



November 30, 2023

Richard Hodes, M.D.  
Director, The Common Fund  
National Institutes of Health

Dinah S. Singer, Ph.D.  
Deputy Director, The Common Fund  
National Institutes of Health

*Sent via email*

Dear Director Hodes and Deputy Director Singer:

We are directors 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. Our website, [fairforall.org](http://fairforall.org), can give you a fuller sense of our identity and activities.

We write in response to a report we received regarding a summer research internship offered by the National Institutes of Health's ("NIH") Cellular Senescence Network ("SenNet") Program. The internship is called the [Consortium Underrepresented Student Program \(CUSP\)](#). This 10-12 week summer program allows participants to conduct their own research project or work on part of an ongoing project at one of the various SenNet laboratory sites. Indeed, selected participants will have the opportunity to work with and learn from researchers at elite institutions such as MIT, Columbia University, Yale University and many others. Additionally, the internship offers participants a stipend, housing, and travel and technology assistance as part of the program. The [application](#) makes clear that only students who identify as "underrepresented" are eligible to apply:

Please note that all applicants must be considered part of an underrepresented group, as defined by NIH. These include individuals from certain ethnic groups, individuals with disabilities, and individuals from disadvantaged backgrounds.

The application links to a [separate NIH page](#) that "underrepresented" to mean individuals with certain disabilities and individuals from the following racial and ethnic groups: "Blacks or African Americans, Hispanics or Latinos, American Indians or Alaska Natives, Native Hawaiians, and other Pacific Islanders."

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater diversity within scientific fields and to make access to educational programs more readily available to students from disadvantaged backgrounds. However, we also believe the skin color and ethnicity-based preferences inherent in the application violate Federal law. Namely, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act, both of which prohibit government agencies from discriminating based on race, skin color, and national origin. U.S. Const. Amend. XIV § 1; 42 U.S.C. § 2000d, d-4a; *Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

As a government agency, the NIH, its subagencies, and programs, including SenNet, are required to adhere to the United States Constitution and the Civil Rights Act. In fact, the NIH actively acknowledges as much in its non-discrimination notice [published on its website](#):

The National Institutes of Health (NIH) complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex. HHS does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.

The CUSP internship program, in its current form, violates NIH's own policy because it expressly treats applicants differently based on their race, color and national origin in violation of the Civil Rights Act.

The Fourteenth Amendment and Title VI had, until recently, been interpreted to permit limited race-based preferences, but even then, only in the most exceptional circumstances. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 720-3 (2007). In particular, any distinction based on skin color had only been upheld as constitutional if it could survive the judicial review standard known as "strict scrutiny." *Gratz vs. Bollinger*, 529 U.S. 244, 275-6 & n.23 (2003). Historically, a racial classification would pass strict scrutiny only if the entity could demonstrate: (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. vs Pena*, 515 U.S. 200, 227 (1995). A policy was not found to be narrowly tailored if a "less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The U.S. Supreme Court had previously recognized only two interests compelling enough to justify racial classifications: the first was to achieve student diversity in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 328-333 (2003). The second was to remedy the effects of past discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989). However, these typically amorphous goals were thrown out in the recent Supreme Court cases on affirmative action because the Court found that they are "not sufficiently coherent for purposes of strict scrutiny." *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, slip op. No. 20-1199, 6 (2023).

The Supreme Court went further in *Students for Fair Admissions* by signaling the beginning of the end for any form of racial preferences, even those that once had a justifiable purpose, when it stated: "[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies without regard to differences of race, of color, or of nationality' - it is 'universal in [its] application.'" *Students For Fair Admission* at 15 (citing *Yick Wo*, 118 U.S. at 369). The Court went on to point out that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'" *Students* at 15; citing *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 289-290.

FAIR supports efforts towards greater diversity in professional and scientific fields. There are permissible ways to achieve that goal without resorting to unlawful, discriminatory bars to application, such as comprehensive outreach efforts aimed at establishing a truly diverse applicant pool. While the application period for the CUSP internship opened earlier this month, it does not close until January 15, 2024, leaving the NIH and SenNet ample time to correct this blatant civil rights violation.

We respectfully urge you to remove the "underrepresented" eligibility requirement for the CUSP internship program, and instead allow students of all races, skin colors, and ethnicities to apply.

Furthermore, it is critical that, in order to comport with current case law, SenNet select its next cohort of CUSP internship participants without regard to these immutable traits. We believe these actions would demonstrate the NIH's and SenNet's commitment to true anti-discrimination and creating an open and welcoming environment within its internship programs.

Very truly yours,

***Leigh Ann O'Neill***

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

***Carrie Mendoza, MD***

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cc: Monica M. Bertagnolli, M.D., Director, National Institutes of Health

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