



May 3, 2022

George Q. Daley
Dean of the Faculty of Medicine
Harvard University

Sent via email

Dear Dean Daley:

The Foundation Against Intolerance & Racism (FAIR) is 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 100 chapters and tens of thousands of members nationwide, including alumni of Harvard University. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an [incident report](#) regarding Harvard University submitted to FAIR on April 26 through our transparency website, fairtransparency.org. The report quotes your email to Harvard alumni and friends about the recent report submitted to the school regarding “Harvard’s history of connections to slavery.” According to the report, your email stated: “I also understand that the truths laid bare in the report are painful and may reopen wounds that are still fresh for many in our community. Let’s recommit ourselves to our mission, community values, and diversity statement.” The report links to a webpage where students and Harvard community members can register for a Community & Affinity Space on the theme of “Reflecting on Harvard’s History and Legacy.” It appears that the spaces will be hosted monthly. The page linked in the report includes registration links and the following graphic:



Events center around a theme for each gathering. Participants will have an opportunity to respond, reflect on their own experience, and connect with others. All Harvard affiliates are welcome!

With the exception of April, Affinity spaces usually offer breakout rooms for the following identities, including:

- Allies
- Asian / Asian American
- Black
- Disability / Neurodiversity
- First Gen/Low Income
- International
- Intersectional
- Latinx
- LGBTQIA+
- Muslim
- Native American / Indigenous / Pacific Islander

We believe the Community & Affinity Spaces are inconsistent with Title VI of the Civil Rights Act. That statute 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.

42 U.S.C. § 2000d. Private universities that receive federal funding, such as Harvard, must comply with Title VI. *Id.* §§ 2000d, 2000d-4a(2); *see Robinson v. Vollert*, 602 F.2d 87, 89 (5th Cir. 1979) (“Title VI prohibits discrimination on account of race, color, or national origin in all programs and activities receiving federal financial assistance”); *Students for Fair Admissions, Inc. v. Harvard College*, 1 F.3d 36 (1st Cir. 2020).

Under Title VI (and the Equal Protection clause from which it is derived), all distinctions based on skin color are “strictly scrutinized” by the courts. *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995). Strict scrutiny applies not only to invidious racial discrimination. Rather, it applies to distinctions that are “benign” or that purport to treat people “differently yet equally.” *See Johnson v. California*, 543 U.S. 499, 506 (2005). The *Johnson* case is instructive. There, an inmate challenged a prison policy that separated new inmates according to skin color: Latino prisoners were housed with other Latinos, black inmates with other black inmates, and so forth. *Id.* at 502. The corrections department argued that strict scrutiny should not apply because the separation was for a benign purpose—reduction of gang-based violence—and all inmates were still treated equally within their respective groups. *Id.* The Court rejected that rationale:

The CDC claims that its policy should be exempt from our categorical rule because it is “neutral”—that is, it “neither benefits nor burdens one group or individual more than any other group or individual.” In other words, strict scrutiny should not apply because all prisoners are “equally” segregated. The CDC’s argument ignores our repeated command that “racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.” Indeed, we rejected the notion that separate can ever be equal—or “neutral”—50 years ago in *Brown v. Board of Education*, and we refuse to resurrect it today.

Id. at 506 (internal citations omitted); *see also Powers v. Ohio*, 400 U.S. 400, 410 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that “[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree”). Thus, even if Harvard’s segregation were benign or “separate but equal,” it will still be strictly scrutinized.

Strict scrutiny “is a searching examination” that is rarely survived. *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013); *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Racial classifications such as Harvard’s will pass strict scrutiny only if the entity proves it has a “compelling interest” in treating individuals differently based on skin color, and the means used to achieve that interest are “narrowly tailored.”

Adarand, 515 U.S. at 227. A policy is not narrowly tailored if a “less restrictive alternative is readily available.” *Boos v. Barry*, 485 U.S. 312, 329 (1988).

On the webpage, Harvard suggests it has an interest in hosting “conversations where Harvard community members can connect with others who share their identities”.¹ We are skeptical that a university that actively seeks diversity and to intellectually challenge its community has a compelling interest in dividing them by their personal identities for discussion. But even if it were a compelling interest, separating individuals by skin color is not narrowly tailored to achieve that goal. Many other non-discriminatory alternatives are readily available, such as encouraging students and other community members to speak openly and freely, allowing equal time for each person who wishes to speak, giving individuals an option to submit comments and questions anonymously in advance, and articulating rules and expectations of respectful conduct and dialogue. The message that it is uncomfortable to be around those who do not share the same skin color stigmatizes all. As stated by the Supreme Court, instead of helping individuals, separating them by color “threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

We hope that going forward, Harvard will hold conversation spaces (and other events) where all are welcome, regardless of their immutable traits. Such openness will help promote understanding, tolerance, and a sense of shared belonging within our universities.

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

Very truly yours,



Letitia Kim
Managing Director of the Legal Network
Foundation Against Intolerance & Racism

¹ While not illegal, we find it important to point out that Harvard is offering an affinity space called “First Gen/Low Income”. This group’s title is flawed in its assumption that those who are first generation college students are inevitably low-income. The flawed creation of this group demonstrates the inherent flaw in affinity groups in general: a single shared characteristic among humans, no matter the characteristic, does not indicate the sharing of anything else.