



September 12, 2012

The Honorable Tom Harkin, Chair, U.S. Senate Committee on Health, Labor, Education & Pensions

The Honorable Michael Enzi, Ranking Member, U.S. Senate Committee on Health, Labor, Education & Pensions

The Honorable Mary Landrieu, Sponsor, Women and Minorities in STEM Booster Act

Dear Chairman Harkin, Ranking Member Enzi, and Senator Landrieu:

We write to you in our individual capacities as three members of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, concerning the proposed Women and Minorities in STEM Booster Act, or S. 3475.¹

We heartily agree with many of S. 3475's findings of fact. For example, we agree that "STEM education at the undergraduate level is vital to developing a workforce that will allow the United States to remain the leader in the 21st century global economy"² and that "to maintain scientific and engineering leadership amid increasing economic and educational globalization, the United States must aggressively pursue the innovative capacity of all people in the United States—women and men."³ Nonetheless, we are concerned that this bill uses the wrong methods to try to achieve these important goals—methods that are likely to backfire.

In 2010, the U.S. Commission on Civil Rights released a report entitled "Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers."⁴ That report indicated that race preferences in admissions have likely had the unintended consequence of decreasing, rather than increasing, the number of African Americans and Hispanics who graduate with degrees in science, technology, engineering or mathematics. Extensive research presented to the Commission showed that success in a science or engineering major depends on both the student's absolute entering credentials and on the student's entering academic credentials relative to other students in the class. When the student is in a class in which his or her entry credentials are significantly below the median student's, the student may be "mismatched" for that class and less likely to

¹ The U.S. Commission on Civil Rights is an independent, bipartisan agency that makes appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice. 42 U.S.C. § 1975(a). We understand that the full text of the bill is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.3475:>.

² Sec. 2(a)(2).

³ Sec. 2(a)(3).

⁴ U.S. Commission on Civil Rights (2010), available at <http://www.usccr.gov/pubs/EncouragingMinorityStudentsinScienceCareers.pdf>.

follow through with an ambition to pursue a science or engineering major than he or she would have been at a slightly less competitive institution. The problem is described at greater length in the enclosed article, “Just Say No To Affirmative Action.”⁵

Put more simply, affirmative action isn’t doing its intended beneficiaries any favors, especially not those who aspire to a degree in science or engineering. It simply increases the likelihood that they will emerge from college with a less marketable, non-STEM degree—and that they will be unemployed.

We acknowledge that some of the programs listed in Sec. 2(e) of the bill—such as online workshops, mentoring and internship programs in which students shadow STEM professionals, and outreach science education programs for elementary and secondary school students—do not necessarily in themselves fuel the movement for preferential treatment of racial minorities in college and university admissions.⁶ But unless S. 3475 is carefully redrafted, the competition to fund such programs will likely do so. S. 3475 gives the director of the National Science Foundation (“NSF”) the authority to decide which colleges, universities and other eligible entities will receive federal funding to carry out these programs. In the past, federal agencies have conditioned the receipt of similar diversity-oriented grants on the number of minority students participating or graduating from a particular program.⁷ If NSF hands out these grants based on similar requirements, some colleges will almost certainly respond to the incentive by using preferences to attract more minority or female students—even if these admissions preferences ultimately hurt their intended beneficiaries’ chances of successfully graduating with a STEM degree. Moreover, S. 3475 gives the director of NSF leeway to fund such additional programs as he or she determines appropriate, some of which might explicitly encourage race or sex preferences. The result will be fewer women and minority students successfully pursuing careers in science and engineering, not more—and probably even fewer scientists and engineers altogether.

We want to increase the number of women and minorities studying science as much as anyone in the country. We want to succeed so much we are willing to employ a little

⁵ Gail Heriot, *Academic Questions*, Vol. 24, Issue 11, 449-466. For an additional academic paper discussing the science mismatch problem that had not yet been completed when the Commission conducted its 2009 briefing, please see Peter Arcidiacono, Esteban Aucejo, and Kenneth Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, June 2, 2011, available at http://public.econ.duke.edu/~psarcidi/grades_4.0.pdf. The amicus brief that the signatories of this letter filed in the *Fisher v. University of Texas* litigation also discusses mismatch in some detail and is available here:

<http://www.utexas.edu/vp/irla/Documents/Gail%20Heriot%20May%2029%202012.pdf>.

⁶ We would, however, caution that some such programs may violate Title VI, Title IX, or the Due Process Clause of the Fifth Amendment if some students cannot participate in them because of their race, national origin, or sex. We are also less than certain that the private sector and private charitable foundations are not already adequately funding science education, internship, and mentoring programs. Certainly the findings section attached to this bill makes no reference to any such alleged market failures.

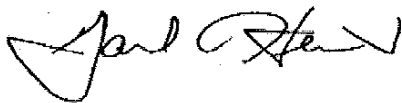
⁷ See, for example, the eligibility criteria for the Centers of Excellence (COE) program in health professions education for under-represented minority (URM) individuals (see Title VII, Section 736 of the Public Health Service Act, 42 U.S.C. 293 (2011) as amended by the Patient Protection and Affordable Care Act, Public Law 111-148, § 5401 (2010) (“PPACA”). The original statute did not require institutions to be at the 75th percentile nationally in terms of graduating racial and ethnic minority students. Yet regulatory language implementing the statute—first proposed at 76 C.F.R. 68770 and later adopted as a final rule at 77 FR 6805—imposed this 75th percentile requirement as a condition for receiving COE grants.

scientific method to get the job done. Preferences don't increase the numbers of minority STEM graduates. The research in this area is extensive and uncontradicted. And the effects it has identified are not subtle. The nation could significantly increase the number of minority students who graduate with science or engineering degrees in five years if selective colleges and universities engaged in race-neutral admissions.⁸

Well-meaning legislation that creates incentives for colleges and universities to engage in race- or gender-preferential admissions is not just ineffective. It is counterproductive. Legislation that does the opposite—that creates incentives for colleges and universities to engage in race- and gender-neutral admissions for students interested in science and engineering— could have huge benefits. We would be happy to work with your staff to develop such a bill.

Thank you for your kind attention. Please feel free to contact Gail Heriot by e-mail at gheriot@usccr.gov or by telephone at (619) 260-2331 if you wish to discuss these matters further. Her special assistant at the Commission, Alison Somin, may also be reached at aschmauch@usccr.gov or at (202) 376-7671 should you have questions about our letter.

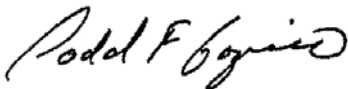
Sincerely,



Gail Heriot
Commissioner



Peter Kirsanow
Commissioner



Todd Gaziano
Commissioner

⁸ While preferential treatment for non-Asian racial minorities has become the overwhelming norm at selective colleges and universities, the treatment of sex is more mixed. Some liberal arts schools admit to discriminating against *women* in admissions as a means of addressing the fact that more women than men apply to college. See, e.g., Alex Kingsbury, *Many Colleges Reject Women at Higher Rates than for Men*, U.S. NEWS & WORLD REP., June 16, 2007. An effort to study the situation was abandoned by the U.S. Commission on Civil Rights over our strong objections. See Gail Heriot & Alison Somin, *Affirmative Action for Men? Strange Silences and Strange Bedfellows in the Public Debate Over Discrimination Against Women in College Admissions*, ENGAGE Vol. 2, Issue 3 (2011), 14-22. There is, however, some evidence that highly elite colleges and universities that specialize in STEM, unlike their less STEM-oriented peers, tend to discriminate in *favor* of women applicants, which may create mismatch problems for STEM-oriented women (just as discriminating in favor of men may create mismatch problems for men).