BOYDEN GRAY & ASSOCIATES PLLC
801 17TH STREET, NW, SUITE 350
WASHINGTON, DC 20006
(202) 955-0620

March 18, 2021

Mayor Stephen H. Hagerty &
Members of Evanston City Council
c/o Devon Reid

2100 Ridge Ave.
Evanston, IL 20201
847-448-8247
dreid@cityofevanston.org

Re: ***Proposal to unconstitutionally condition housing program funds on applicant race***

Dear Mayor Hagerty and Members of City Council:

I write on behalf of the Project on Fair Representation, a not-for-profit legal defense foundation that believes racial and ethnic classifications are unconstitutional, unfair, and harmful. The purpose of this letter is to warn the City of Evanston that its new reparations proposal is unconstitutional—specifically, that the evidence for its proposed racially discriminatory reparations program is seriously insufficient to state a compelling interest, and that its proposal is not narrowly tailored to achieve its stated interests.

According to the City of Evanston website, the City Council is considering a proposal called the "Restorative Housing Program." The Frequently Asked Questions section of your website indicates that this program would disburse City funds collected through a 3 percent tax on the sale of cannabis directly to financial institutions or vendors for house purchase down payments, real property repairs or improvements, and mortgage repayment to "eligible applicants." *See* Evanston Reparations FAQs, City of Evanston (accessed March 18, 2021), https://www.cityofevanston.org/government/city-council/reparations. While details of the application process have not yet been established, the proposal states that it will expressly condition eligibility for this program on the applicant's race, specifically, that the "program identifies eligible applicants as Black or African American persons having origins in any of the Black racial and ethnic groups of Africa."

As the website notes, Evanston—like many cities throughout the U.S.—has an ugly history of housing discrimination, and the reparations policy appears to be a well-intentioned step to remedy these harms.[1] We agree that the racial classifications of Evanston's past are abhorrent to the cornerstone principle of equal justice under law and are a cause of lament. And ensuring safe, affordable housing is an important goal for any community.

[1] *See* Morris (Dino) Robinson, Jr., & Jenny Thompson, *Evanston Policies and Practices Directly Affecting the African American Community 1900–1960 (and Present)* (August 2020), https://www.cityofevanston.org/home/showpublisheddocument?id=59759.

The City's proposed Restorative Housing Program, however, is neither a wise nor a lawful means for achieving this goal. It provides benefits not on the basis of whether someone has suffered past discrimination, but solely on their skin color or national origin. Ironically, the City's approach would resurrect the very legal theories that were used to justify racial discrimination in the past and would perpetuate racial classifications in a way that is incompatible with the Fourteenth Amendment of the Constitution.

As four Supreme Court justices have written, the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (opinion of Roberts, C.J.). If enacted as currently described, the Restorative Housing Program would unlawfully discriminate on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment applies to political subdivisions like the City of Evanston, and it protects "any person" against denial of "the equal protection of the laws." U.S. Const. amend. XIV, § 1. Evanston's proposed "reparations" scheme violates this text and the principles it enshrines. As the Supreme Court has held, "[r]acial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000).

Consequently, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). The Restorative Housing Program's race-based government classifications fail both parts of this test.

First, the City's proposal does not serve a compelling government interest. To date, the city does not appear to have supported its proposal with the kind of specific evidence necessary to justify the imposition of a new racially discriminatory policy. This is a significant requirement in the strict scrutiny analysis. As the Supreme Court has explained, the government must "identify [] discrimination, public or private, with some specificity," and establish a "strong basis in evidence to conclude that remedial action [is] necessary." *Shaw*, 517 U.S. at 909–10 (citations and quotation marks omitted). Significantly, a naked racial classification cannot depend on a history report about "'societal discrimination' which is an inadequate basis for race-conscious classifications." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989).

The City's stated purpose for its race-based program is as follows: "Affordable housing and economic development were the top priorities identified . . . . The strongest case for reparations by the City of Evanston is in the area of housing, where there is sufficient evidence showing the City's part in housing discrimination as a result of early City zoning ordinances in place between 1919 and 1969, when the City banned housing discrimination." Evanston

Reparations FAQs, *supra*. The injustices visited on Black residents of Evanston were real and harmful, and the city was obviously right to end them. Thankfully, nothing in the draft report shows current or recent discrimination by the Evanston City Council. As the proposal notes, however, the City now does not believe that merely banning racial discrimination was enough, but it is entirely unclear from the report whether and to what extent current conditions are attributable to the lingering effects of this discrimination—which was outlawed more than fifty years ago.

This is a complicated factual issue that the City has given inadequate treatment thus far. Further, the City's draft report cites no evidence of current government-sponsored housing discrimination in Evanston. Indeed, the report even notes that as long ago as 1967, the Evanston City Council "passed an ordinance providing a penalty for real estate agents found practicing discrimination"; the report waves this non-discriminatory action aside as "largely seen as ineffective since it did not address the larger issues related to housing discrimination." Robinson & Thomspon, *supra* at 50. But this claim is unsupported. The best evidence provided by the City regarding *current* housing discrimination appears to be the report that 38 housing discrimination complaints were filed over a nine-year period, from 2003 to 2012. But only 28.8% of these filings even referenced race in general, and those that did didn't necessarily even complain of discrimination based on Black or African American status. The report references a nonprofit organization's statistics for school suspensions by race for 2018–19 and several news stories regarding policing policies, but draws no connection between these suggested forms of discrimination and housing. Robinson & Thomspon, *supra* at 34, 59–60.

This conclusory evidence is far too thin to support the drastic remedy of racial discrimination.

Second, the proposed remedy—a racially discriminatory grant funding process—is not narrowly tailored. To be narrowly tailored, the Supreme Court has "always expected that the legislative action would substantially address, if not achieve, the avowed purpose." *Shaw*, 517 U.S. at 915. Because the City cites only generalized past discrimination and inequities, there is no way to measure the avowed purpose of the program in those terms. But even on the broad terms of "affordable housing and economic development," there is no evidence that "down payment/closing cost assistance to purchase real property located within the City," "funds to repair, improve, or modernize real property located within the City," or "funds to pay down mortgage principal, interest, and/or late penalties for real property located within the City" would achieve the City Council's vague interests. Evanston Reparations FAQs, *supra*. The relief would likely also be over-inclusive as there is no requirement that an applicant have suffered personal ill effects traceable to housing discrimination. Making race the sole proxy for victimhood fosters racial resentment and cultural division and would be unwise policy even if it were legally permissible (which it is not).

More generally, the City of Evanston cites no evidence that the current panoply of federal and state fair housing laws and assistance programs are inadequate.

Finally, the City appears to have failed to give more than perfunctory consideration to race-neutral alternatives, such as upzoning or loosening restrictive zoning practices City-wide. It also failed to consider pure income-based housing assistance to achieve greater financial equality regardless of the race of the applicant. As economist Thomas Sowell and others have shown in their investigations to inequality around the world, the most effective way to remedy past discrimination is to remove government barriers and to ensure fair and equal application of comprehensible rules. In keeping with Evanston's "solutions only" approach to achieving equity and empowerment, the City would be well served to look at ways in which it is unintentionally inhibiting development and growth in disadvantaged communities within the City without sorting people by race.

What Evanston should not do is create new race-based classifications. As Justice Clarence Thomas has written, "there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring) (quotation, alteration, and citation omitted). Evanston's proposal immorally, illegally, and unjustifiably distributes race-based benefits, in violation of the Constitution. It should therefore not be enacted.

Sincerely yours,

C. Boyden Gray