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August 1, 2023

VIA ELECTRONIC MAIL:

City of Madison
Mayor Satya Rhodes-Conway
210 Martin Luther King Jr Blvd
Room 403
Madison, WI 53703
mayor@cityofmadison.com

RE: Madison’s Racially Discriminatory BizReady Program

Dear Mayor Rhodes-Conway:

On July 14, 2023, the City of Madison created the BizReady Program, which is a “training, technical assistance, and micro-enterprise funding initiative.” A program administrator, yet to be identified, will run the \$300,000 program by offering training and technical assistance to entrepreneurs. “Micro-grants,” in the amount of \$3,000, will also be available to at least 25 entrepreneurs. The administrator, likely a non-profit entity, may use remaining funds for expenses and “overhead.”¹

The program’s most notable feature is that it discriminates based on race. The draft request for proposal (RFP) indicates the program’s goal is to support “BIPOC populations,” to encourage “BIPOC business ownership,” and to “support the development of BIPOC entrepreneurs across the city.” In short, the City’s new program is only available to certain entrepreneurs who are “Black, Indigenous, People of Color.”

Programs like BizReady that discriminate based on race are illegal and unconstitutional because they violate the guarantee of equality under the law.

The United States Supreme Court recently declared unconstitutional the affirmative-action plans of Harvard College and the University of North Carolina. In its opinion, the Court articulated several principles that doom the BizReady Program. *See Students for Fair Admissions, Inc. v. Harvard*, Nos. 20-1199 & 21-707 (June 29, 2023) (cited as “Op. at ___”).

The United States Constitution and several related federal laws establish a strict rule of racial equality. These laws apply to all governments and nearly all

¹ Relevant documents are available at these links: [Madison Press Release](#); [Draft Request for Proposal](#); [BizReady PowerPoint](#).

private entities in America. Programs and policies, whether federal, state, or local, “shall be the same for the black as for the white.” Op. at 10. This is the “Constitution’s pledge of racial equality.” Op. at 13. Therefore, programs like BizReady “must be made available to all on equal terms.” Op. at 12. On its face, BizReady is illegal and unconstitutional.

There is only one potentially relevant exception to this rule. In very limited circumstances, a government entity may use race as a factor to remedy “specific, identified instances of past discrimination that violated the Constitution or a statute.” Op. at 15. But Madison does not even pretend that BizReady is designed to remedy a past episode of intentional discrimination by city officials. Instead, Madison asserts multiple justifications for the program, none of which justify this race-based program.

For example, Madison claims that more “diversity” in business ownership will benefit the City because a “diverse business ownership ecosystem fosters inclusion within our community as it creates a spectrum of social and economic engagement opportunities for all residents of the city.” But the Supreme Court has rejected the “benefits of diversity” as a compelling interest because such a goal is both incoherent and unmeasurable. Op. at 24. What, precisely, are the benefits of a “diverse business ownership ecosystem” and how can the City determine when it has “foster[ed]” enough “inclusion” or created a “spectrum of social and economic engagement” to declare the program a success? Such are unanswerable questions.

Next, Madison explains that BizReady is necessary to cure racial disparities. According to program materials, “BIPOC business ownership in Madison has lagged behind BIPOC demographic growth in the city.” Again, using race-based policies to cure racial disparities is forbidden: “racial balancing” is “patently unconstitutional.” Op. at 32.² At most, BizReady is a clumsy attempt to cure “societal discrimination,” which the Supreme Court has also rejected as a justification for racial preferences. Op. at 35.

Even if Madison could conjure up a “sufficiently coherent” justification for its race-based program, Op. at 23, BizReady is unconstitutional for several other independently sufficient reasons. Racial categories employed in a race-based program may never be imprecise, arbitrary, undefined, overbroad, or underinclusive. Op. at 25. It is unclear at this point how the City defines “BIPOC” and whether the term includes *all* non-white individuals or just *some*. We assume it is the latter because Madison’s other race-based programs, such as its Affirmative Action Program and

² Madison’s statements—like many professions of “systemic racism”—wrongly assume that racial disparities are always statistically relevant and solely the result of racial discrimination, and not any of the innumerable non-discriminatory factors existing in society (such as geography, education, poverty, family structure, and government policies). *See, e.g.,* Sowell, Thomas. *Discrimination & Disparities*. Basic Books, 2019.

the Targeted Business Assistance Program (also illegal programs), extend special benefits, priorities, and preferences only to a narrowly defined group of “minorities.” See Madison Ord. § 39.02(9)(a)7 (limiting the definition of “minority” to certain groups based on geography). The City’s definition of “minority,” for example, excludes all individuals who are from, or whose ancestors are from, the Middle East (e.g. Iran, Turkey, and Syria), North Africa (e.g. Egypt, Morocco, Libya), North Asia (e.g. Mongolia, Tibet, Kazakhstan), and non-Hispanic countries in the Caribbean and Central and South America (e.g. Brazil, Belize, French Guiana, Suriname) from these programs. Like the imprecise racial categories used by Harvard, see Op. at 25, BizReady’s racial categories alone make that program (and Madison’s other race-based programs) illegal.

Finally, and perhaps most importantly, programs like BizReady may “never” use race as a “negative” or “stereotype.” Op. at 27. BizReady does both. White entrepreneurs (and other racial minority groups) cannot qualify for BizReady precisely because of their race. Race, therefore, is a “negative” for these entrepreneurs. And BizReady’s entire program is premised on the stereotype that a person’s race means that they are more or less valuable to the City, and the unsubstantiated belief that a white, Syrian, or Brazilian business owner cannot “foster inclusion” in the same way that a Black or Native American owner can. As the Supreme Court noted, it is a stereotype to assume that a black entrepreneur “can usually bring something that a white person cannot offer” simply because of the entrepreneur’s race. Op. at 29.

Certainly, there are other arguments even beyond these discrediting race discrimination (not the least of which is the moral argument that race discrimination is *always* wrong). In the event that the City does not find these arguments persuasive, then let me add a final argument. Government officials face significant financial liability in federal court for race discrimination. (Madison learned this in *David Blaska v. City of Madison*, which resulted in the elimination of racial quotas from its police civilian oversight board.) Under the federal statutes that render BizReady illegal (42 U.S.C. §§ 1981, 1983, 1985), entrepreneurs excluded from BizReady because of race may obtain compensatory damages, punitive damages, and attorney fees. And private entities (such as non-profit corporations) that partner with the City to implement BizReady face the same liability. In a similar program offered in San Antonio, Texas, a non-profit called LiftFund Inc., which partnered with county officials, is a defendant in a federal race-discrimination lawsuit and facing significant liability. Any entity considering returning the City’s “request for proposal” should seriously consider whether they want to defend their actions and the City’s in federal court.

If the City would like to avoid this taxpayer liability, then I would suggest fixing the program before it starts. There are numerous race-neutral alternatives that could accomplish the City’s designated objectives without engaging in racial

discrimination. Madison could support entrepreneurs who demonstrate that they came from poverty, are immigrants or whose parents are immigrants, who had a parent who was incarcerated, or who grew up or lives in a crime-ridden neighborhood. All these factors are race-neutral and may be lawfully used, *so long as* the new factors are not simply pretexts or intentional proxies for race. Enacting a race-neutral program for race-based reasons is likewise illegal. The simple rule is this: treat people you want to help as individuals, not based on race, and you will not face a federal civil-rights lawsuit.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

A handwritten signature in black ink, appearing to read "Dan Lennington", written in a cursive style.

Daniel P. Lennington

Deputy Counsel