BOYDEN GRAY & ASSOCIATES PLLC
801 17TH STREET, NW, SUITE 350
WASHINGTON, DC 20006
(202) 955-0620

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Alice Cuprill-Comas
Executive Vice President and General Counsel
Oregon Health & Science University
Mail code: L101
3225 S.W. Pavilion Loop
Portland, OR 97239

Re: the 30-30-30 plan's racially and ethnically discriminatory admissions program

Dear Ms. Cuprill-Comas:

I write on behalf of the Project on Fair Representation, a not-for-profit legal defense foundation that believes that racial and ethnic classifications are unconstitutional, unfair, and harmful. The purpose of this letter is to warn the Oregon Health & Science University (OHSU) that its new "30-30-30 plan" violates the Fourteenth Amendment of the U.S. Constitution because its racially and ethnically discriminatory admissions program imposes an illegal racial quota, and neither serves a compelling state interest nor is narrowly tailored to such an end.

As you know, 30-30-30 is an educational, hiring, and admissions program developed "to help the state address the current health care workforce shortage and health care inequities that were exacerbated by COVID-19 and its disproportionate impact on underserved communities."[1] In addition to increasing by 30% the number of graduates in key health care programs (a worthy end), OHSU has stated that 30-30-30 "will . . . increase all OHSU learner diversity to 30% by the year 2030."[2] Specifically, "OHSU will ensure that at least 30% of its learners identify as underrepresented minorities."[3] The professed goals of the program are to "allow [OHSU] to train health care providers who better represent the racial and ethnic diversity of Oregonians, and who are prepared to provide high-quality, culturally competent care."[4]

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[1] Oregon Health & Science University, *Oregon Legislature Funds OHSU's 30-30-30 Plan to Address Health Care Workforce Crisis, Increase Education Program Diversity* (Mar. 4, 2022), https://news.ohsu.edu/2022/03/04/oregon-legislature-funds-ohsus-30-30-30-plan-to-address-health-care-workforce-crisis-increase-education-program-diversity.

[2] *Id.*

[3] Oregon Health & Science University, *OHSU's Role in Addressing Oregon's HealthCare Workforce Crisis*, https://s3.amazonaws.com/cms.ipressroom.com/296/files/20220/OHSU%27s+Role+in+Addressing+Oregon%27s+Health+Care+Workforce+Crisis.pdf.

[4] *Oregon Legislature Funds OHSU's 30-30-30 Plan to Address Health Care Workforce Crisis, Increase Education*

This is kind of racial balancing is blatantly unconstitutional. The Fourteenth Amendment applies to public institutions like OHSU and protects "any person" against denial of "the equal protection of the laws."[5] At the core of this guarantee is the prohibition on racial discrimination in all but the rarest of circumstances. Decades of Supreme Court precedent have held that quotas and other forms of racial balancing are never permissible. For example, in *University of California Regents v. Bakke*, the Supreme Court in a controlling opinion by Justice Powell explained that a program designed to achieve "some specified percentage of a particular group merely because of its race or ethnic origin, . . . must be rejected not as insubstantial but as facially invalid."[6] Similarly, in *Grutter v. Bollinger*, the Court re-affirmed that quotas and all other forms of racial balancing are "patently unconstitutional."[7] Indeed, even OHSU's own Affirmative Action Equal Opportunity office states that "Federal law specifically prohibits quotas."[8]

In the face of such precedents, universities have often cried out that a race-conscious program isn't *really* a quota—it's just a goal, an aspiration, or a guidepost. Such deflection with the 30-30-30 program would miss the point. The problem is not just the method by which the program works, but also its stated purposes, which are to "allow [OHSU] to train health care providers who better represent the racial and ethnic diversity of Oregonians, and who are prepared to provide high-quality, culturally competent care."[9] The Supreme Court has been clear that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[10] To the extent that there is anything "compelling" about racial balancing it is just how pernicious it is. In reviewing the program, I was reminded of an explanation that the dean of Cornell University Medical College gave in 1940 to justify the school's admissions program, which discriminated against Jews: "We limit the number of Jews admitted to each class to roughly the proportion of Jews in the population of the state."[11] Such arguments are incompatible with the Constitution's requirement of equal protection.

Program Diversity.

[5] U.S. Const. amend. XIV § 1.

[6] 438 US 265, 307 (1978) (controlling opinion of Powell, J.).

[7] 539 U.S. 306, 308 (2003).

[8] Oregon Health & Science University, *Affirmative Action and Equal Opportunity*, https://www.ohsu.edu/affirmative-action-and-equal-opportunity/affirmative-action.

[9] *Oregon Legislature Funds OHSU's 30-30-30 Plan to Address Health Care Workforce Crisis, Increase Education Program Diversity*.

[10] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 311 (2013)

[11] Qtd. in Barron H. Lerner, *In a Time of Quotas, a Quiet Pose in Defiance*, THE NEW YORK TIMES (May 25, 2009), https://www.nytimes.com/2009/05/26/health/26quot.html.

As the Supreme Court has explained, racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[12] Indeed, they "perpetuat[e] the very racial divisions the polity seeks to transcend."[13]

The other stated purpose—that proportional representation by race is needed to ensure "high-quality culturally competent care"—is also deeply troubling. The notion that the quality or cultural competence of medical care is somehow dependent on whether the caregiver is the "right" race or not is nothing short of bigotry. There is nothing *less* inclusive or "culturally competent" than the implication that what matters is a caregiver's race, rather than his or her ability to listen, learn, and treat others with respect, dignity, and skill.

Finally, it is irrelevant that OHSU is an institution of higher learning. The *only* situation where a race-conscious university admissions programs has ever been held to be permissible is where the program was designed to promote diversity as a means of advancing the institution's educational mission.[14] The 30-30-30 program's ham-fisted quotas do not purport to serve this narrow goal. Nor is there any reason to think that the 30-30-30 program is narrowly tailored to achieving any of its vague and undefined (and, indeed, pernicious) purposes.

* * *

The bottom line is this: the 30-30-30 program will not hold up in court no matter how it is described or defended. And, because OHSU receives federal funding, it could be liable not only for constitutional violations pursuant to 42 U.S.C. § 1983, but also under Title VI of the Civil Rights Act of 1964 and the Civil Rights Act of 1866.[15] Under the Civil Rights Act of 1866, moreover, individuals at OHSU responsible for enacting and enforcing this racially discriminatory policy can be held *personally* liable as well.[16] Such liability can include both compensatory and punitive damages.[17] And unlike employment discrimination cases under Title VII, liability under the Civil Rights Act of 1866 has no cap.

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[12] *Shaw v. Reno*, 509 U.S. 630, 642, 643 (1993) (quoting *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)).

[13] *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality opinion).

[14] *See, e.g.*, *Grutter*, 539 U.S. at 322.

[15] 42 U.S.C. § 2000d; *see also Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) ("[D]iscrimination 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" and the Civil Rights Act of 1866, 42 U.S.C. § 1981).

[16] *Flores v. City of Westminster*, 873 F.3d 739, 753 n.6 (9th Cir. 2017).

[17] *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 458 (1975).

The 30-30-30 program's racial discrimination is indefensible, and you should act swiftly to end it.

Sincerely yours,

C. Boyden Gray