



THE EQUAL PROTECTION PROJECT
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BY EMAIL (OCR.Philadelphia@ed.gov)

U. S. Department of Education
Office for Civil Rights - Philadelphia Office
The Wanamaker Building
100 Penn Square East, Suite 515
Philadelphia, PA 19107-3323

Re: Civil Rights Complaint Against Western Kentucky University For Racially Discriminatory Undergraduate Scholarships

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 Western Kentucky University ("WKU"), a public institution, for creating, promoting and awarding two separate racially-discriminatory scholarships (the "scholarships"): 1) the WKU Athletics Minority Fellowship ("AMF"), an undergraduate scholarship for minority students interested in careers focusing in collegiate athletics; and 2) the WKU Distinguished Minority Fellowship ("DMF"), a scholarship that aims

to help undergraduate minority students attain graduate degrees. The scholarships are *only* available to non-white applicants.

WKU's creation, ongoing sponsorship and active promotion of the scholarships 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 WKU's blatantly discriminatory AMF and DMF scholarships and the circumstances under which they were 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 WKU Athletics Minority Fellowship ("AMF")

According to WKU's website, the AMF provides "at least four undergraduate scholarships in the 2023-24 school year for students interested in careers focusing in collegiate athletics."¹ The purpose of the scholarships are "to enhance[e] the success of **students of color** – excluding student-athletes on athletic scholarship – within the athletic department's administrative areas."²

¹ See <https://wkusports.com/sports/2021/7/11/wku-athletics-minority-fellowship> [https://archive.ph/uctzC] (accessed on Sept. 10, 2023).

² *Id.* (emphasis added); see also <https://www.wku.edu/dei/resources.php> [https://archive.ph/JsEEB] (accessed on Sept. 11, 2023).

Athletics Minority Fellowship Program for Undergraduates

WKU Athletics seeks to offer four undergraduate scholarships in the 2021-22 school year for students interested in careers focusing on Athletic Administration. The **WKU Athletics Minority Fellowship** program will be dedicated to enhancing the success of students of color – excluding student-athletes on athletic scholarship – within the athletic department’s administrative areas. This scholarship is specifically geared toward undergraduates with **FEWER** than 90 collegiate credit hours.

Those who are selected into the AMF program receive a \$2,000 scholarship per academic year, or \$1,000 per semester.³ The deadline date for applications was July 1, 2023.⁴ As this is the third consecutive academic year that the AMF scholarship has been offered,⁵ there is every expectation that it will continue into the foreseeable future.

The centrality of race to WKU’s AMF scholarship program is apparent. One of the requirements for eligibility for the scholarship is that the applicant “identify as an underrepresented ethnic minority.”⁶

Requirements

- Must be full-time undergraduate students (enrolled in at least 12 credit hours per semester)
- Must have completed fewer than 90 collegiate credit hours (except for returning fellows)
- Must meet the requirements of WKU’s Satisfactory Academic Progress (SAP) Policy (must maintain at least a 2.0 cumulative GPA and earn at least 67% of attempted hours)
- Must identify as an underrepresented ethnic minority as it pertains to the culture of WKU (see application)
- Students who are chosen for the program will be expected to successfully complete and pass a 1-hour credit course provided by Athletics each semester they participate in the program
- Students who are chosen for the program will also be expected to complete a capstone internship in WKU Athletics, with a rotation in at least four administrative departments required for the first semester
- Capstone internship will require work outside the classroom, including some nights and weekends

According to the application for the AMF scholarship, a student is only an “underrepresented ethnic minority” if he or she is “Black/African-American,” “Black/African Descent,” “Asian, Native Hawaiian [or] Pacific Islander,” “Hispanic/Latino” or “American Indian/Alaskan Native.”⁷

³ *Id.*

⁴ See <https://www.wku.edu/dei/resources.php> [https://archive.ph/JsEEB] (accessed on Sept. 11, 2023).

⁵ See <https://www.wbko.com/2021/07/14/wku-athletics-announces-new-undergraduate-minority-fellowship-program/> [https://archive.ph/eZ2Fq] (accessed on Sept. 15, 2023).

⁶ See <https://www.wku.edu/dei/resources.php> [https://archive.ph/JsEEB] (accessed on Sept. 11, 2023).

⁷ See <https://wkusports.com/form/49> [https://archive.ph/swAW7] (accessed on Sept. 11, 2023); <https://tinyurl.com/yv39hk58> (accessed on Sept. 11, 2023).

Ethnic Origin *

- Black/African-American
- Black/African Descent
- Asian, Native Hawaiian, Pacific Islander
- Hispanic/Latino
- American Indian/Alaskan Native
- Other (Please explain in next box)

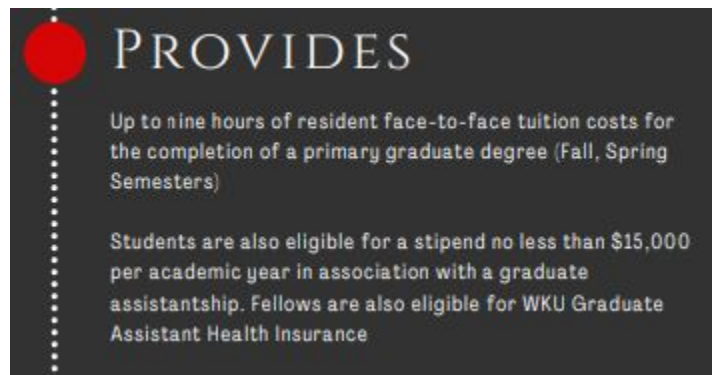
The WKU Distinguished Minority Fellowship (“DMF”)

In addition to the AMF scholarship, WKU’s “Distinguished Minority Fellowship,” or DMF scholarship, discriminates on the basis of race. As reflected in the screenshot of the application website below, the DMF scholarship is intended “to help minority students attain graduate degrees by providing tuition as well as employment opportunities.”⁸

Distinguished Minority Fellows

The Distinguished Minority Fellows program is designed to help minority students attain graduate degrees by providing tuition as well as employment opportunities. Admission into the program is competitive and applicants are encouraged to submit the application materials as early as possible. Applications are accepted once annually in the Spring for admission for the following fall semester.

The DMF scholarship provides “[u]p to nine hours of resident face-to-face tuition costs for the completion of a primary graduate degree,” plus eligibility for a stipend of “no less than \$15,000 per academic year in association with a graduate assistantship.”⁹



⁸ See <https://www.wku.edu/graduate/aid/map.php> [https://archive.ph/pIIuP] (accessed on Sept. 12, 2023).

⁹ *Id.*

To be eligible for the DMF scholarship, students “must have minority status.” According to the school, that means that they must be “African American, American Indian/Alaskan Native, Native Hawaiian/Pacific Islander, two or more races or Hispanic/Latino.”¹⁰



The application for the DMF scholarship, which is accepted by WKU from January 15 through April 15 each year, requires applicants to check the box corresponding to one of those racial/ethnic categories.¹¹



(<http://www.wku.edu/graduate/aid/map.php>)

Distinguished Minority Fellows (DMF)

Students must be fully admitted to a graduate degree program by the DMF application deadline in order to be considered for the award.

Name: _____ WKU ID Number: _____
Last First M.I./Maiden

E-mail Address _____ Graduate Program of Study: _____

Ethnic Origin: African-American Asian, Native Hawaiian, Pacific Islander Hispanic/Latino American Indian/Alaskan Native

Gender: M F GPA: Undergraduate _____ Graduate _____

Because the scholarship – which began in 2012¹² – has been renewed for over a decade, there is a strong likelihood that it will continue beyond this academic year.

The AMF and DMF Scholarships Violate The Law

¹⁰ See <https://www.wku.edu/graduate/aid/dmfflyer.pdf> [<https://archive.ph/kqjAG>] (accessed on Sept. 12, 2023).

¹¹ See <https://www.wku.edu/graduate/aid/map.php>. Although the informational flier states that “minority status” includes being of “two or more races,” the application does not include a corresponding checkbox for that.

¹² See <https://archive.ph/BGgfv> (accessed on Sept. 15, 2023).

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.¹³

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,” and thus applies to universities receiving federal financial assistance). As WKU receives federal funds, it is subject to Title VI.¹⁴

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).¹⁵

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 WKU’s reasons for employing racial and ethnic preferences in selecting the recipients of the AMF and DMF scholarships, it violated Title VI by doing so.

¹³ 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 WKU. 42 U.S.C. § 2000(a)(a). Similarly, the AMF and DMF scholarships defy WKU’s own non-discrimination policy. *See* <https://www.wku.edu/eoo/nondisc.php> [<https://archive.ph/3Npk1>] (accessed on Sept. 12, 2023).

¹⁴ *See* https://www.wku.edu/strategyopfin/budget/2022_2023docs/fy23_revenue_detail.pdf [<https://archive.ph/4x1hm>] (accessed on Sept. 12, 2023).

¹⁵ 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 preferences in this context as well.

And, because WKU is a public institution, its introduction of invidious discrimination into the scholarship eligibility criteria violates the Equal Protection clause of the Fourteenth Amendment.

The inclusion of racial criteria in the promotional materials about the scholarship 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 scholarship’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 AMF and DMF scholarships flunk 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, WKU cannot demonstrate that imposing racial and ethnic restrictions on the AMF and DMF scholarships 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).¹⁶ Neither applies here.

¹⁶ 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

To the extent that the purpose of the AMF and DMF scholarships is to “assist[] individuals from minority groups in obtaining their higher education goals,”¹⁷ 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).

And, irrespective of whether the AMF and DMF scholarships further a compelling interest, they are 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, American Indian/Alaskan Native, Native Hawaiian/Pacific Islander or Hispanic/Latino, they are automatically ineligible for the scholarships. 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 “underrepresented ethnic minority” and “minority” eligibility requirements for the AMF and DMF scholarships, respectively, apply in an undifferentiated fashion to multiple racial and ethnic groups, they are 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 *47-48,¹⁸ 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.*

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.”).

¹⁷ See <https://www.wku.edu/graduate/aid/map.php> [https://archive.ph/pIIuP] (accessed on Sept. 12, 2023).

¹⁸ 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).

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

OCR Has Jurisdiction

OCR has jurisdiction over this complaint. WKU is a public institution and a recipient of federal funds.¹⁹ 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.

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 scholarships on the basis of race and ethnicity is presumptively invalid, and since WKU 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 WKU’s role in creating, sponsoring, supporting and promoting the AMF and DMF scholarships – and to discern whether WKU 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

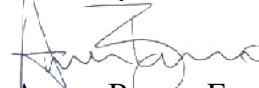
¹⁹ See https://www.wku.edu/strategyopfin/budget/2022_2023docs/fy23_revenue_detail.pdf [https://archive.ph/4x1hm] (accessed on Sept. 12, 2023).

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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 AMF and DMF scholarships based on discriminatory criteria, and that it ensure that all ongoing and future programming through WKU comports with the Constitution and federal civil rights laws.

Sincerely,



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The Equal Protection Project

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-And-

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