



FOUNDATION
AGAINST
INTOLERANCE
& RACISM

April 28, 2023

Ms. Caitlin Strokosch
President and CEO
National Performance Network
8121 Fig Street
New Orleans, LA 70118

Sent via email

Dear Ms. Strokosch:

The Foundation Against Intolerance & Racism 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 in Louisiana. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an [incident report](#) about the National Performance Network (“NPN”) submitted to us through our transparency website, fairtransparency.org. That report, in pertinent part, states the following:

The National Performance Network’s Southern Artists for Social Change program provides \$75,000 project grants to "artists and culture bearers of color" living, working, and engaging in social change in urban, rural, and tribal communities of Alabama, Louisiana, and Mississippi. The grant program uses federal funds from the National Endowment for the Arts. They have given over \$200,000 in awards. White artists are excluded from funding consideration.

Upon further examination the [National Performance Network’s Artists for Social Change Program](#) states explicitly that “Artists must identify as Black, Indigenous, and/or people of color (BIPOC).” Additionally, the NPN website clearly [demonstrates](#) its receipt of federal grant funding via the National Endowment for the Arts.

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater fairness and assist those in need of financial assistance in the arts. We believe, however, that establishing a federally-funded program whereby applicants can be excluded based on skin color or ancestry violates 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, 2000d-4a(2); *see Regents of University of California v. Bakke*, 438 U.S. 265, 266 (1978) (“Title VI of the Civil Rights Act of 1964...provides...that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance.”). As a recipient of federal funds, The National Performance Network (NPN) is required to comply with Title VI.

Under Title VI (and the Equal Protection clause of the Fourteenth Amendment from which it is derived), any distinction based on skin color 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. 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 racial classifications. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 720-3 (2007). The first is to achieve student diversity in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003). 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). For discrimination that is intended to achieve diversity, an institution that receives federal funding may consider skin color only if it is a “plus” factor among many other criteria and the applicants are still evaluated holistically. *Grutter*, 539 U.S. at 328-33; *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., plurality opinion). For remedial discrimination, the 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); *Bakke*, 438 U.S. at 307-10.

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.

NPN appears to have created the program for remedial purposes: “NPN envisions a world in which artists of color living and working in the South have the power, resources, and opportunities to thrive.” As established by the Supreme Court in *J.A. Croson*, *Wygant*, and *Bakke*, however, disparities existing

generally in the world cannot legally justify remedial discrimination. NPN has identified no past discrimination it committed, nor any deleterious present effects that were caused by such past discrimination. Even if the program's purpose, which includes access to grant money, were to diversify the applicant pool, it would still be impermissible because "BIPOC" identity is not a "plus" factor but a necessary precondition for eligibility.

Administering a grant program that excludes applicants based on skin color also appears to conflict with NPN's admirable core principles stated on its [website](#):

The National Performance Network does not discriminate on the basis of race, color, ethnicity, religion, creed, gender, gender expression, age, national origin, mental or physical disability, sexual orientation, physical characteristics, marital status or military status, in any of its activities or operations.

It is generous and thoughtful of NPN to offer grants based on economic need or other criteria unrelated to immutable traits. Under Title VI, however, it may not offer such a benefit only to certain applicants based on their skin color or ancestry. We urge NPN to open the program to any deserving applicant without regard to their immutable traits. We also believe that such a gesture would demonstrate NPN's commitment to non-discrimination and equal access.

We would like to give NPN an opportunity to respond. Please let us know within the next five (5) days if you intend to do so.

Very truly yours,



Leigh Ann O'Neill
Director of Legal Advocacy
Foundation Against Intolerance & Racism



Brent Morden
Managing Director, FAIR in the Arts
Foundation Against Intolerance & Racism

cc: stephanie@nnpweb.org, stanlyn@nnpweb.org, sage@nnpweb.org, steve@nnpweb.org,
josato@youthspeaks.org