



**THE EQUAL PROTECTION PROJECT**  
**A Project of the Legal Insurrection Foundation**  
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January 22, 2024

**BY EMAIL** (OCR.Chicago@ed.gov)

U. S. Department of Education  
Office for Civil Rights – Chicago Office  
John C. Kluczynski Federal Building  
230 S. Dearborn Street, 37th Floor  
Chicago, IL 60604

**Re: Civil Rights Complaint Against University of Wisconsin-Madison Regarding Race-Based Undergraduate Program**

To Whom It May Concern:

This is a federal civil rights complaint pursuant to the U.S. Department of Education's Office for Civil Rights ("OCR") discrimination complaint resolution procedures. *See* 42 U.S.C. § 2000d-1; 34 C.F.R. §§ 100.7, 100.8, and 100.9.

We write on behalf of the Equal Protection Project of the Legal Insurrection Foundation, a non-profit that, among other things, seeks to ensure equal protection under the law and non-discrimination by the government, and that opposes racial discrimination in any form.

We bring this civil rights complaint against the University of Wisconsin-Madison ("UW-Madison"), a public institution, for supporting and promoting a program that engages in invidious discrimination on the basis of race, color and national origin.

## **The Creando Comunidad: Community Engaged BIPOC Fellows Program**

According to the UW-Madison website, the “Creando Comunidad: Community Engaged Black, Indigenous, and People of Color (BIPOC) Fellows” (“BIPOC Fellows”) is a UW-Madison program, offered through the university’s Morgridge Center for Public Service, designed “to connect[ ] BIPOC undergraduate students who are currently, or striving to, participate in community engagement.”<sup>1</sup>

The mission of the program is “to center and empower the strengths of BIPOC undergraduate students partaking in critical service work,” to provide them “opportunities for community building, collaboration, support, and both personal and professional development” and to “support the deconstruction of systemic oppression through critical service.”<sup>2</sup>



The screenshot shows the website for the Morgridge Center for Public Service. The header includes the center's logo and name, a search bar, and a navigation menu with links for Home, About, Students, Faculty & Staff, Community, Events, and News. The main content area features a breadcrumb trail (Home / Get Connected / Community-Engaged BIPOC Fellows) and a section titled "Community-Engaged BIPOC Fellows". Below the title, there are three paragraphs of text describing the program's purpose and mission.

As the name of the program suggests, a race- and ethnicity-based criterion dictates who can participate in the BIPOC Fellows program. Eligibility is restricted to undergraduate students who are “member[s] of a historically underrepresented racial or ethnic group or community.”<sup>3</sup>

<sup>1</sup> See <https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#application-and-expectations> [https://web.archive.org/web/20231218221700/https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#eligibility-requirements] (accessed on Jan. 14, 2024).

<sup>2</sup> *Id.*

<sup>3</sup> See <https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#eligibility-requirements> [https://web.archive.org/web/20231218221700/https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#eligibility-requirements] (accessed on Jan. 14, 2024).

Application and Expectations

Eligibility Requirements

To be eligible for the Creando Comunidad: Community-Engaged BIPOC Fellows Program students must:

- a. Have at least one year left to degree completion
- b. Be an undergraduate student at the University of Wisconsin-Madison
- c. Be a member of a historically underrepresented racial or ethnic group or community

The BIPOC Fellows program “convenes monthly to connect undergraduate Students of Color who are currently, or striving to, participate in community engagement.”<sup>4</sup>

Creando Comunidad: Community Engaged BIPOC Fellows Description and Application

Creando Comunidad: Community Engaged BIPOC Fellows is a cohort-based program that convenes monthly to connect undergraduate Students of Color who are currently, or striving to, participate in community engagement. Our mission is to center and empower the strengths of BIPOC undergraduate students partaking in critical community-engaged work as well as provide opportunities for community building, collaboration, support, and personal/professional development.

The phrase “Students of Color” is defined by UW-Madison as “[a] domestic (non-international) student who identifies, alone or in combination with other racial/ethnic categories, as African American/Black, American Indian/Alaska Native, Asian, Hispanic/Latino(a), or Native Hawaiian/Pacific Islander.”<sup>5</sup>

Undergraduate students who are selected to participate in the BIPOC Fellows program receive \$500 in scholarship funds and, among other requirements, must attend seven 90-minute “cohort meetings” between October 2023 and May 2024.<sup>6</sup>

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<sup>4</sup> See [https://uwmadison.co1.qualtrics.com/jfe/form/SV\\_9KPDxpHbGNkvaB0?Q\\_CHL=qr](https://uwmadison.co1.qualtrics.com/jfe/form/SV_9KPDxpHbGNkvaB0?Q_CHL=qr) [https://web.archive.org/web/20231218221822/https://uwmadison.co1.qualtrics.com/jfe/form/SV\_9KPDxpHbGNkvaB0?Q\_CHL=qr] (accessed on Jan. 14, 2024).

<sup>5</sup> See <https://search.data.wisc.edu/glossary/284597> [https://web.archive.org/web/20231218222141/https://search.data.wisc.edu/glossary/284597] (accessed on Jan. 14, 2024).

<sup>6</sup> See [https://uwmadison.co1.qualtrics.com/jfe/form/SV\\_9KPDxpHbGNkvaB0?Q\\_CHL=qr](https://uwmadison.co1.qualtrics.com/jfe/form/SV_9KPDxpHbGNkvaB0?Q_CHL=qr) [https://web.archive.org/web/20231218221822/https://uwmadison.co1.qualtrics.com/jfe/form/SV\_9KPDxpHbGNkvaB0?Q\_CHL=qr] (accessed on Jan. 14, 2024).

As a result of your participation in the Creando Comunidad: Community Engaged BIPOC Fellows program, you will:

1. Receive \$500 in scholarship funds
2. Co-develop strategies and communities of mentorship and support to grow and sustain your community-engaged work within your personal and professional life
3. Apply critical lenses to community engagement and social change experiences that center the needs, experiences, and wisdom of diverse communities
4. Explore and interrogate a variety of innovative theories and frameworks related to community engagement, such as participatory action research, counter-storytelling, and cultural wealth.
5. Reflect on your values and commitments towards educational and personal goals that embody the [Wisconsin Idea](#) while developing your civic identity

If you are accepted to the program, you will be expected to:

1. Attend a total of seven, 90-minute cohort meetings from October 2023 to May 2024
2. Present broader work centered on community engagement that you will develop throughout the program at the Wisconsin Idea Conference and/or attend the Wisconsin Idea Conference
3. Have at least one individual meeting with a program lead each semester

The application for the BIPOC Fellows program – which, for the 2023-24 academic year closed on September 20, 2023 – requires applicants to state whether they “identify as a Student of Color,” and to describe their racial and gender identities.<sup>7</sup> A screen capture of the relevant portion of the online application form is reproduced below.

Name

What is your school email? (Eg. buckybadger123@wisc.edu)

Please select your academic year.

- 1st  
 2nd  
 3rd  
 4th  
 5th +

Do you identify as a Student of Color?

- Yes  
 No

Describe your racial identity.

Describe your gender identity. Please feel free to add your pronouns.

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<sup>7</sup> *Id.*

### **The BIPOC Fellows Program At UW-Madison Violates The Law**

UW-Madison’s voluntary and ongoing participation in and active promotion of the BIPOC Fellows program, which awards financial scholarships and mentorship to students based on their race and skin color, violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution as well as Title VI of the Civil Rights Act of 1964 (“Title VI”) and its implementing regulations. *See* 42 U.S.C. § 2000d et seq.; 28 C.F.R. Part 100; *see also Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”).

The unlawfulness of such racial preferences in admissions was confirmed recently by the United States Supreme Court in *Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll.*, 2023 U.S. LEXIS 2791 (2023). There, the Court declared that “[e]liminating racial discrimination means eliminating all of it .... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” *Id.* at 34 (cleaned up). “Distinctions between citizens solely because of their ancestry [and race] are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Id.* at 35 (citation omitted).

The BIPOC Fellows program at UW-Madison makes clear that students who do not meet the prerequisite racial categories – for example, students who identify as white – are automatically ineligible.

The discrimination is apparent: if applicants are African American/Black, American Indian/Alaska Native, Asian, Hispanic/Latino(a), or Native Hawaiian/Pacific Islander, they are automatically eligible for the program. Applicants who do not fall into one of those racial categories are automatically excluded from consideration.

It violates Title VI for a recipient of federal money to create, support and promote a racially segregated program. When a public institution does so, such conduct also violates the Equal Protection Clause of the Fourteenth Amendment.<sup>8</sup>

Title VI of the Civil Rights Act prohibits intentional discrimination on the basis of race, color or national origin in any “program or activity” that receives federal financial assistance.

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<sup>8</sup> Although OCR does not enforce Title II of the Civil Rights Act of 1964, that statute makes it unlawful to discriminate on the basis of race or color in a place of “public accommodation,” such as UW-Madison. 42 U.S.C. § 2000(a)(a). Similarly, the BIPOC Fellows program defies UW-Madison’s own non-discrimination policy. *See* <https://tinyurl.com/4h5fpkmx> [https://archive.is/rxRss] (accessed on Jan. 14, 2024). Wisconsin state law also provides that “[n]o student may be denied admission to, participation in or the benefits of, or be discriminated against in any service, program, course or facility of the [University of Wisconsin] system or its institutions because of the student’s race, color [or] ... national origin[.]” Wis. Stat. § 36.12(1). UW-Madison’s BIPOC Fellows program obviously violates this law.

See 42 U.S.C. § 2000d. The term “program or activity” means “all of the operations ... of a college, university, or other postsecondary institution, or a public system of higher education.” See 42 U.S.C. § 2000d-4a(2)(A); *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 355 (8th Cir. 2020) (“Title VI prohibits discrimination on the basis of race in federally funded programs,” and thus applies to universities receiving federal financial assistance). As UW-Madison receives federal funds,<sup>9</sup> it is subject to Title VI.

It does not matter if the recipient of federal funding discriminates in order to advance a benign “intention” or “motivation.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) (“Intentionally burning down a neighbor’s house is arson, even if the perpetrator’s ultimate intention (or motivation) is only to improve the view.”); accord *Automobile Workers v. Johnson Controls, Inc.*, 499 U. S. 187, 199 (1991) (“the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect” or “alter [its] intentionally discriminatory character”). “Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might favor the interests of that class as a whole or otherwise promote equality at the group level.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*154 (Gorsuch, J., concurring).

Simply put, “Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert.” *Id.* at \*170 (cleaned up). Thus, regardless of UW-Madison’s reasons for sponsoring and promoting the BIPOC Fellows program, it violated Title VI by doing so.

And, because UW-Madison is a public institution, its creation, sponsorship and promotion of the BIPOC Fellows program also violates the Equal Protection Clause of the Fourteenth Amendment.

“Any exception to the Constitution’s demand for equal protection must survive a daunting two-step examination known ... as strict scrutiny.” *Id.* at \*34 (internal quotation marks and citation omitted). The UW-Madison program at issue here flunks that exacting test.

Under strict scrutiny, suspect classifications “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). It is the government that bears the burden to prove “that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989). Here, the government cannot carry its burden.

A “racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation omitted). Here, UW-Madison cannot demonstrate that limiting program participation to African American/Black, American Indian/Alaska Native, Asian,

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<sup>9</sup> See <https://www.wisconsin.edu/news/download/BOR-FY24-Annual-Budget-Presentation.pdf> [https://archive.is/H151S] (accessed on Jan. 14, 2024).

Hispanic/Latino(a), or Native Hawaiian/Pacific Islanders serves any legitimate governmental purpose, let alone an extraordinary one. Classifications based on immutable characteristics like skin color “are so seldom relevant to the achievement of any legitimate state interest” that government policies “grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Indeed, the Supreme Court has recognized only two interests compelling enough to justify racial classifications. The first is remedying the effects of past de jure segregation or discrimination in the specific industry and locality at issue in which the government played a role, and the second is “avoiding imminent and serious risks to human safety in prisons, such as a race riot.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*35 (citation omitted).<sup>10</sup> Neither applies here.

To the extent that the BIPOC Fellows program’s purpose in requiring that each applicant be “a member of a historically underrepresented racial or ethnic group or community”<sup>11</sup> is to achieve racial balance, such an objective has been “repeatedly condemned as illegitimate” and “patently unconstitutional” by the Supreme Court. *Parents Involved in Cmty. Sch.*, 551 U.S. at 726, 730 (“Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class”) (cleaned up, citation omitted).

And, irrespective of whether the BIPOC Fellows program furthers a compelling interest, it is not narrowly tailored. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (to be to be narrowly tailored, a race-conscious program must be based on “individualized consideration,” and race must be used in a “nonmechanical way”). Here, the race-based eligibility criterion is mechanically applied. If applicants are not African American/Black, American Indian/Alaska Native, Asian, Hispanic/Latino(a) or Native Hawaiian/Pacific Islanders, they are automatically ineligible for the scholarship. To the extent that any individualized consideration exists, it only applies to distinguish between applicants who have first satisfied the threshold racial litmus test.

Further, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications. *J.A. Croson Co.*, 488 U.S. at 506. Because the race- and ethnicity-based eligibility requirement for the BIPOC Fellows program applies in an undifferentiated

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<sup>10</sup> Until recently, a third interest, “the attainment of a diverse student body,” existed, *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007), but that was substantively overruled by *Students for Fair Admissions*, a fact recognized by Justice Thomas in his concurring opinion. *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*149 (Thomas, J. concurring) (“The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”)

<sup>11</sup> See <https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#eligibility-requirements> [<https://web.archive.org/web/20231218221700/https://morgridge.wisc.edu/get-connected-students/community-engaged-bipoc-fellows/#eligibility-requirements>] (accessed on Jan. 14, 2024).

fashion to multiple racial groups, it is overbroad and therefore not narrowly tailored. *Id.* (the “gross overinclusiveness” and undifferentiated use of racial classifications suggests that “the racial and ethnic groups favored by the [policy] were added without attention to whether their inclusion was justified”).

Indeed, in *Students for Fair Admissions*, the Supreme Court found that similar racial categories as those used by UW-Madison for its BIPOC Fellows program are “imprecise,” “plainly overbroad,” “arbitrary,” “undefined” and “opaque.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*47-48,<sup>12</sup> and declared that “it is far from evident ...how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.” *Id.*

Similarly, the ineligibility of white students for the BIPOC Fellows program makes that program underinclusive, since the racial criterion is arbitrary and excludes swaths of students who are deeply committed to engaging with their communities but are not permitted to apply due to their skin color, race and ethnicity.

Finally, for a policy to survive narrow-tailoring analysis, the government must show “serious, good faith consideration of workable race-neutral alternatives,” *Grutter*, 539 U.S. at 339, and that “no workable race-neutral alternative” would achieve the purported compelling interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). There is no evidence that any such alternatives were ever contemplated here.

Because UW-Madison’s blatant racial preference system for the BIPOC Fellows program is presumptively invalid, and since there is no compelling government justification for such invidious discrimination, its use of racial preferences violates state and federal civil rights statutes and constitutional equal protection guarantees.

### **OCR Has Jurisdiction**

OCR has jurisdiction over this complaint. UW-Madison is a public institution and a recipient of federal funds. It is therefore liable for violating Title VI and the Equal Protection Clause.

### **The Complaint Is Timely**

This complaint is timely brought because it includes allegations of discrimination based on race and national origin that occurred within the last 180 days and is ongoing. Indeed, the applications for the BIPOC Fellows program closed at the end of September 2023, and the students who were selected to participate are required to attend seven 90-minute “cohort meetings” before May 2024.

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<sup>12</sup> In his concurrence, Justice Thomas criticizes these categories as being “artificial.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*134 (Thomas, J., concurring).



### **Request For Investigation And Enforcement**

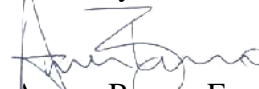
In *Richmond v. J. A. Croson Co.*, Justice Scalia aptly noted that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society.” 488 U.S. at 505 (citation omitted). This is true regardless of which race suffers – discrimination against white applicants is just as unlawful as discrimination against black or other non-white applicants. As Justice Thomas correctly noted in *Students for Fair Admissions*, race-based admissions preferences “fly in the face of our colorblind Constitution and our Nation’s equality ideal” and “are plainly – and boldly – unconstitutional.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*150 (Thomas, J., concurring).

Because the exclusion of white applicants in the BIPOC Fellows program is presumptively invalid, and since UW-Madison cannot show any compelling government justification for such an invidiously discriminatory program, its conduct violates federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate UW-Madison’s role in participating in, sponsoring, supporting and promoting the BIPOC Fellows program – and to discern whether UW-Madison is engaging in such discrimination in its other activities – and to impose whatever remedial relief is necessary to hold it accountable for that unlawful conduct. This includes, if necessary, imposing fines, initiating administrative proceedings to suspend or terminate federal financial assistance and referring the case to the Department of Justice for judicial proceedings to enforce the rights of the United States under federal law. After all, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

Accordingly, we respectfully ask the Department of Education’s Office for Civil Rights to impose remedial relief as the law permits for the benefit of those who have been illegally excluded from UW-Madison’s BIPOC Fellows program based on racially discriminatory criteria, and to ensure that all ongoing and future programming through that university comport with the Constitution and federal civil rights laws.

Sincerely,



Ameer Benno, Esq.

The Equal Protection Project

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-And-

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