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13
14 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
15 **SAN JOSE DIVISION**

16 SANTA CRUZ LESBIAN AND GAY
COMMUNITY CENTER d/b/a THE DIVERSITY
17 CENTER OF SANTA CRUZ, et al.,

18 *Plaintiffs,*

19 v.

20 DONALD J. TRUMP, in his official capacity as
21 President of the United States, et al.,

22 *Defendants.*
23

Case No. 20-cv-07741-BLF

**[PROPOSED] AMICI CURIAE BRIEF
OF THE CITY OF SEATTLE AND 20
CITIES AND COUNTIES**

Hearing Date: December 10, 2020

Hearing Time: 9:00 A.M.

Trial Date: None Set

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 4 <https://tinyurl.com/y527tyok> 9

5 Office of Management and Budget, *Historical Tables* <https://tinyurl.com/ydcevha6>
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7 Oscar Lopez, *Number of LGBT+ Elected Officials in U.S. Hits New High* (July 16, 2020),
 8 <https://tinyurl.com/y27o17p2> 6

9 *Race & Social Justice Initiative 2019-2021 Strategy*, City of Seattle,
 10 <https://tinyurl.com/y58be42c>..... 4

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17 *See What We Do*, The People’s Institute Northwest, <https://tinyurl.com/y534g8os>. 4

18 Stephen M. Hennessy et al., *Cultural Awareness and Communication Training: What Works*
 19 *and What Doesn’t*, 68 *Police Chief* 11, 15-19 (Nov. 2001) (abstract),
 20 <https://tinyurl.com/yyua4yrf>. 5

21 *Transportation Equity Program*, Seattle Dep’t of Transp., <https://tinyurl.com/yy2rbt6c> 6

22 William H. Frey, *The Nation is Diversifying Even Faster than Predicted, According to New*
 23 *Census Data*, Brookings Institute (July 1, 2020), <https://tinyurl.com/y9fget85>..... 4

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INTERESTS OF *AMICI CURIAE*

1
2 The City of Seattle, together with 20 cities and counties (“*amici*”), submit this brief in
3 support of Plaintiffs’ motion for a nationwide preliminary injunction against Executive Order 13950,
4 “Combatting Race and Sex Stereotyping” (“Executive Order”). This vague and unconstitutional
5 Executive Order seeks to delegitimize concepts underlying essential racial- and gender-justice
6 efforts within our jurisdictions and has the potential to chill important programming on these issues.
7 The Executive Order has created significant confusion and concern among local governments
8 because it is unclear whether it prevents us from continuing trainings on so-called “divisive
9 concepts,” such as unconscious and systemic bias, and because we rely on the services provided by
10 many federal contractors who similarly incorporate such concepts into their inclusion endeavors.

11 All *amici* receive funding, both directly and indirectly, from the federal government. We are
12 therefore concerned about the reach of the Order, which purports to strip funding from federal
13 contractors who “inculcate” their employees with training on concepts including unconscious bias
14 and systemic racism. *See* Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020). Due to the
15 Executive Order’s vague wording, *amici* cannot say with certainty whether we will be subject to
16 enforcement under the Executive Order and have therefore spent resources contingency planning for
17 this outcome. Additionally, *amici* are concerned about the effects of the Executive Order on
18 organizations that provide services within our communities. Because non-government organizations
19 that serve marginalized members of our communities may lose funding if they choose not to comply
20 with the Executive Order, we must consider a potential increase in demand for government-provided
21 services. A nationwide preliminary injunction is necessary to provide *amici* the assurance we need to
22 operate with certainty—without a risk of losing federal funding or needing to absorb the workloads
23 of other organizations.

SUMMARY OF ARGUMENT

24
25 Over the past four years, the Trump Administration has sought to curtail, wherever and
26 however it can, the embrace of a multicultural, inclusive society. This battle goes well beyond
27 xenophobic immigration policies, rollbacks of civil rights enforcement initiatives at the Department
28 of the Justice, efforts to ban transgender people from the military, and the use of race-based

1 patriotism. Put simply, the Trump Administration scorns efforts to remedy the racist harms of our
2 past, initiatives to overcome white supremacist norms of our present, and visions for a future that
3 celebrates the unique experiences of the many who comprise the one of our nation. The Executive
4 Order uses the tremendous fiscal power of the federal government to perpetuate systemic bias and
5 stop those who want to propagate an anti-racist vision of the future through programmatic work
6 intended to build stronger communities.

7 Given the context surrounding its issuance, the Executive Order’s intention is clear: to punish
8 those who are a part of the racial justice reckoning of this moment. In one of the largest movements
9 in U.S. history, millions of Americans have joined each other in protesting racial injustice, police
10 violence against unarmed black people, and systems of power that perpetuate endemic inequality.
11 These demonstrations and calls to action have touched all facets of society, from corporate
12 boardrooms to local governments. In response to this movement, organizations have instituted new
13 training, policies, and reforms to heighten awareness of the presence of unconscious bias and white
14 supremacy in everyday interactions, group dynamics, and organizational structures. Many local
15 governments have created and continued plans for institutional reform, including the diversion of
16 funding for police departments, new restrictions on use of force, and agendas for achieving racial
17 equity in health care and outcomes. These efforts have a long way to go.

18 *Amici* and thousands of entities around the country risk loss of funds and potential
19 enforcement by the federal government. The possible consequences of this uncertainty cannot be
20 overstated, given how integral comprehensive diversity training is to the programmatic efforts of
21 many local governments. These trainings enable *amici* to better serve their most vulnerable and
22 marginalized community members by creating greater understanding across difference. They also
23 build momentum for organizational goals such as the hiring and retention of a diverse workforce and
24 the creation of an inclusive work environment. The Executive Order jeopardizes the achievement of
25 these goals, undermines the values reinforced in these trainings, and has the potential to chill this
26 protected expression for jurisdictions that cannot afford to bear the risk of losing funding. This
27 unlawful attempt to silence entities engaged in the hard work of combating systemic bias must be
28 remedied through a nationwide injunction.

ARGUMENT

I. THE EXECUTIVE ORDER DISRUPTS THE OPERATIONS OF LOCAL GOVERNMENTS THAT PERFORM COMPREHENSIVE DIVERSITY TRAININGS AND UNDERMINES THE GOALS SUCH TRAININGS SUPPORT.

The Executive Order runs directly counter to *amici*'s efforts to provide representative, empathetic government and to recognize and rectify our own institutional shortcomings. These important efforts have been aided by the types of diversity trainings that President Trump's Executive Order intends to prohibit. These trainings, tailored to meet the needs of each jurisdiction, give local governments tools to engage with those they represent, as well as help advance local governments' inward-facing organizational goals and efforts to comply with anti-discrimination laws. In short, the Executive Order disrupts the operations of local governments across the country.

A. Diversity Trainings Are Often Tailored to a Community and Its Needs.

Local governments engage in a variety of training and other activities designed to confront systemic racism and sexism both in the government itself and in the communities those governments serve. They need the flexibility to shape these programs in a way that is responsive to the contours of their communities and designed to overcome the unique histories of discrimination and structural racism within the components of government—flexibility eliminated by the Executive Order.

For example, since early 2019 Milwaukee County has provided diversity and inclusion and racial equity training to more than 4,000 employees and partners. The training is facilitated by the Milwaukee County Office on African American Affairs, the county human resources department, and local and national training vendors with subject matter expertise. These trainings have been appreciated and desired by employees, with the overwhelming response being appreciation for prioritizing the work of normalizing conversations about race and equity and creating spaces to explore the impacts of bias and racism on their workforce, community engagement practices, policy-making, operations and budgeting, and services delivery.

The City of Seattle's commitment to combatting the pernicious effects of systemic discrimination was formalized in 2004 when it adopted the Race and Social Justice Initiative ("RSJI"). Executive Order 2017-13: Race and Social Justice Initiative, City of Seattle (Nov. 28, 2017), <https://tinyurl.com/y2w6m2bd>. This ongoing initiative provides racial and gender equity

1 support to Seattle departments through trainings, technical assistance, hands-on facilitation, and
 2 community engagement. The RSJI is intended to address Seattle’s environmental, structural, and
 3 institutional goals for racial and gender justice. Training for Seattle personnel on these topics is
 4 integral to the effectiveness of the RSJI. Such trainings “build racial justice knowledge, awareness,
 5 network and organizing skills, and deepen analysis of racism and its intersections with other forms
 6 of oppression.” *Race & Social Justice Initiative 2019-2021 Strategy*, City of Seattle,
 7 <https://tinyurl.com/y58be42c>. In addition to its own work, Seattle relies on outside organizations for
 8 their expertise in bringing RSJI principles to the community through convenings and other training
 9 events. Seattle has partnered with the People’s Institute Northwest to conduct anti-racism training
 10 and to participate in its Race and Social Justice Roundtable discussions addressing education
 11 disparities. *See What We Do*, The People’s Institute Northwest, <https://tinyurl.com/y534g8os>.

12 **B. Diversity Training Helps Local Governments Engage with Their Communities.**

13 Diversity trainings incorporating such “divisive concepts” as systemic and implicit bias equip
 14 local governments with perspectives that improve their abilities to serve their increasingly diverse
 15 communities with empathy and respect. Almost 70 percent of the nation’s cities with populations of
 16 300,000 or more are more racially diverse than they were in 2010. Deidre McPhillips, *A New*
 17 *Analysis Finds Growing Diversity in U.S. Cities*, *U.S. News* (Jan. 22, 2020),
 18 <https://tinyurl.com/y5rolmc9>. While whites made up about 80 percent of the U.S. population in
 19 1980, they made up just 60 percent in 2019. William H. Frey, *The Nation is Diversifying Even*
 20 *Faster than Predicted, According to New Census Data*, Brookings Institute (July 1, 2020),
 21 <https://tinyurl.com/y9fget85>. Meanwhile, more people are identifying as LGBTQ than ever before.
 22 About 4.5 percent of adults in the U.S. identified as lesbian, gay, bisexual, or transgender in 2019, up
 23 from 3.5 percent in 2011. Daniel Trotta, *Some 4.5 Percent of U.S. Adults Identify as LGBT: Study*,
 24 Reuters (Mar. 5, 2019), <https://tinyurl.com/y42hhmxb>.

25 Local governments cannot provide essential services and ignore these realities at the same
 26 time. Accordingly, comprehensive diversity trainings help local government staff and elected
 27 officials strengthen their cultural competencies and better understand the perspective and concerns of
 28 their diverse community. For example, *amici*’s criminal justice goals benefit from training in cultural

1 awareness and communication. Diversity training can help police officers understand changes in the
2 composition of their communities and consider how such changes might necessitate modifications in
3 the way they do their jobs. *See* Stephen M. Hennessy et al., *Cultural Awareness and Communication*
4 *Training: What Works and What Doesn't*, 68 *Police Chief* 11, 15-19 (Nov. 2001) (abstract),
5 <https://tinyurl.com/yyua4yrf>. Diversity training for law enforcement might include a discussion on
6 conflict management and how people of different backgrounds may perceive and respond to law
7 enforcement based on their group's historical treatment at the hands of police. Such a program is
8 highly likely to reference concepts of unconscious bias, white supremacy, and structural
9 discrimination.

10 Training is not just an end unto itself—such programs can result in actual policy reform. In
11 Seattle, the RSJI and its anti-discrimination policies have informed the city's criminal justice
12 policies, including decisions about how to use prosecutorial discretion at every step of the legal
13 process. RSJI-trained prosecutors used RSJI processes to develop a pre-charge diversion program for
14 young adults, and prosecutors moved to quash more than 200 old warrants for people charged or
15 convicted of low-level non-violent offenses citing the disproportionate impact on people of color.
16 *See Report on Racial Equity Analysis: Seattle Pre-Filing Diversion Program, Young Adult*
17 *Misdemeanors*, City of Seattle (Apr. 25, 2018), <https://tinyurl.com/y2jp6mnn>; *City Files Motion to*
18 *Clear Some Low-level, Non-Violent Misdemeanor Warrants with Seattle Municipal Court*, *The*
19 *Seattle Medium* (Nov. 28, 2018), <https://tinyurl.com/y3kd9t68>.

20 Criminal justice reform is just one of the many local government objectives that diversity
21 trainings support. Through building better communication, comprehensive diversity trainings
22 enhance the outcomes of planned interactions between local government staff, elected officials, and
23 community members in task forces, at public events, and during other outreach activities. Trainings
24 may also produce more equitable decisions regarding a local government's resource allocations.
25 Trainings that cover the history of government-sponsored residential segregation may help inform
26 decisions on the placement of affordable housing throughout a jurisdiction. Trainings with local
27 transportation staff that cover systemic bias in resource allocation—such as the fact that
28 neighborhoods of color often suffer from worse road and infrastructure maintenance—may help

1 direct future dispersals of resources toward these communities. For example, Seattle City Light
 2 applied RSJI principles in replacing its complaint-based streetlight repair program, and Seattle’s
 3 Department of Transportation has developed a “transportation equity workgroup” to address the
 4 unequal distribution of transportation options across the City, applying RJSI principles. Julie Nelson
 5 & Glenn Harris, *Changing the Lights*, Chicago Public Schools, <https://tinyurl.com/y2zavj44>;
 6 *Transportation Equity Program*, Seattle Dep’t of Transp., <https://tinyurl.com/yy2rbt6c>. Likewise,
 7 the City of Oakland created a Department of Race and Equity in 2015 and has since trained
 8 thousands of employees in workplace diversity and inclusion. In accordance with those principles,
 9 Oakland’s Transportation Department is prioritizing policies that lead to equity in transportation
 10 access and affordability, paving programs, and traffic safety enforcement. *See Department of*
 11 *Transportation Strategic Plan*, City of Oakland, <https://tinyurl.com/y4yxobqm>.

12 **C. Diversity Training Supports Inward-Facing Organizational Goals.**

13 In addition to supporting community engagement efforts, comprehensive diversity training
 14 also reinforces local governments’ inward-facing, organizational goals. *Amici* strive to ensure that
 15 their ranks are reflective of the communities they serve. Unfortunately, for all of this nation’s
 16 history, American government has not been illustrative of its diversity. For example, in 2017, white
 17 men held the majority of elected positions at all levels of government, despite comprising only 31
 18 percent of the population. Alexa Lardieri, *Despite Diverse Demographics, Most Politicians Are Still*
 19 *White Men*, *U.S. News* (Oct. 24, 2017), <https://tinyurl.com/y858lbpp>. Gay and trans people hold 0.17
 20 percent of elected positions nationwide, despite making up 4.5 percent of the adult population. Oscar
 21 Lopez, *Number of LGBT+ Elected Officials in U.S. Hits New High* (July 16, 2020),
 22 <https://tinyurl.com/y27ol7p2>. To help combat this disparity, many local governments are taking steps
 23 to recruit and retain a diverse workforce—an effort that is supported by trainings.

24 For example, the City of Tacoma’s 2015 Equity in the Workforce Policy requires that both
 25 managers with screening and hiring responsibilities and individuals evaluating applicants or their
 26 materials receive training on cultural awareness, while interview panelists must receive training on
 27 implicit bias and discriminatory practices before starting interviews. Office of Equity & Human
 28 Rights, *Handbook for Recruiting, Hiring & Retention: Applying an Equity Lens to Recruiting*,

1 *Interviewing, Hiring & Retaining Employees*, City of Tacoma (October 2015),
2 <https://tinyurl.com/y2c9ml5h>. Meanwhile, in response to findings that women and people of color
3 were underrepresented in the top ranks of municipal government, Seattle developed the “Minimize
4 Bias in Employment Decisions” training program as well as the “Employee Performance
5 Management System” to reduce bias in employment decisions and performance evaluations,
6 respectively. These RSJI-inspired programs have achieved significant early results.

7 As a workforce becomes more diverse, training becomes even more important, as it helps
8 inform staff about how individual beliefs and practices could affect workplace behaviors and
9 interactions. Like many local governments, *amici* strive to provide a work environment inclusive of
10 all races; ethnicities; national origins; gender expressions, identities, and attractions; and sexes. In
11 2016, Seattle implemented a Workforce Equity Strategic Plan, which aims to create a workplace
12 where “institutional and structural barriers impacting employee attraction, selection, participation
13 and retention have been eliminated....” Seattle Department of Human Resources & Seattle Office for
14 Civil Rights, *2018 Workforce Equity Update Report 5* (Mar. 2019), <https://tinyurl.com/y59ugnra>.
15 Training that creates awareness of and sensitivity to these differences, while highlighting the value
16 that different perspectives add to a workforce, can help foster an environment that allows a diverse
17 workforce to thrive. In a study involving interviews of representatives from eleven local
18 governments in the Willamette Valley region in Oregon, “[a]ll interviewees recognized the
19 importance of having members of the organization understand the importance of diversity,” with
20 most providing diversity-focused training opportunities. Masami Nishishiba, *Local Government*
21 *Diversity Initiatives in Oregon: An Exploratory Study*, 44 *State & Local Gov’t Rev.* 55, 60 (2012),
22 <https://tinyurl.com/y5mfomwx>. If done correctly, diversity trainings can help create a work
23 environment where all individuals feel valued for their unique contributions to the team.

24 The combined goals of a diverse workforce and an inclusive work environment in turn
25 support another organizational goal: the improved provision of services through greater
26 understanding of community needs and enhanced communication with all residents. But the benefits
27 of having a diverse workforce are not self-actualizing. A diverse workforce can boost an
28 organization’s effectiveness and ability to innovate only if there are “conditions that foster inquiry,

1 egalitarianism, and learning.” Robin J. Ely & David A. Thomas, *Getting Serious About Diversity:*
2 *Enough Already with the Business Case*, Harv. Bus. Rev. (Nov. 2020), <https://tinyurl.com/y3cn8j1z>.
3 In other words, “an ‘add diversity and stir’ approach . . . will not spur leaps in . . . effectiveness.” *Id.*
4 It takes dedicated efforts, such as comprehensive diversity trainings, to realize the benefits. These
5 conclusions are not academic. In addition to *amici*’s experiences, they are the lived experiences of
6 corporate leaders as well. A coalition letter published by the U.S. Chamber of Commerce exhorted
7 the Trump Administration to withdraw the Executive Order, noting that it “is already having a
8 broadly chilling effect on legitimate and valuable [diversity and inclusion] training companies use to
9 foster inclusive workplaces, help with talent recruitment, and remain competitive in a country with a
10 wide range of different cultures.” *Coalition Letter on Executive Order 13950*, U.S. Chamber of
11 Commerce (Oct. 15, 2020), <https://tinyurl.com/y45sjkby>.

12 **D. Diversity Training Can Help Prevent Harms that Lead to Liability Under Anti-**
13 **Discrimination Statutes.**

14 Last, diversity trainings of the type prohibited by the Executive Order can help avoid
15 infractions that lead to liability under state and federal anti-discrimination laws. For example, Title
16 VII of the Civil Rights Act of 1964 makes it illegal to discriminate, through both adverse
17 employment decisions and hostile work environments, against someone on the basis of their race,
18 color, religion, national origin, or sex. *See* 42 U.S.C. § 2000e *et seq.* Diversity trainings can help
19 prevent the harm these laws are meant to protect against by minimizing the number of bias-
20 motivated incidents in the first place and by giving staff the tools to intervene before situations
21 escalate. Indeed, an affirmative defense to vicarious liability for hostile work environment and
22 harassment claims includes an employer’s showing of exercise of reasonable care to prevent and
23 correct harassing behavior. *See, e.g., Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1184 (9th
24 Cir. 2005) (describing the *Faragher/Ellerth* defense). Proving this defense may include
25 demonstrating that the employer provided anti-discrimination training. *See, e.g., Davis v. Team*
26 *Elec. Co.*, 520 F.3d 1080, 1097 (9th Cir. 2008).

1 **II. A NATIONWIDE INJUNCTION IS NEEDED TO PREVENT THE HARMS CAUSED**
2 **BY THE EXECUTIVE ORDER.**

3 Allowing the Executive Order to remain in effect while its dubious constitutionality is
4 litigated jeopardizes all of the crucial endeavors enumerated above. Nationwide relief is necessary to
5 protect *amici* and other local governments across the country as well as the federal contractors upon
6 which *amici* rely for the delivery of diversity trainings and essential services.

7 The federal government is a crucial source of funds for state and local governments. In 2019,
8 the federal government granted more than \$600 billion in public funds to state and local
9 governments. Office of Management and Budget, Historical Tables <https://tinyurl.com/ydcevha6>
10 (Table 12.1). Funding is provided through a variety of mechanisms, including contracts. *See, e.g.*,
11 Office of Financial Management, State of Washington, State and Federal Agreements,
12 <https://tinyurl.com/y527tyok>. This flow of public money to state and local governments is essential
13 to many key government services, providing hundreds of millions of dollars for, among other things,
14 transportation, agriculture, and housing services. There is no definition of “Government contract” in
15 the Executive Order, and no rules interpreting the Executive Order providing a definition of this
16 term. *See* Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020). Any funding relationship
17 with the federal government runs the risk of being deemed within these impermissible restrictions.

18 The Executive Order therefore places *amici* and local governments across the entire nation in
19 a difficult predicament. They must choose between funding that allows them to sustain the wellbeing
20 of their residents and programming that assists them in carrying out that mission. Even if Seattle or
21 other local governments are able to avoid this attempt to disrupt their work, the crippling effect the
22 Executive Order has on community-based organizations likewise impairs *amici*. For one, community
23 organizations often work alongside local governments to create and provide diversity trainings. If
24 service organizations lose funding and are forced to reduce or stop their activities, the public will be
25 harmed by the interruption of essential services unless local governments are able to step in and
26 dedicate resources to fill that void. For example, Plaintiffs Aids Foundation of Chicago and NO/Aids
27 Task Force in New Orleans receive millions of dollars in federal funding to provide services directly
28 to people who otherwise would end up in city shelters or county hospital emergency rooms. Should

1 local governments attempt to fill the gap created by the constraints of the Executive Order, they will
2 need to shift resources over from other expenditures, potentially implicating the provisioning of
3 services to a different set of constituents and so on.

4 A remedy confined to the geographic reach of this Court cannot adequately address the
5 nationwide harm caused by the Executive Order. “[T]he scope of injunctive relief is dictated by the
6 extent of the violation established, not by the geographical extent of the plaintiff.” *E. Bay Sanctuary*
7 *Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (internal quotation marks omitted). As the
8 Executive Order applies to all parties who receive federal funding and use diversity training, the
9 injury extends well beyond the parties here. The cities and counties joined in this brief are but a
10 sample of the many across the country that will be adversely affected.

11 **CONCLUSION**

12 For all of the foregoing reasons and for the reasons stated in Plaintiffs’ motion for
13 preliminary injunction, *amici* respectfully request that the Court grant Plaintiffs’ request for a
14 nationwide preliminary injunction.

15 Dated: December 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victoria Stilwell, hereby certify that the foregoing *Proposed Amicus Brief of the City of Seattle and 20 Cities and Counties* was filed through the CM/ECF system and will be sent electronically to the registered participants.

Dated: December 3, 2020

/s/ Victoria Stilwell
Victoria Stilwell