



**THE EQUAL PROTECTION PROJECT**  
**A Project of the Legal Insurrection Foundation**  
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November 27, 2023

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

U. S. Department of Education  
Office for Civil Rights - Denver Office  
Cesar E. Chavez Memorial Building  
1244 Speer Boulevard, Suite 310  
Denver, CO 80204-3582

**Re: Civil Rights Complaint Against University of Colorado Boulder Regarding Race-Based Scholarship 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 Colorado Boulder ("CU Boulder"), a public institution, for supporting and promoting a scholarship program that engages in invidious discrimination on the basis of race, color and national origin.

The Ronald E. McNair Postbaccalaureate Achievement Program (“McNair Scholars Program”) is one of eight federal programs, known as TRIO programs, that are “designed to identify and provide services for individuals from disadvantaged backgrounds.”<sup>1</sup> Each TRIO program is “targeted to serve and assist low-income individuals, first-generation college students, and individuals with disabilities to progress through the academic pipeline from middle school to postbaccalaureate programs.”<sup>2</sup> The U.S. Department of Education provides grants for these programs to “institutions of higher education, public and private agencies and organizations ... with experience in serving disadvantaged youth and secondary schools,” which then “plan, develop and carry out the services for student.”<sup>3</sup>

The McNair Scholarship Program, which was authorized by the 1986 amendments to the Higher Education Act of 1965, *see* 20 U.S.C. § 1070a-15, “awards grants to 4-year postsecondary institutions to provide services to students who are low-income and first-generation (i.e., low-income students where neither parent has received a bachelor’s degree), as well as students from groups underrepresented in graduate education.”<sup>4</sup>

## Program Description

Through a grant competition, funds are awarded to institutions of higher education to prepare eligible participants for doctoral studies through involvement in research and other scholarly activities. Participants are from disadvantaged backgrounds and have demonstrated strong academic potential. Institutions work closely with participants as they complete their undergraduate requirements. Institutions encourage participants to enroll in graduate programs and then track their progress through to the successful completion of advanced degrees. The goal is to increase the attainment of Ph.D. degrees by students from underrepresented segments of society.

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<sup>1</sup> See <https://www2.ed.gov/about/offices/list/ope/trio/index.html> [https://web.archive.org/web/20231116034138/https://www2.ed.gov/about/offices/list/ope/trio/index.htm] (accessed on Nov. 15, 2023). The name TRIO is not an acronym, it was given after the first three programs (“Upward Bound,” “Talent Search” and “Student Support Services”) were implemented. See <https://www2.ed.gov/about/offices/list/ope/trio/triohistory.html> [https://web.archive.org/save/https://www2.ed.gov/about/offices/list/ope/trio/triohistory.html] (accessed on Nov. 15, 2023).

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

<sup>3</sup> *Id.*

<sup>4</sup> See <https://www2.ed.gov/about/offices/list/ope/trio/mcnairfastfactsreport201920.pdf> [https://web.archive.org/save/https://www2.ed.gov/about/offices/list/ope/trio/mcnairfastfactsreport201920.pdf%20at%202] (accessed on Nov. 15, 2023) at 2.

The goal of the program “is to increase the attainment of Ph.D. degrees by students from underrepresented segments of society.”<sup>5</sup> Under this program, which is available at 187 undergraduate institutions across the United States and Puerto Rico,<sup>6</sup> federal funds are awarded to institutions of higher education to prepare undergraduate students from “disadvantaged backgrounds” for doctoral studies “through involvement in research and other scholarly activities.”<sup>7</sup> These funds are used to provide McNair Scholars with research opportunities, faculty mentoring and seminars, and cover such things as paid summer research internships, graduate school visits, fee waivers for graduate school application fees and funding for travel to academic conferences.<sup>8</sup>

### **McNair Scholars in our program will receive:**

- **\$2800 stipend** to support a McNair Research Internship during at least one summer
- **Paid tuition** to attend McNair course as part of the McNair Research Internship
- **Paid travel** to research conferences, regional or national
- **Paid travel** to visit prospective graduate school programs
- **Research mentorship** with a CU faculty member in your field
- **Mentoring** from current graduate students in your field and in related fields
- **GRE preparation** & GRE exam fee reduction waivers
- **Seminars** focused on preparing competitive application in to graduate study, including:
  - *How to get funding for graduate study*
  - *Research proposal writing*
  - *Grant proposal writing*
  - *The culture of graduate school*
  - *PhD to Industry*
  - *Smart financial decisions for graduate school*
  - *& more!*

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<sup>5</sup> See <https://www.colorado.edu/mcnair/> [https://web.archive.org/save/https://www.colorado.edu/mcnair/] (accessed on Nov. 15, 2023).

<sup>6</sup> See <https://mcnairscholars.com/about/> [https://web.archive.org/save/https://mcnairscholars.com/about/] (accessed on Nov. 15, 2023).

<sup>7</sup> See <https://www2.ed.gov/programs/triomcnair/index.html> [https://web.archive.org/save/https://www2.ed.gov/programs/triomcnair/index.html] (accessed on Nov. 15, 2023).

<sup>8</sup> See <https://www.colorado.edu/mcnair/requirements> [https://archive.is/0RoSe] (accessed on Nov. 19, 2023).

To be eligible for a McNair Scholarship, the student applicant must be enrolled in a degree-granting program at an eligible institution.<sup>9</sup> At least two-thirds of the students who apply for a McNair Scholarship from a participating institution must be “low-income individuals who are first-generation college students,” but “[t]he remaining participants may be from groups that are underrepresented in graduate education.” 20 U.S.C. § 1070a-15(d).

## Eligibility

**Who May Apply:** Institutions of higher education and combinations of institutions of higher education

Students who qualify for McNair must be enrolled in a degree-granting program at an eligible institution. In all projects, at least two-thirds of the participants must be low-income, potential first-generation college students. The remaining participants may be from groups that are underrepresented in graduate education.

Although the statute provides that groups that are underrepresented in graduate education “includ[e]” “Alaska Natives,” “Native Hawaiians” and “Native American Pacific Islanders,” *see* 20 U.S.C. § 1070a-15(d)(2)(A-C), federal regulations have expanded the definition to also include “Black (non-Hispanic), Hispanic [and] American Indian” individuals. *See* 34 C.F.R. § 647.7(b) (“The following ethnic and racial groups are considered underrepresented in graduate education: Black (non-Hispanic), Hispanic, American Indian, Alaskan Native ... Native Hawaiians ... and Native American Pacific Islanders[.]”).<sup>10</sup>

CU Boulder’s voluntary ongoing participation in and active promotion of the McNair Scholarship program, which awards funding, research and scholarship opportunities 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

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<sup>9</sup> *See* <https://www2.ed.gov/programs/triomcnair/eligibility.html> [<https://archive.is/ScWKB>] (accessed on Nov. 19, 2023).

<sup>10</sup> Insofar as this federal regulation explicitly limits “groups underrepresented in graduate education” to certain enumerated races and ethnicities, the regulation is unlawful. *See, e.g., Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (federal loan forgiveness program for black farmers violated equal protection). OCR need not resolve that issue, however, because CU Boulder’s participation in the McNair Scholars program has always been entirely voluntary. By electing to participate in that program, CU Boulder has affirmatively chosen to violate the Fourteenth Amendment and antidiscrimination laws.

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 CU Boulder’s voluntary participation in the blatantly discriminatory McNair Scholarship program and the circumstances under which it was promoted, and 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.

### **CU Boulder’s McNair Scholars Program**

According to CU Boulder’s website, in order to be eligible for the McNair Scholars program, undergraduate students must either “come from a low income family background (according to federal definitions) and be the first in [their] family to go to college” or “be a member of a group that is underrepresented/underserved in graduate education,” which CU Boulder defines as “Black or African American,” “Hispanic or Latinx,” “American Indian or Alaskan Native” or Native Hawaiian and other Pacific Islanders.”<sup>11</sup>

#### **To be eligible, you must:**

- have a strong desire to obtain a PhD
- be a US citizen or permanent resident
- come from a **low income family background** (according to federal definitions) and be the first in your family to go to college (no parent or legal guardian holds a 4-year college degree, or you were a ward of the court after age 13)
  - **or** be a member of a group that is underrepresented/underserved in graduate education, defined as the following:
    - Black or African American
    - Hispanic or Latinx
    - American Indian or Alaskan Native
    - Native Hawaiian and other Pacific Islanders
- be currently enrolled as an undergraduate in a degree program at CU Boulder (students who already hold a bachelor’s degree are not eligible)
- be heading into your junior or senior year in the upcoming fall semester (**you must also have at least one year remaining before graduation**)
- have a *minimum* cumulative GPA of 2.7

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<sup>11</sup> See <https://www.colorado.edu/mcnair/application> [https://archive.is/N2JFy] (accessed on Nov. 19, 2023).

As shown in the screen capture below, CU Boulder’s website provides that applications for the McNair Scholars program for the 2024-25 Academic Year are due by January 30, 2024.<sup>12</sup>



**2024-25 McNair Scholars  
Program Application**

Interested in applying to the McNair Scholars Program?  
Attend one of our Information Sessions. All Information  
Sessions will be held in the **Lucile Berkeley Buchanan  
Building Room 334 (LBB 334)**. You can also join  
remotely at [this Zoom link](#).

- **Thursday November 16th at 3:00 PM**

If you have any questions,  
contact [mcnairscholars@colorado.edu](mailto:mcnairscholars@colorado.edu).

Applications will open soon.

***Applications have a priority deadline of January 30th.***

The application for the McNair Scholars program at CU Boulder makes clear that students who do not fall into these racial or ethnic categories – i.e., students who identify as white or Asian – must demonstrate that they are “economically disadvantaged” in order to be eligible.

The discrimination is apparent: if applicants are black, African American, American Indian, Alaskan Native, Hispanic/Latino or Native Hawaiian/Pacific Islander, they are automatically eligible for the program. Applicants who do not fall into one of those racial and ethnic categories are automatically excluded from consideration unless they can satisfy the extra requirements of demonstrating that they meet the guidelines for being “low income” and that neither of their parents completed a Bachelor’s degree program. The “underrepresented” groups are not required to prove any economic need, and their parents’ educational background is utterly irrelevant to their eligibility for the scholarship.

### **The McNair Scholars Program Violates The Law**

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<sup>12</sup> *Id.*

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>13</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. *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 CU Boulder receives federal funds<sup>14</sup> – indeed, the McNair Scholars program is funded by federal dollars – it is subject to Title VI.<sup>15</sup>

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 CU Boulder’s reasons for participating in, sponsoring and promoting the McNair Scholars program, it is violating Title VI by doing so.

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<sup>13</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 CU Boulder. 42 U.S.C. § 2000(a)(a). Similarly, the McNair Scholars program defies those schools’ own non-discrimination policies. *See* <https://www.colorado.edu/oiec/policies/discrimination-harassment> [https://archive.ph/S3GrI] (accessed on Nov. 14, 2023).

<sup>14</sup> *See* [https://www.boarddocs.com/co/cu/Board.nsf/files/CT3N9K5EC669/\\$file/Section%202%20-%20Boulder\\_FINAL.pdf](https://www.boarddocs.com/co/cu/Board.nsf/files/CT3N9K5EC669/$file/Section%202%20-%20Boulder_FINAL.pdf) [https://archive.is/7UumN] (accessed on Nov. 14, 2023).

<sup>15</sup> *See* <https://www.cu.edu/cu-careers/news/cu-boulder-receives-134m-continue-mcnair-scholars-program> [https://archive.is/3UIUG] (accessed on Nov. 19, 2023).

And, because CU Boulder is a public institution, its voluntary participation in, sponsorship and promotion of the McNair Scholars 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 CU Boulder 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. Peña*, 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, CU Boulder cannot demonstrate that giving scholarship preference to “Black/African American,” “Hispanic/Latino,” “Native American/Alaskan Native” and “Pacific Islander/Native Hawaiian” students 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>16</sup> Neither applies here.

To the extent that the purpose of the McNair Scholars program “is to increase the attainment of Ph.D. degrees by students from underrepresented segments of society,” achieving 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

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<sup>16</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.”)



(“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 McNair Scholars 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 selection criterion is mechanically applied. If applicants are not black, African American, American Indian, Alaskan Native or Hispanic, they are automatically ineligible for the programs unless they can demonstrate that they meet the guidelines for being “first generation” and “low income.” 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 “underrepresented in graduate education” eligibility requirement for the McNair Scholars 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 the same racial categories used by CU Boulder for its McNair Scholars program are “imprecise,” “plainly overbroad,” “arbitrary,” “undefined” and “opaque.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at \*47-48,<sup>17</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 requirement that applicants who are white or Asian (non-Pacific Islander) must demonstrate that they are “first generation” and “low income” to qualify for the McNair Scholars program makes those programs underinclusive since those criteria are arbitrary and, in the case of the “low income” criterion, fluctuates annually.<sup>18</sup>

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<sup>17</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).

<sup>18</sup> To qualify as “low income,” the applicant’s family’s taxable income cannot have exceeded 150 percent of the federal poverty level in the calendar year preceding the year in which the applicant participates in the program. See <https://www2.ed.gov/about/offices/list/ope/trio/mcnairfastfactsreport201920.pdf> [https://web.archive.org/save/https://www2.ed.gov/about/offices/list/ope/trio/mcnairfastfactsreport201920.pdf] (accessed on Nov. 19, 2023). The poverty threshold is updated each year by the Census Bureau. See

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 CU Boulder’s blatant racial preference system for the McNair Scholars program is presumptively invalid, and since there is no extraordinary government justification for such invidious discrimination, its use of racial preferences violates federal civil rights statutes and constitutional equal protection guarantees.

### **OCR Has Jurisdiction**

OCR has jurisdiction over this complaint. CU Boulder is a public institution and 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 is 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 the exclusion of white applicants in the McNair Scholars program is presumptively invalid, and since CU Boulder cannot show any extraordinary government justification for having participated in or promoted such an invidiously discriminatory program, its conduct violates federal civil rights statutes and constitutional equal protection guarantees.

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<https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines#:~:text=The%20poverty%20thresholds%20are%20the,Americans%20in%20poverty%20each%20year> [https://archive.is/ClacF] (accessed on Nov. 19, 2023). The federal TRIO Programs’ current-year low-income levels can be found at <https://www2.ed.gov/about/offices/list/ope/trio/incomelevels.html> [https://archive.is/0X56K] (accessed on Nov. 19, 2023).

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The Office for Civil Rights has the power and obligation to investigate CU Boulder's role in participating in, sponsoring, supporting and promoting the McNair Scholars programs – and to discern whether CU Boulder 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 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 CU Boulder's McNair Scholars programs based on racially discriminatory criteria, and that it ensures that all ongoing and future programming through CU Boulder comports with the Constitution and federal civil rights laws.

Sincerely,



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-And-

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