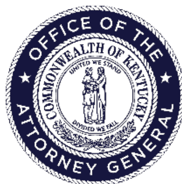

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OAG 23-06

Subject: Whether the Governor's Minority Management Trainee Program is lawful.

Requested by: Senator Stephen Meredith
Kentucky Senate, District 5

Syllabus: The Governor's Minority Management Trainee Program discriminates on the basis of race and therefore violates both the Civil Rights Act of 1964 and the Kentucky Civil Rights Act.

Opinion of the Attorney General

"Eliminating racial discrimination means eliminating all of it."

—*Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023).

Kentucky's Personnel Cabinet currently operates a training program called the Governor's Minority Management Trainee Program (GMMTP). The mission of the GMMTP is to "develop exceptional [state government] leaders by providing opportunities to continually learn, improve performance and excel in their department/agency."[1] The Personnel Cabinet is funded by taxpayer dollars.[2]

But the program is not open to all state employees. Instead, it has two basic eligibility requirements. First, an individual must be an Executive Branch "merit employee"—*i.e.*, a non-political appointee—with at least one year of state government experience, a grade 12 job classification or higher, and a recommendation from the

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1 *Governor's Minority Management Trainee Program*, Kentucky Personnel Cabinet, https://perma.cc/7J93-AJZX.

2 *See About Us*, KENTUCKY PERSONNEL CABINET, https://perma.cc/7RB7-KGNK.

employee's Cabinet Secretary or agency head. Second, that employee must "[b]e an ethnic minority as defined below: Hispanic or Latino, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, American Indian or Alaska Native, [or] Two or More Races."[3] Because of this second requirement, many Kentuckians are barred from participation in the program.

The Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023), lays bare that the second eligibility requirement violates both the Civil Rights Act of 1964 and the Kentucky Civil Rights Act.

I. The Supreme Court's Decision in *Students for Fair Admissions*

The United States Supreme Court recently held that two prominent universities engaged in unlawful racial discrimination by considering race as a factor in their admissions processes. *See Students for Fair Admissions,* 143 S. Ct. at 2166. The Court rejected the universities' argument that their race-based decision-making was justified by vague and unmeasurable interests related to diversity.[4] *Id.* at 2166–68. The Court also emphasized that using an individual's race as a negative factor violates the law. *See id.* at 2168–70.

In so holding, the Court determined that the various diversity-related interests the universities asserted were "commendable goals" but "not sufficiently coherent" to pass constitutional muster. *Id.* at 2166. The Court went on to reject the universities' argument that there is "an inherent benefit in race *qua* race—in race for race's sake[,]" as based on the demeaning assumption that all minority students think alike. *Id.* at 2170; *see also id.* at 2189 (Thomas, J., concurring) ("[T]wo white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well have more diverse outlooks . . . than two students from Manhattan's Upper East Side [who attended] its most elite schools, one of whom is white and the other of whom is black.").

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[3] *Supra* note 1.

[4] More specifically, Harvard College asserted interests in "training future leaders in the public and private sectors; preparing graduates to adapt to an increasingly pluralistic society; better educating its students through diversity; and producing new knowledge stemming from diverse outlooks." *Students for Fair Admissions*, 143 S. Ct. at 2166 (cleaned up). Similarly, the University of North Carolina asserted interests in "promoting the robust exchange of ideas; broadening and refining understanding; fostering innovation and problem-solving; preparing engaged and productive citizens and leaders; and enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Id.* (cleaned up). The Court held that while these interests are "plainly worthy," they are "inescapably imponderable." *Id.* at 2167.

The principle that emerges from the Court's decision is clear: "[e]liminating racial discrimination means eliminating all of it." *Id.* at 2161. And under state and federal statutes, there is no exception for race-based programs like the GMMTP.

II. The Civil Rights Act of 1964

The Civil Rights Act of 1964 was a landmark law aimed at ending discrimination on the basis of race. The law includes two complementary titles: Title VI and Title VII. Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other financial assistance from the federal government. *See* 42 U.S.C. § 2000d et seq. Title VII makes it illegal to refuse to hire someone based on the "individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(d). Title VII also prohibits discrimination "against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide . . . training." *Id.*

The GMMTP violates Title VI. There is no question that the GMMTP is a race-based program funded by taxpayer money.[5] Indeed, the GMMTP is a state program, the title of the program mentions race, and race is the GMMTP's foundational eligibility requirement. As Justice Gorsuch explained in *Students for Fair Admissions*, "[u]nder Title VI, it is never permissible 'to say "yes" to one person . . . but to say "no" to another person' even in part 'because of the color of his skin.'" *Id.* at 2221 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 418 (1978) (Stevens, J., concurring)). And "never" means *never*. The prohibition on race-based discrimination applies regardless of motivation or intention. *See id.* at 2209.

It is likewise obvious that the GMMTP is unlawful under Title VII. There is no denying that the Commonwealth is a covered employer and that the GMMTP is a training program covered by Title VII. *See* 42 U.S.C. § 2000e(b). Nor can the Commonwealth ignore that Title VII specifically prohibits discrimination "against any individual because of his race, color, religion, sex, or national origin *in admission to*, or employment in, *any program established to provide . . . training*. 42 U.S.C. § 2000e-2(d) (emphasis added). By limiting admission to the training program to certain races, the GMMTP clearly violates Title VII.

"[B]oth Title VI and Title VII codify a categorical rule of individual equality, without regard to race." *Students for Fair Admissions*, 143 S. Ct. at 2209 (Gorsuch, J., concurring) (citation omitted). There is no exception to this categorical rule. State agencies and programs, including the GMMTP, must comply with both titles.

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[5] Like the universities in *Students for Fair Admissions*, the Commonwealth "elect[s] to receive millions of dollars of federal assistance annually." 143 S. Ct. at 2208 (Gorsuch, J., concurring).

III. The Kentucky Civil Rights Act

The Kentucky Civil Rights Act (KCRA) was enacted in 1966 to implement in the Commonwealth "the policies embodied in the [f]ederal Civil Rights Act of 1964." KRS 344.020(1)(a); s*ee also Jefferson Cnty. v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002). The KCRA makes it unlawful for an employer to "limit, segregate, or classify employees . . . [or] to deprive an individual of employment opportunities . . . because of the individual's race, color, . . . [or] national origin . . . ." KRS 344.040(1)(b). Kentucky courts have interpreted KRS 344.040 as prohibiting "*any* direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons . . . ." *See Brooks v. Lexington-Fayette Urb. Cnty. Housing Auth.*, 132 S.W.3d 790, 801 (Ky. 2004), *as modified on denial of reh'g* (May 20, 2004) (quoting KRS 344.010(5) (emphasis added)).

The KCRA is "virtually identical" to the federal Civil Rights Act of 1964. *Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Hill*, 607 S.W.3d 549, 555 (Ky. 2020); *see also The Bd. of Regents of N. Ky. Univ. v. Weickgenannt*, 485 S.W.3d 299, 305 (Ky. 2016) ("In 1966, the General Assembly passed the KCRA to place the Commonwealth on par with the protections guaranteed in the [f]ederal Civil Rights Act of 1964."). For this reason, Kentucky courts "interpret the civil rights provision of KRS Chapter 344 . . . consistent with the analogous federal anti-discrimination statutes." *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 575 (Ky. 2016). Therefore, just as Title VI and Title VII are considered categorical prohibitions of racial discrimination under federal law, so too is the KCRA considered to categorically prohibit racial discrimination under Kentucky law. Indeed, the KCRA safeguards "*all individuals* within the state from discrimination." KRS 344.020(1)(b) (emphasis added). No race or color is favored or disfavored in the eyes of Kentucky law.

Because the GMMTP premises participation on the basis of race, it necessarily treats people differently because of their race. Moreover, the nature of the program—training employees to help them advance and perform well in the Executive Branch—means that those who cannot participate are at a disadvantage. *See Students for Fair Admissions*, 143 S. Ct. at 2169 ("A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."). Such action is unlawful under the KCRA. *See* KRS 344.040(1)(b).

IV. Conclusion

All forms of racial discrimination are detestable. However well-meaning the authors of raced-based programs may be, experience has shown us that "meeting social racism with government-imposed racism is . . . self-defeating, resulting in a never-ending cycle of victimization." *Students for Fair Admissions*, 143 S. Ct. at 2205 (Thomas, J., concurring). Accordingly, the Commonwealth has both a moral and statutory obligation to prevent racial discrimination. But we cannot meet this obligation while tolerating programs within state government itself—like the Governor's Minority Management Trainee Program—that discriminate on the basis of race. This office therefore finds that the Governor's program as currently constituted violates both the Civil Rights Act of 1964 and the Kentucky Civil Rights Act.

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