating Black people to an inferior train car (though they

often were) but from the very act of drawing lines based on race. Again, his realism on the purpose of the Louisiana statute cuts deep:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Id. at 556–57 (Harlan, J., dissenting).

The DEI initiatives that Mr. Diemert complains of have both champions and detractors. Many of those detractors, like Mr. Diemert himself, argue that the DEI regimes in place in government and non-government institutions are not innocuous programs designed to promote racial harmony and understanding, but rather are a pretext for political indoctrination and a racial spoils system. That question is beyond the scope of this brief. But it is worthy of the same clear-eyed realism that Justice Harlan brought to the Louisiana statute. Mr. Diemert argues that the state-sanctioned DEI regime is essentially imposing on him a badge of inferiority on the basis of his race. Justice Harlan understood, as Francois de La Rochefoucauld wrote, that "hypocrisy is the tribute that vice pays to virtue" and that politicians, and even his colleagues on the bench, would obfuscate the real reasons behind a racial classification that they knew was indefensible.

III. Renewing Justice Harlan's Vision

Some may argue that it is folly to enlist a historical figure to address a contemporary controversy. But Harlan's dissent in 1896 sets forth a national vision—indeed a national constitutional policy that bears consideration today. In large part, Harlan's view has prevailed, if not always in the judiciary but in the hearts and minds of the American people. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (decided the same day as *Brown* and noting equal protection stems from "our American ideal of fairness"). Harlan wrote that "the destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under sanction of law." *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). The idea of two races "indissolubly linked together" was hardly a forgone conclusion in 1896. And there are still voices urging racial separation—albeit for different reasons—today. *See, e.g.,* Dion J. Pierre, *Harvard Prepares to Host All Black Graduation,* National Association of Scholars (May 12, 2017), https://www.nas.org/blogs/article/harvard_prepares_to_host_all_black_graduation; *Columbia's Multicultural and Affinity Graduation Celebrations*, Columbia University, https://commencement.columbia.edu/content/multicultural-grad-celebration (last visited July 24, 2025).

To be sure, as the district court noted, these affinity group celebrations—like the City of Seattle's affinity groups—qualify that they are "open to all." But does not the very act of separation sow division and distrust? Put in starker terms, applying the reasoning of Harlan's *Plessy* dissent, would a rail car that was labeled "whites preferred" be any less odious than one labeled "whites only?"

And although the U.S. Supreme Court overruled *Plessy's* separate-but-equal doctrine in *Brown v. Board of Education*, it did so without citing Harlan's dissent. *See generally Brown*, 347 U.S. 483. Rather, the *Brown* Court distinguished *Plessy* on the basis that times and circumstances had changed. *Id.* at 492–493. *See* Krishnakumar, *supra*, at 800. Thus, Harlan's vision of a Fourteenth Amendment that prohibited the government from engaging in *any* racial distinctions and fulfilling the Declaration of Independence's promise of equality have yet to be realized. The U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023), has reshaped the constitutional landscape regarding the treatment of race in American society. This change leaves room for a reconsideration of Harlan's expansive view of the Fourteenth Amendment and the radical notion that no government ought to be engaged in classifying its citizens by—or even making note of—their race. While Justice Marshall noted that the Constitution had not been color-blind for the period between *Plessy* and *Brown*, it is never too late to start.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 29(a)(2) and L.R. 32-1(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,333 words.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 25th day of July 2025.

Respectfully submitted,

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