



August 2, 2022

Dr. Nancy Sherwood
Director, Pre-K Discovery Scholars Program
University of Minnesota

Ms. Megan Larson
Senior Program Associate, Clinical and Translational Science Institute
University of Minnesota

Sent via email

Dear Dr. Sherwood and Ms. Larson,

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan, nonprofit organization dedicated to advancing civil rights 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 Minnesota. 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 the [Pre-K Discovery Scholars Program](#) through the University of Minnesota's Clinical and Translational Science Institute. The Program provides a \$50,000 grant to junior faculty members to support their research. However, the Program is open only to faculty who are "underrepresented in health-related sciences" or who are from a "disadvantaged background as defined by NIH." Individuals are automatically eligible if they are "Black or African American, Hispanic or Latino, American Indian or Alaska Native, Native Hawaiian and other Pacific Islander."

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater fairness and advance worthy initiatives in medical education and scientific research. We believe, however, that establishing funding opportunities based on skin color or ancestry violates the Equal Protection guarantee of the Fourteenth Amendment and Title VI of the Civil Rights Act, which prohibits federally-funded programs from discriminating against individuals or denying them any benefits "on the ground of race, color, or national origin." 42 U.S.C. § 2000d. As a public institution, the University is bound by the Equal Protection clause. Additionally, as a recipient of federal funds the University must comply with Title VI's prohibition against discrimination.

Under both the Equal Protection clause and Title VI, any distinction based on skin color (such as those used by the University in determining Program eligibility) will be 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. Peña*, 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.

We believe the University’s racial classifications in determining eligibility for the Program would not pass strict scrutiny. First, if the goal is to remedy past discrimination, the University has not established a strong basis in evidence of specific past discrimination in faculty research in the local community. Additionally, while FAIR supports efforts towards greater faculty diversity, the Program is not narrowly tailored to achieve that end. Targeted outreach efforts, for example, would be a narrower means to achieve diversity rather than criteria that automatically grant (and deny) eligibility based on skin color. See *Grutter*, 539 U.S. at 309 (diversity measures must be “flexible enough to consider all pertinent elements of diversity” beyond just racial categorization or ancestry). The Program impermissibly makes skin color a defining feature of the grant application, as individuals are eligible solely based on their skin color. For example, as between two individuals who are identically situated but for different ancestries, a person of Spanish descent would be automatically eligible for the Program, while an individual of Portuguese ancestry would not.

We urge the University to revise the application criteria for the Program so that any individual can apply in future cycles, regardless of skin color or ancestry. We believe that doing so would demonstrate the University’s [commitment](#) to creating “an institutional environment that is open and respectful” and a “campus climate free of discrimination and bigotry.”

Dr. Nancy Sherwood

Ms. Megan Larson

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We would like to give the University an opportunity to respond. Please let us know within the next week if you intend to do so.

Very truly yours,

A handwritten signature in black ink, appearing to read "Leigh Ann O'Neill". The signature is fluid and cursive, with the first name "Leigh" and last name "O'Neill" clearly distinguishable.

Leigh Ann O'Neill

Staff Attorney

Foundation Against Intolerance & Racism