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Oregon Health Authority
c/o Patrick Allen, Director (OHA.DirectorsOffice@state.or.us)
c/o Leann Johnson, Director of Equity and Inclusion (leann.r.johnson@state.or.us)

Re: Reported Proposal for Oregon to Discriminate on the Basis of Race, Ethnicity, and National Origin in Prioritizing Access to Covid Vaccines

Dear Friends,

I understand that Oregon, like all states, is working through the complicated legal, ethical, and logistical concerns related to its distribution of Covid-19 vaccinations. Oregon Public Broadcasting has reported that (in Phase 1a), Oregon has prioritized vaccinating healthcare workers and residents of long-term care facilities.¹ As these initial vaccinations unfold, Oregon Public Broadcasting has also reported that Oregon's Vaccine Advisory Committee (the "OVAC") has finalized and proposed to the Oregon Health Authority (the "OHA") a recommendation for who should be afforded priority in Phase 1b of Oregon's vaccination process.

I understand that this disease is particularly dangerous to people subject to particular classifications, including those of advanced years and those with pre-existing health problems. I further understand that Oregon's draft Covid-19 Vaccination Plan reflects a conclusion that "communities of color" have been disproportionately affected by the disease to date.² And I understand both that Oregon wishes to assure that it is making scarce vaccine-resources available where they will maximize their impact and that this motivates Oregon to emphasize the most susceptible Oregonians in its roll-out plans.

So it is, on one level, understandable that, according to Oregon Public Broadcasting's report, the OVAC's proposal prioritizes the vaccination of the following (in Phase 1b):

- people in communities of color, specifically those most impacted by the pandemic: "Black, African-American, Hispanic/Latino/Latinx, indigenous

¹ <https://www.opb.org/article/2021/01/15/oregon-coronavirus-vaccine-plan-priority-groups/>.

² <https://www.oregon.gov/oha/covid19/Documents/COVID-19-Vaccination-Plan-Oregon.pdf>.

peoples, tribal and urban-based native communities, and Pacific Islanders.”

- Refugee communities
- adults 16-64 with chronic conditions
- people in custody
- frontline workers not already included in Phase 1a or 1b
- multigenerational homes
- people in low-income senior housing and other congregate senior housing not covered in the other categories.

However, the inclusion of racial, ethnic, and national-origin classifications in OVAC’s prioritization scheme raises serious legal and Constitutional concerns. I know you know that the 14th Amendment to the U.S. Constitution requires each state to afford “the equal protection of the law” to “every person within its jurisdiction.” I know that the AHA’s policies reflect this requirement by prohibiting discrimination “in any of its programs in relation to those protected classes as defined by State of Oregon law and [F]ederal law[,]” including “National Origin[,]” “Color[,]” and “Race[.]”

I write now to express my concern that the OVAC’s proposal, if adopted, might violate both this policy and Federal law. The proposal expressly identifies groups of people within Oregon’s jurisdiction who would be prioritized for potentially life-saving treatment on the basis of their race, ethnicity, and national origin. Definitionally, such prioritization would de-prioritize the access of others to the same potentially life-saving treatment on the basis of their race, ethnicity, and national origin.

No matter how well-intentioned, any such policy facially discriminating on the basis of race, ethnicity, and national origin, if adopted, would have to survive the “strict scrutiny” of the Federal courts.³ Strict scrutiny allows governmental discrimination on these bases only where such discrimination: (a) fulfills a compelling purpose; and (b) is narrowly tailored to that purpose.

Respectfully, the OHA’s draft COVID-19 plan demonstrates why the OVAC proposal could almost surely not survive strict scrutiny. As it notes, the health challenges faced by “communities of color” are not new and appear to correlate with “long[-]faced barriers to access to preventative medical services, including immunizations[,]” such as: (a) living in “densely populated neighborhood[s;]” (b) differential neighborhood access to groceries; and (c) geographic proximity to healthcare providers. The existence of these correlates, along with the higher-rates of pre-existing conditions to which they’ve potentially given rise, calls into question both whether there is a compelling purpose for OHA to focus on the race, ethnicity and national origin of

³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Oregonians (rather than on these non-suspect factors) and whether that proposed focus could be scored as narrowly tailored (when such non-suspect alternatives are available).

I hope that you will bear in mind these considerations when the OVAC's proposal is turned into a policy and that no Court will need to be involved in assuring that Oregon's vaccine rollout is both successful and compliant with governing law.

Respectfully Yours,

A handwritten signature in black ink, appearing to read 'D. Morenoff', with a stylized flourish at the end.

Daniel I. Morenoff