THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
18 MAPLE AVE. #280
BARRINGTON, RI 02806
www.EqualProtect.org

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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 the University of North Dakota School of Law For Racially Discriminatory "Cultural Diversity Tuition Waiver" 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 North Dakota School of Law ("UNDSOL"), a public institution, for its Cultural Diversity Tuition Waiver ("CDTW") program – a racially discriminatory program that reduces tuition for specific racial and ethnic

groups "in order to encourage racial and ethnic diversity within [its] student body."[1] To be eligible for the tuition reduction, students must be "African American/Black," "Alaska Native," "Asian/Asian American," "Hawaiian Native/Other Pacific Islander," "Hispanic/Latino," "Native American/American Indian" or "Multiracial/Multiethnic."[2] The CDTW program is *only* available to non-white applicants.

UNDSOL's ongoing sponsorship and active promotion of a tuition reduction program for which eligibility depends on ethnicity and race 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 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).

OCR should investigate UNDSOL's blatantly discriminatory CDTW program and the circumstances under which it was approved, take all appropriate action to end such discriminatory practices and impose remedial relief. This includes, if necessary, imposing fines, initiating administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance, and referring the case to the Department of Justice for judicial proceedings to enforce the rights of the United States.

The UNDSOL's Cultural Diversity Tuition Waiver Program

As depicted in the screen shot below, the UNDSOL's website states that the law school "offers partial tuition waivers" to students who meet certain racial criteria, and that this program was designed "to encourage racial and ethnic diversity within [its] student body."[3]

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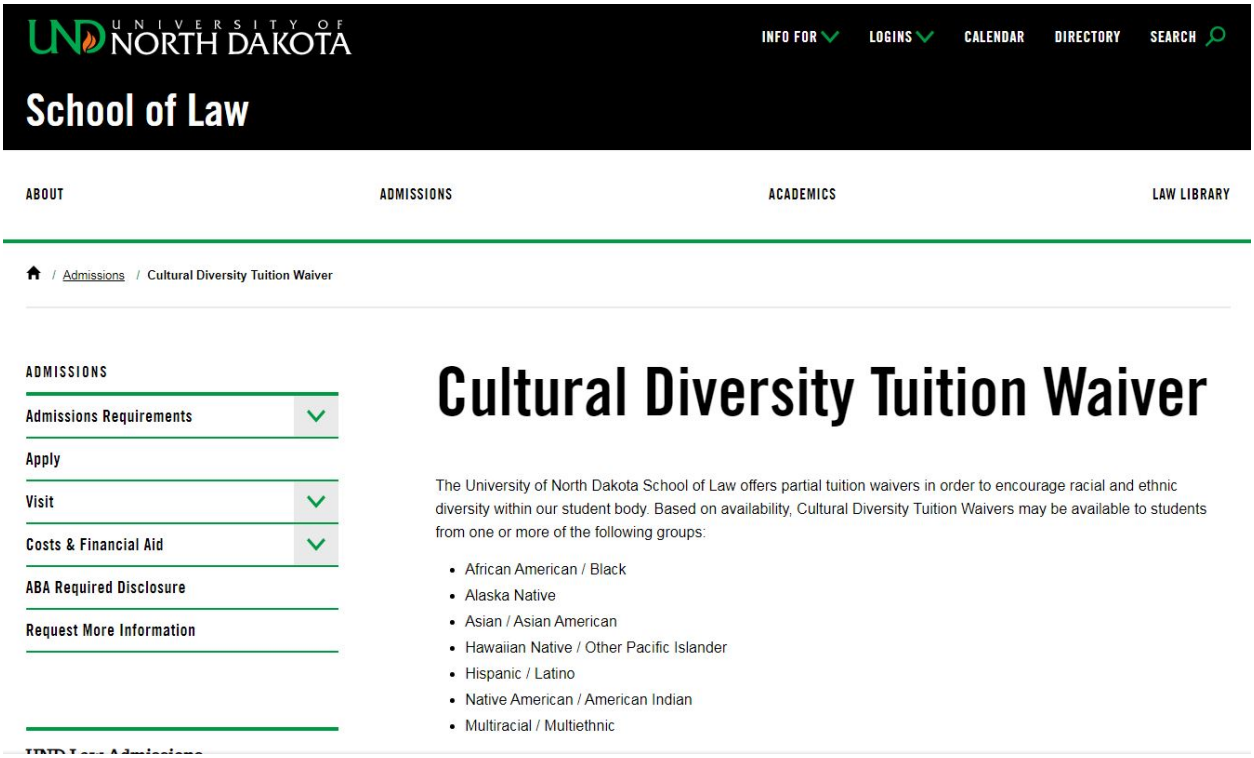
[1] *See* https://law.und.edu/future-students/diversity.html [https://archive.ph/9soA9], [https://web.archive.org/save/https://law.und.edu/future-students/diversity.html] (accessed on October 28, 2023).

[2] *Id*.

[3] *Id*.



UNDSOL's Cultural Diversity Tuition Waiver Program Violates The Law

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.[4] Under clear case law, UNSDOL's explicit use of racial classifications is unlawful. Because a law school should be presumed to know the law, the discrimination here is intentional.

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. *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,"

[4] 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 UNDSOL. 42 U.S.C. § 2000(a)(a). Similarly, the CDTW program defies UNDSOL's own non-discrimination policy. *See* https://law.und.edu/students/student-life/nondiscrimination-policy.html [https://archive.ph/17iXu], [https://web.archive.org/save/https://law.und.edu/students/student-life/nondiscrimination-policy.html] (accessed on Oct. 28, 2023).

and thus applies to universities receiving federal financial assistance). As the University of North Dakota receives federal funds, it is subject to Title VI.[5]

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).[6]

"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 UNDSOL's reasons for employing racial and ethnic eligibility criteria for the CDTW program, it violated Title VI by doing so.

And, because UNDSOL is a public institution,[7] its introduction of invidious discrimination into the tuition waiver eligibility criteria violates the Equal Protection clause of the Fourteenth Amendment.

The inclusion of racial criteria in the promotional materials about the tuition waiver program undoubtedly deters students of other races and ethnicities from applying for it. That, in itself, violates the law. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the constitutional harm is "the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The tuition waiver program's racial litmus test is patently discriminatory.

"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 CDTW program flunks that exacting test.

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[5] *See* https://tinyurl.com/jekzmnjf [https://archive.ph/McMNw] (accessed on Nov. 7, 2023).

[6] While *Students for Fair Admissions* condemned the use of racial preferences in college admissions, the broad principles of that case apply with equal force to the use of racial criteria in this context as well.

[7] *See* https://ndus.edu/institutions/ [https://web.archive.org/save/https://ndus.edu/institutions/] (accessed on Oct. 22, 2023).

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, UNDSOL cannot demonstrate that imposing racial and ethnic restrictions on the CDTW program furthers 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).[8] Neither applies here.

To the extent that the purpose of the CDTW program is to "encourage racial and ethnic diversity within our student body,"[9] achieving such racial balance is an objective that the Supreme Court has "repeatedly condemned as illegitimate" and "patently unconstitutional." *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).

[8] 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.").

[9] *See* https://law.und.edu/future-students/diversity.html [https://archive.ph/9soA9], [https://web.archive.org/save/https://law.und.edu/future-students/diversity.html] (accessed on October 28, 2023).

And, irrespective of whether the CDTW 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 racial criterion is mechanically applied. If applicants are not "African American/Black," "Alaska Native," "Asian/Asian American," "Hawaiian Native/Other Pacific Islander," "Hispanic/Latino," "Native American/American Indian" or "Multiracial/Multiethnic," they are automatically ineligible for the tuition reduction.[10] To the extent that any individualized consideration exists, it only applies to distinguish between applicants who have first satisfied the threshold ethnic/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 racial eligibility requirement for the CDTW program applies in an undifferentiated fashion to multiple racial and ethnic 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 and ethnic categories were "imprecise," "plainly overbroad," "arbitrary," "undefined" and "opaque." *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *47-48,[11] 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*.

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 UNDSOL's ethno-racial eligibility criteria for the CDTW program are presumptively invalid, and since there is no extraordinary government justification for such invidious discrimination, UNDSOL's use of those requirements violates state and federal civil rights statutes and constitutional equal protection guarantees.

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[10] *See* https://law.und.edu/future-students/diversity.html [https://archive.ph/9soA9], [https://web.archive.org/save/https://law.und.edu/future-students/diversity.html] (accessed on October 28, 2023).

[11] In his concurrence, Justice Thomas criticized these categories as being "artificial." *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *134 (Thomas, J., concurring).

OCR Has Jurisdiction

OCR has jurisdiction over this complaint. UNDSOL is a public institution and its parent university is a recipient of federal funds. It therefore is 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 that are ongoing.

Request For Investigation And Enforcement

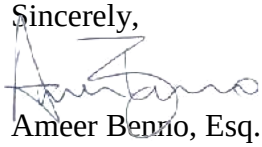
In *Richmond v. J. A. Croson Co.*, Justice Scalia aptly noted that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society." 488 U.S. at 505 (citation omitted). This is true regardless of which race suffers – discrimination 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 awarding education tuition waivers on the basis of race and ethnicity is presumptively invalid, and since UNDSOL cannot show any extraordinary government justification for such invidious discrimination, its conduct violates federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate UNDSOL's role in creating, sponsoring, supporting and promoting the CDTW program – and to discern whether UNDSOL is engaging in such discrimination in its other activities – and to impose whatever remedial relief is necessary to hold the school accountable for its 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 that the Department of Education's Office for Civil Rights impose remedial relief as the law permits for the benefit of those who have been illegally excluded from the CDTW program based on discriminatory criteria, and that it ensure that all ongoing and future programming through UNDSOL comports with the Constitution and federal civil rights laws.

Sincerely,



Ameer Benno, Esq.
The Equal Protection Project
Ameer@legalinsurrection.com

-And-

William A. Jacobson, Esq.
President
Legal Insurrection Foundation
Contact@legalinsurrection.com