WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 East Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

January 14, 2022

VIA ELECTRONIC & REGULAR MAIL
Laura S. Kaiser
President & CEO
SSM Health
10101 Woodfield Ln.
Creve Coeur, MO 63132
laura.kaiser@ssmhealth.com

Re: Race Discrimination in the Distribution of COVID-19 Therapeutics

Dear Ms. Kaiser:

The Wisconsin Institute for Law & Liberty (WILL) is a law and policy center dedicated to enforcing the rule of law and protecting individual rights. As relevant here, WILL's Equality Under the Law Project files strategic litigation to enforce the federal and state guarantees of equal treatment under law.

On December 30, 2021, SSM Health sent an email to its Wisconsin physicians concerning the distribution of monoclonal antibody products ("mAbs"). It is our understanding the email was sent at the direction of administrators of the SSM Health System in Missouri, and SSM's mAbs distribution policy, as described below, applies in multiple states.

As explained on your website, mAbs are "highly effective in neutralizing the [COVID-19] virus and preventing symptoms from worsening." According to the December 30 email, SSM announced the use of a new "risk scoring calculator" to determine which patients will be eligible for mAbs. It is our understanding that this new calculator governs the distribution of GSK's Sotrovimab, while a previous calculator governed the distribution of two other mAbs (Lilly's Bamlanivimab and Regeneron's Casirivimab/Imdevimab). SSM has discontinued use of the Lilly and Regeneron products, according to the email.

To be eligible for mAbs, patients must score a minimum of 20 points. But under your current risk scoring calculator, patients will receive a substantial preference based on race, with the color of a patient's skin mattering more than medically recognized co-morbidities or symptoms. For example, a 50-year-old white female (15 points) suffering from obesity (1 point), asthma (1 point), and hypertension (1 point)

would not be eligible for mAbs because she does not receive the 20-point minimum score under the calculator. On the other hand, an otherwise healthy 50-year-old African-American female (22 points), without any of these health risks, would be eligible. As another example, a 40-year-old white male (14 points) presenting in an emergency room *with shortness of breath* (4 points) would not be eligible, while a 40-year-old African American male (21 points) without any co-morbidities or symptom risk factors would be eligible.

These inequities result solely from the weight given to race in the calculator. The risk scoring calculator provides a 7-point bonus to all patients who are "non-white or Hispanic." In other words, non-white patients receive a 7-point head start in your risk scoring calculator and are therefore more likely to receive life-saving medical treatment based solely on the color of their skin. But having "non-white" skin color is not a medical condition, co-morbidity, or treatable symptom. In other words, SSM is not contending that the condition of being "non-white" itself makes COVID-19 more virulent such that persons who possess these physical characteristics (which are undefined in the calculator) are at a greater risk. SSM is apparently granting this bonus for other, non-medical reasons.

For your benefit, I have reproduced a copy of the chart from SSM's email below:

SCORING:

If a patient is 12 or older, then scores based on the following:

Pt Age	3 pts for every decade live (23 = 6 pts, 84 = 24 pts)
Gender	2 pts for being Male
Race/Ethnicity	7 pts if Non-White or Hispanic
Dyspnea	4 pts if Dyspnea or Breathing Problem as a RFV past 365 days
Diabetes	3 pts if Diabetes on Problem List or Encounter/Invoiced Diagnosis Past 365 days or Has Diabetes HM
Obese	1 pt if BMI >= 35
Asthma	1 pt if Asthma on Problem List or Encounter/Invoiced Diagnosis Past 365 days
Hypertension	1 pt if Hypertension on Problem List or Encounter/Invoiced Diagnosis Past 365 days

The approach taken by your calculator is not only profoundly unethical and immoral, it is illegal. Federal law forbids race discrimination. Under Section 1557 of the Affordable Care Act (42 U.S.C. § 18116), patients may not be discriminated against based on race in any health program or activity "a part of which is receiving Federal financial assistance." Title VI of the Civil Rights Act of 1964 contains a similar prohibition. Numerous other legal authorities—regulations, manuals, civil-rights clearances, claim forms, and provider agreements, just to name a few—require certification or a formal attestation of compliance with non-discrimination laws, including when submitting claims for reimbursement to federal programs. Private healthcare providers are also subject to the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits race discrimination in contractual relationships among private parties. And finally, numerous state laws prohibit race discrimination. In Wisconsin, for example, state law prohibits "preferential treatment" or the denial of "full and equal enjoyment" based on race at any "clinic" or any other place where "services are available either for free or for a consideration." Wis. Stat. § 106.52.

Because your risk calculator discriminates against patients based on race, it is illegal. We are asking that you immediately suspend use of this calculator and develop a new tool that evaluates patients based on their individual health history and symptoms, rather than their race.

Thank you for your attention to this important matter.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Rick Esenberg
President & General Counsel
Rick@will-law.org

Daniel P. Lennington
Deputy Counsel
Dan@will-law.org