August 2, 2022

Mr. Matthew McCooe
Chief Executive Officer
Connecticut Innovations

Sent via email

Dear Mr. McCooe:

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties, and promoting a common culture based on fairness, understanding, and humanity. We have more than eighty chapters and tens of thousands of members nationwide, including in Connecticut. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an incident report submitted through our transparency website, fairtransparency.org regarding Connecticut Innovations (CI). CI recently received $120 million of federal funding through the American Rescue Plan Act. CI has indicated that it plans to use part of those funds to establish the Connecticut Future Fund (CTFF), which will be used to "support entrepreneurs from underserved and diverse backgrounds."

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater fairness and provide opportunities for entrepreneurs to start businesses. However, such efforts must be consistent with the Constitution and other civil rights protections. As an arm of the Connecticut state government, CI is bound by the Equal Protection clause of the Fourteenth Amendment. Furthermore, as a recipient of federal funds, it must comply with Title VI of the Civil Rights Act, which provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Under Title VI and the Equal Protection clause from which it is derived, any distinction based on skin color or other protected traits is strictly scrutinized. *Gratz v. Bollinger*, 539 U.S. 244, 275-6 & n.23 (2003). A racial classification will pass strict scrutiny only if the entity demonstrates (1) it has a "compelling interest" in treating individuals differently based on skin color and (2) the methods to achieve that interest are "narrowly tailored." *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 227 (1995). A policy is not narrowly tailored if a "less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The Supreme Court has recognized only two interests compelling enough to justify distinctions based on skin color or other immutable traits. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701,

720-3 (2007). The first is to achieve student body diversity in universities, *see Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003), which does not apply here. The second is to remedy the effects of past discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989). In order to pursue remedial discrimination, an entity must produce "a strong basis in evidence" of present ill effects caused by specific acts of past discrimination in the industry and locality at issue. *J.A. Croson*, 488 U.S. at 492, 498-500. Amorphous claims of general or societal discrimination are insufficient. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 276 (1986).

The case of *Podberesky v. Kirwan* is instructive. There, the University of Maryland established a scholarship solely for students of one skin color, for the stated purpose of remedying statistical disparities in attendance and graduation rates. *Podberesky*, 38 F.3d 147, 152 (4th Cir. 1994). An ineligible student filed suit, alleging unlawful discrimination. Citing *J.A. Croson*, the Court of Appeals held that the university was required to produce strong evidence that the university had discriminated in the past, that the past discrimination was connected to the present disparities, and that the scholarship was narrowly tailored to remedy the discrimination. *Podberesky*, 38 F.3d at 153-4, 158-61. Because the university failed to do so, the Court of Appeals ruled against it. *Id.* at 162.

A policy restricting receipt of CTFF funds to businesses based on the immutable characteristics of their respective owners would almost certainly not pass strict scrutiny. While CI may have an interest in supporting diverse businesses throughout the state, distributing funds based on skin color or other protected traits is not the least restrictive means to promote equal opportunities. A system based on financial need, however, would be more narrowly tailored than one based on skin color or other immutable characteristics.

Accordingly, FAIR would encourage CI to consider entrepreneurs' financial need when investing the CTFF funds, rather than the skin color, ancestry, or other protected characteristics of the business owner. Doing so not only would ensure that CI is in compliance with the Constitutional and statutory requirements, but also would demonstrate CI's commitment to ensuring fairer access to opportunities for all, regardless of immutable traits.

We would like to give CI an opportunity to respond. Additionally, please let us know if any updates or changes have been made to the CTFF implementation plans.

Very truly yours,

Leigh Ann O'Neill
Staff Attorney
Foundation Against Intolerance & Racism