Case No. 25-1068

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSHUA F. YOUNG,
Plaintiff – Appellant,

v.

COLORADO DEPARTMENT OF CORRECTIONS, ET AL.,
Defendants – Appellees.

On Appeal from the United States District Court
for the District of Colorado

BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION, THE MANHATTAN INSTITUTE, AND THE AMERICAN CIVIL RIGHTS PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus Southeastern Legal Foundation is a Georgia nonprofit corporation, amicus the Manhattan Institute is a New York nonprofit corporation, and amicus the American Civil Rights Project is a Texas nonprofit and 501(c)(3) corporation. Amici do not have any parent companies, subsidiaries, or affiliates. Amici do not issue shares to the public, and no publicly traded corporation owns 10% or more of their stock.

Counsel also certifies that the following listed persons and entities have an interest in the outcome of this case and were not included in the Certificates of Interested Persons in any previously filed brief:

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IDENTITY OF AMICI CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and rebuilding the American Republic. SLF has an abiding interest in the protection of our civil liberties and, in particular, the ability of public employees to hold their jobs free from a racially hostile environment that violates both the letter and spirit of our colorblind Constitution. This is especially true when the government-employer attempts to force controversial ideologies upon its captive employees under the guise of workplace training. SLF has defended the rights of public employees across the country and is committed to defending their freedom of thought from impermissible governmental demands.

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has sponsored scholarship and filed briefs in cases involving racial discrimination and the propagation of insidious DEI structures, *see*, *e.g.*, Ilya Shapiro, *Lawless: The Miseducation of America's Elites*

[1] No counsel for a party has authored this brief in whole or in part, and no person other than Amici, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Because Defendants-Appellees did not consent to the filing of this brief, Amici have filed a Motion for Leave to File along with this brief. *See* Fed. R. App. P. 29(a)(3).

(2025); Christopher F. Rufo, *America's Cultural Revolution* (2023), as well as those that insulate government actors from legal accountability.

The American Civil Rights Project (the ACR Project) is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law. The ACR Project believes its expertise will benefit the Court in its consideration of this case.

In filing this brief, amici urge the Court to hold that when an employer requires its employees to attend training sessions it is implied that the employer expects its employees to implement the trainings. After all, an employer does not pay its employees to attend training sessions as a means of providing them with general education. This case interests amici because it involves the compulsion of beliefs and speech by a government employer in violation of our nation's most basic tenets establishing freedom of speech and thought. Amici frequently represent and advocate for employees in situations where government entities attempt to use overly broad job descriptions to compel attendance at trainings on topics such as DEI and then try to skirt judicial oversight by using implied threats to achieve informal censorship and to compel the speech and actions of their employees on topics of great political and social debate. Accordingly, amici have an interest in seeing this Court uphold precedent regarding when implicit government threats are objectively coercive and infringe upon First Amendment rights. *See Bantam Books*

v. Sullivan, 372 U.S. 58 (1963); *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243 (10th Cir. 2000).

SUMMARY OF ARGUMENT

Job training is *for* the job. That's certainly a reasonable expectation. Yet here, Plaintiff Young was required to attend a Colorado Department of Corrections (CDOC) training that was anything but related to Young's duties as a Sergeant. The training defined "race" as "[a] social construct . . . created and used to justify social and economic oppression of people of color by white people." App. Vol. 1 at 160 (ER 156). The training further intimated that all white people either espouse "white racism" or "perpetuate white supremacy." *Id.* at 164 (ER 160). The entire purpose of the training was to advance what is euphemistically called "equity," a concept whereby the government discriminates and stigmatizes by race to ensure equality of outcome rather than equality of opportunity. *See Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 648 (5th Cir. 2021) (Ho, J., concurring in part and concurring in the judgment) (explaining that the difference between equity and equality is "the difference between securing equality of opportunity regardless of

race and guaranteeing equality of outcome based on race. It's the difference between color blindness and critical race theory.").

The district court erred in finding that Plaintiff could not state a claim because no one directly told him that he faced penalties if he did not implement the controversial ideology espoused in the challenged training. *See* App. Vol. 4 at 231 (ER 1017–18). The district court failed to recognize that threats can be implied. When it comes to workplace training, employees are allowed to reach the natural and obvious conclusion about the point of the training—that it is now part of their job, even if the employer never expressly says, "do this or else we'll ____." An employee's concern that he faces consequences from a failure to implement training is anything but "imaginary or wholly speculative," which is the standard for alleging a plausible claim. *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) (quoting *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979)). The Court should remand the matter to the district court for discovery and factual development so it may assess, at summary judgment with the benefit of the full record, whether Defendants were reasonably implying a penalty under the four-part test recently set forth by the Supreme Court in *National Rifle Ass'n v. Vullo*, 602 U.S. 175 (2024). Doing so would not unnecessarily interfere with any legitimate interest an employer has in training a competent workforce. On the contrary, the Court would be fulfilling its important role in ensuring that diversity training required by public employers

does not become a delusive name for the imposition of a political orthodoxy on public employees.

ARGUMENT

I. Plaintiff reasonably construed the training as a demand to implement the government's race-based ideology on the job, even though Defendants never directly threatened Plaintiff for failing to comply.

A. The sufficiency of Plaintiff's pleading turns on whether he reasonably believed he faced penalties for failing to implement the training when performing his job.

This Court has already recognized that the government requiring its employees to either "endorse a particular race-based ideological platform or risk losing their job," could support a Title VII or a compelled speech claim. *See Young v. Colo. Dep't of Corr.,* 94 F.4th 1242, 1251 n.2 (10th Cir. 2024) ("*Young I*"). Everyone seems to agree that: (1) the training involved a highly controversial and race-based ideology; (2) it was done in the workplace; and (3) Plaintiff found it objectionable. The only question is whether, per *Young I*, the training amounted to a requirement that Plaintiff endorse the training by implementing it on the job, or if he just had to listen to it.

The district court correctly ruled that the standard is objective and viewed "from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." App. Vol. 4 at 229 (ER 1016) (quoting *Harsco Corp. v. Renner*, 475 F.3d 1179, 1187 (10th Cir. 2007)). Yet the district court ruled that

Plaintiff only had to listen to the training and dismissed Plaintiff's amended complaint because the government never directly told him that his job depended on him changing his beliefs in accordance. *Id.* at 229–30 (ER 1016–17). In sum, the district court treated his belief that his workplace training was for use *in* the workplace as objectively unreasonable. But an employer does not pay an employee to attend training sessions just to generally educate the employee; rather, it does so to set expectations for and to shape the employee's actions and speech within the workplace.[2] This is particularly true where the employer, as CDOC did here, makes the training mandatory. By denying the proposition that employers intend for employees to apply training materials in the workplace, the district court's ruling subverts well established law in this Circuit and the Supreme Court regarding when the government's threats are objectively coercive.

B. Defendants reasonably intimated that Plaintiff was expected to adopt the job training when performing on his job.

Just last year, in *National Rifle Ass'n*, the Supreme Court reiterated that veiled threats from the government can be just as coercive as direct ones. 602 U.S. at 181; *see also Lee v. Weisman,* 505 U.S. 577, 592 (1992) ("subtle coercive pressure" may

[2] Sexual harassment training is an example of such. An employer does not dictate this training to educate employees about appropriate interactions between individuals of different sexes. It does so to inform its employees of (1) the law and (2) the employer's demands—how, for instance, a male employee must interact with a female employee in the workplace, or how employees should respond if they witness workplace sexual harassment.

violate the First Amendment). The government cannot get away with threats just by being sly or clever. As recognized long ago in the Second Circuit, the government may not take actions that "can *reasonably* be interpreted as *intimating* that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Hammerhead Enters. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983) (emphasis added).

It is hard to understand how requiring employees to take workplace training could do anything but "reasonably intimate" to employees that they must adopt the substance of the training as part of their jobs or face adverse employment actions. And that is exactly what this Court told Plaintiff could give rise to a claim in *Young I,* 94 F.4th at 1251 n.2 (if Defendants directed Plaintiff to "endorse a particular race-based ideological platform or risk losing [his] job[]," then it could support a Title VII or a compelled speech claim). "People do not lightly disregard" the "thinly veiled threats," *Bantam Books*, 372 U.S. at 68, of their employer. "[M]ost people are frightened," *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003), to test whether their employer is just making suggestions when it makes them sit through a training. The lower court did not question what a reasonable employee might think of the job training at issue here, even though "[w]hen evaluating compelled speech, [courts] consider the context in which the speech is made," *Evergreen Ass'n, Inc. v. City of*

New York, 740 F.3d 233, 249 (2d Cir. 2014) (citing *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988)).

To be sure, the district court was correct that a plaintiff's fears must be objectively well grounded, not irrational or subjective. App. Vol. 4 at 229 (ER 1016) (quoting *Harsco*, 475 F.3d at 1187)). But the district court did not address the well-established standard that a fear of punishment is only unreasonable when it is "*imaginary* or *wholly* speculative." *Kan. Judicial Review*, 519 F.3d at 1118 (emphasis added) (quoting *Babbitt*, 442 U.S. at 302); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (same). Nothing is "imaginary" about an employee fearing a penalty from disregarding the substance of mandatory workplace training. By finding Plaintiff had no objective basis to believe that "workplace training" was training for the workplace and he needed to adopt and apply the ideology espoused in the training, the district court artificially heightened the pleading standard for alleging an objective threat.

Courts do not require that threats be express or direct, because a threat can be "objective" without being either. Not even the formal power to punish is necessary to establish that the government has crossed the line into coercion. *See Bantam Books,* 372 U.S. at 66–68. This Court itself has long recognized that "indirect discouragement" is enough to cause undue pressure. *Phelan*, 235 F.3d at 1247 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950)); *see Cressman*,

798 F.3d at 948 (finding compulsion through "indirect discouragement"). The government can effectively demand Plaintiff endorse "a particular race-based ideological platform," *Young I,* 94 F.4th at 1251 n.2, through "other means of coercion" short of direct orders, *Bantam Books*, 372 U.S. at 67. After all, clever government officials wishing to skirt judicial oversight can use implied threats to achieve "informal censorship" and impose a preferred viewpoint without any "safeguards whatever." *Id*. at 67, 70. The Supreme Court therefore held in *Bantam Books* that the government may not employ "*informal sanctions*," and that unlawful coercion is not limited to direct threats. *Id*. at 67 (emphasis added).

No court has recognized this with more clarity than this one did when, in *Axson-Flynn v. Johnson*, it concluded that the government brought coercive pressure to bear even without a "direct threat or a gun to the head," 356 F.3d at 1290. The case involved a Mormon student at the University of Utah's acting program who refused to use offensive words during classroom exercises. *Id*. at 1280. The university never told her to say the words or be kicked out of the program, nor did it punish her in any way. *Id.* at 1290. Instead, she just read the writing on the wall, assumed "that it was only a matter of time," and left the university before it could formally threaten or sanction her. *Id*. at 1283. Yet this Court ruled that her assumptions were legitimate and that the university's actions could be deemed compulsory all the same.

Like the student in *Axson-Flynn*, Plaintiff felt he had no choice but to resign before the government formally threatened him with penalties. *See id.* at 1290 (university never threatened to expel or suspend the student). His employer gave him workplace training. He assumed—naturally—that it was relevant to his job and thus, his employer wanted him to use it in the workplace. He also reasonably assumed that if he failed to comply with and apply it, then he would suffer adverse consequences. Although Plaintiff was never threatened by his employer with penalties, neither was the student in *Axson-Flynn*. Like her, Plaintiff was entitled to read the writing on the wall. Employment penalties are what happens when employees don't act in accordance with their employer's expectations. At the very least, Plaintiff, by pleading that the training and associated materials were a "workplace training," makes it plausible, for Federal Rule of Civil Procedure 12(b)(6) pleading purposes, that Plaintiff had an objective basis for inferring he faced repercussions for not applying the training in the workplace. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Certainly, his allegations make out more than an "imaginary" fear, the legal threshold he must surpass when drafting allegations. *See Babbitt*, 442 U.S. at 302. In sum, normally employers do not invest the time and expense of workplace training when they are not training their employees on their expectations for the job.

Courts "look through forms to the substance" in determining whether the government is "simply exhort[ing]" or impermissibly pressuring. *Bantam Books*,

372 U.S. at 66–67. Just as in *Bantam Books*, Plaintiff "reasonably understood" that Defendants were telling him what he was supposed to do *on* the job when it gave him training *for* his job. *Id*. at 68. In fact, any other conclusion would have been strange. It would be odd indeed if every employee was free to ignore workplace training unless his or her boss also added, "and if you don't do it, you are fired." That's not how any workplace functions and that's not what *Bantam Books* (or *Phelan*, or *Cressman*, or *Axson-Flynn*) requires.

Plaintiff has pled sufficiently to be entitled to the discovery he needs to advance proof capable of allowing a reasonable jury to conclude that his belief about the training was reasonable. This inquiry turns on facts. The Supreme Court recognized in *National Rifle Ass'n* that the question of whether a plaintiff has "reasonably understood" the government to be making a "coercive threat" turns on facts that can be flushed out in the discovery process. 602 U.S. at 189 (noting examples of (1) word choice and tone; (2) regulatory authority; (3) the recipient's perception of a threat; and, (4) whether the speech refers to adverse consequences). Plaintiff ought to get that chance.

II. Courts have an important role in protecting the rights of employees from workplace training that constitutes a hostile work environment.

Amici acknowledge that all employers must be allowed to train their employees for the workplace; "the government could barely function otherwise." *Id.* at 187 (recognizing that the government itself can "say what it wishes"

(quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995))). But when the employer is the government, it may not compel its employees to affirm beliefs with which they disagree. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 891–93 (2018). An employer can demand that its employees engage in speech, but only when that speech is part of their job duties. *Id*. at 908. That does not mean, however, that every speech restriction imposed by a government employer upon its employees is valid. *Id*. at 916. As far back as *Garcetti v. Ceballos*, the Court recognized that public employers cannot impose their ideologies upon their employees by drafting "an excessively broad job description" because not everything a public employee says in the workplace is "government speech subject to government control." *Kennedy v. Bremerton Sch. Dist*., 597 U.S. 507, 530–31 (2022) (quoting *Garcetti*, 547 U.S. 410, 424 (2006)).

The job duties inquiry is a practical one that asks whether the sort of speech in question is "ordinarily within the scope of an employee's duties." *Id*. at 529 (quoting *Lane v. Franks*, 575 U.S. 228, 240 (2014)). To be sure, this involves a bit of "practical" line drawing about what speech is "ordinar[y]" for a particular job, but it is a line that courts are long accustomed to drawing. *Garcetti*, 547 U.S. at 416, 424; *see Kennedy*, 597 U.S. at 529 (speech in question was not within the scope of duties of a football coach) (citing *Lane*, 573 U.S. at 240 (employee's speech after a criminal trial about his government job not within the scope of duties)). Just as courts

police for pretext a school's purported pedagogical interest in requiring classroom speech as part of a mandated school curriculum, courts would be "abdicating [their] judicial duty" if they failed to investigate whether a public employer's workplace training materials were a pretext for political indoctrination. *Axson-Flynn*, 356 F.3d at 1292–93.

Under this practical inquiry, no doubt exists that this workplace training is not "ordinarily" within the scope of a Visiting Sergeant at the CDOC. *Kennedy*, 597 U.S. at 516, 529. His job was to ensure the safety of prisoners and guests during visiting periods. No one pays a Visiting Sergeant—or any correctional officer—to advance equity or address "white fragility." Any purported justification for the promotion of these concepts would apply equally to any person in America, not just visiting sergeants in prisons. To find otherwise would make all employee speech subject to government control. That's not the law.

CONCLUSION

For all these reasons, and those stated by Plaintiff in his brief, Amici ask this Court to reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 3,194 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Times New Roman, in 14-point type.

/s/ Jordan R. Miller

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on April 29, 2025, with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/ Jordan R. Miller