



THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
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March 20, 2023

BY OVERNIGHT MAIL AND EMAIL

Andrea Nicolay - Executive Director (nicolaya@albanypubliclibrary.org)
Thomas McCarthy Jr. - President, Board of Trustees (mccarthy@albanypubliclibrary.org)
Albany Public Library
161 Washington Avenue
Albany, NY 12210

Re: Albany Public Library's 2023 Touhey Library Equity Fellowship

To Whom It May Concern:

I write on behalf of the Equal Protection Project (“EPP”) 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.

It has come to our attention that the Albany Public Library (“APL”) is currently accepting applications for its third annual Touhey Library Equity Fellowship (“TLEF”), a paid summer internship at two of the APL’s branches that is available only to non-white graduates of library school programs. As the TLEF is racially exclusionary – only black students and black recent graduates are eligible to apply to and participate in the program – we write to express our concern and call to your attention that this program appears to violate a variety of state and federal civil rights laws, as well state and federal constitutional prohibitions on race-based discrimination.

The internship is described on the APL’s website as being open only “to Black graduates of master of library and information science ... or master of science in information systems ... programs at American Library Association-accredited institutions who completed their degrees between 2020 and May 2023.” The website description further notes that “[t]he paid internship gives recent Black graduates of library school programs the opportunity to gain valuable practical skills and proficiency in many aspects of public librarianship.”

And, critically, the application for the TLEF explicitly restricts participation in the fellowship “to two Black recent Library and Information Science graduates,” and unequivocally states that only “Black students or new professionals” are eligible to apply.¹

The purpose of this letter is to put the APL on notice of the racially discriminatory nature of the TLEF. It violates Title VI of the Civil Rights Act of 1964 for a recipient of federal money, such as the APL, to discriminate on the basis of race.² *See* 42 U.S.C. § 2000d, *et seq.* Similarly, racial discrimination in the context of hiring and employment transgresses Title VII. *See* 42 U.S.C. § 2000e, *et seq.* Needless to say, the TLEF also defies the analogous statutory civil rights protections of the New York State and Albany City Human Rights Laws. *See* N.Y. Exec. L. § 296; Albany City Code, Art. III, § 48-26.

Further, government-run programs such as the TLEF that discriminate on the basis of race not only violate state and federal civil rights statutes but also the equal protection guarantees of the New York State and United States Constitutions. By promoting, sponsoring and hosting a deliberately racially-restrictive program, the APL could be held liable for all such violations.

To be sure, certain race-based classifications can be upheld if they can withstand strict scrutiny. That is not the case here, however.

Under strict scrutiny, suspect classifications “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). A “racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Shaw v. Reno*,

¹ *See* <https://ffapl.org/2023-touhey-apprenticeship-application/>
[<https://web.archive.org/web/20230319163910/https://ffapl.org/2023-touhey-apprenticeship-application/>]
(accessed on March 19, 2023).

² According to budget documents available on the APL’s website, the APL received \$35,000 in federal grant money in FY 2021-2022, and an identical line item was included in the APL’s proposed budget for 2022-2023. That proposed budget was approved in May 2022. *See* https://www.albanypubliclibrary.org/wp-content/uploads/2022/03/22-23budget_3.9.22.pdf
[https://web.archive.org/web/20220523210508/https://www.albanypubliclibrary.org/wp-content/uploads/2022/03/22-23budget_3.9.22.pdf] (accessed on March 19, 2023); <https://www.albanypubliclibrary.org/blog/budget-vote-trustee-election-results/>
[<https://web.archive.org/web/20230319204357/https://www.albanypubliclibrary.org/blog/budget-vote-trustee-election-results/>] (accessed on March 19, 2023).

509 U.S. 630, 643-44 (1993) (citation omitted). This rigorous standard applies even when the government employs such classifications for “benign” reasons. *Bush v. Vera*, 517 U.S. 952, 984 (1996). Ultimately, 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 APL cannot demonstrate that limiting the TLEF to just black students and black recent graduates of library science programs 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,³ and the second is “the attainment of a diverse student body.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007).⁴ Neither applies here.

Moreover, the aim of the TLEF is to achieve racial balance – on the APL’s website, its executive director openly avows that the purpose of the TLEF is to “attract Black librarians to Albany Public Library” because “[t]he library profession isn’t as racially diverse as it could be”⁵ – 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).

³ The bar to satisfy this criterion “is a high one.” *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021). *First*, the policy must target a specific episode of past discrimination; it cannot rest on a “generalized assertion that there has been past discrimination in an entire industry.” *J.A. Croson Co.*, 488 U.S. at 498. *Second*, there must be evidence of intentional discrimination in the past – “[s]tatistical disparities don’t cut it.” *Id.* *Third*, the government must have had a hand in the past discrimination it now seeks to remedy. “[I]f the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.” *Id.*

⁴ The continued vitality of the latter category is uncertain and is currently before the U.S. Supreme Court. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022).

⁵ See <https://www.albanypubliclibrary.org/blog/apl-seeks-applicants-for-paid-summer-equity-internship/> [https://web.archive.org/web/20230319164703/https://www.albanypubliclibrary.org/blog/apl-seeks-applicants-for-paid-summer-equity-internship/] (accessed on March 19, 2023).

Nevertheless, even if the TLEF 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 TLEF is mechanically applied. If applicants are not black, they are automatically excluded from consideration. To the extent that any individualized consideration exists, it only applies to distinguish between applicants who have first satisfied the threshold racial litmus test.

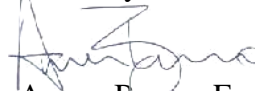
Finally, for a policy to survive narrow-tailoring analysis, the government must show “serious, good faith consideration of workable race-neutral alternatives,” *Grutter*, 539 U.S. at 339, and that “no workable race-neutral alternative” would achieve the purported compelling interest. *Fisher v. Univ.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

Because the blatant racial classification utilized by the APL is presumptively invalid, and since the APL cannot show any extraordinary government justification for engaging in such invidious discrimination, the TLEF appears to transgress state and federal civil rights statutes and constitutional equal protection guarantees.

We thank you for your attention to this letter, and we trust that you will cease and desist from continuing to conduct the TLEF based on racially discriminatory factors. We understand that the application period is still open. Please confirm to us in writing that the APL is opening the TLEF program to all otherwise eligible applicants without regard to race, and identify the steps that the APL is taking to remedy the current application, evaluation and award process.

Please respond to us no later than March 28, 2023 at the email addresses listed below.

Sincerely,



Ameer Benno, Esq.

Director of Litigation

The Equal Protection Project

Ameer@legalinsurrection.com

-And-

William A. Jacobson, Esq.

President

Legal Insurrection Foundation

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Albany Public Library

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