DAVE MURPHY

State Representative • 56th Assembly District

ASSEMBLY JOINT RESOLUTION 109

TESTIMONY OF STATE REPRESENTATIVE DAVE MURPHY

Chairperson Tusler and members of the Assembly Committee on Judiciary, thank you for the opportunity to testify today on Assembly Joint Resolution 109.

AJR-109 is a constitutional amendment before this committee on first consideration. This amendment restores Merit, Fairness and Equality not only to hiring by the University of Wisconsin System, but to hiring by all governmental entities statewide.

The joint resolution specifically defines "governmental entities" as the State, its political subdivisions - including municipalities, the University of Wisconsin System, the Technical College System, any public college or university, any public school district, and any office, department, independent agency, board, commission, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

The amendment prohibits these governmental entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration.

As I mentioned, this amendment restores Merit, Fairness and Equality to hiring.

First, it restores Merit to the hiring system by hiring people based on their skills and capabilities.

Second, it restores Fairness to the hiring system by ensuring that all applicants are treated equally. It assures no one is given improper preferential treatment and no one is improperly discriminated against.

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Third, it restores Equality to the hiring system. Equality is different than "equity" in the buzzword "DEI." "Equity" means everyone's outcomes have to be the same, regardless of their skill or capability. "Equality," on the other hand, means everyone – everyone – has an equal opportunity to be hired and advance in their job based on their particular set of skills and abilities.

Finally, I'd like mention that this constitutional amendment is based on a similar amendment passed in Michigan in 2006. That amendment has been upheld by the United State Supreme Court.

Nothing belongs in our State's constitution more than an affirmative statement that all people should be treated equally. This amendment will assure everyone is treated in an equal manner in the State hiring process, and that everyone has an equal opportunity to be successful and help move Wisconsin Forward.

Thank you for your time and I would be happy to take any questions.

Stephen L. Nass
Wisconsin State Senator

AJR 109 The Merit, Fairness, and Equality Act Prohibiting Government Discrimination in Public Employment, Education, and Contracting

Testimony of Senator Steve Nass
Assembly Committee on Judiciary
January 30, 2024 • North Hearing Room, State Capitol

Thank you Chairman and committee members for allowing me to provide testimony in support of AJR 109. One of the foundational elements of the U.S. Constitution and our American justice system is equal protection under the law for all Americans, regardless of race, sex, color, ethnicity, or national origin. This constitutional amendment gives Wisconsin voters the opportunity to further embed these bedrock principles into our State Constitution.

On June 29, 2023, the U.S. Supreme Court ruled in *Students for Fair Admissions v. Harvard* that admissions policies that treat students differently based upon race are in violation of the Constitution's equal protection clause, and are not permissible. Chief Justice John Roberts, writing for the majority, concluded that a student "must be treated based on his or her experiences as an individual – not on the basis of race."

Yet a recent review of job postings from UW System institutions confirms that the UW continues their near obsessive use of race and "diversity" ideology as a prominent feature in hiring professors and other academic staff; not merit, qualifications, and achievement. Moreover, it was just discovered earlier this month that UW Madison Law School is mandating all law students take a controversial "re-orientation diversity training" program presented by radical instructor Debra Leigh, vice president for cultural fluency, equity, and inclusion at St. Cloud Technical & Community College.

Leigh has long been controversial for her views, including that those who claim to be colorblind are racist. Noted legal scholar Jonathan Turley, after reviewing the program, concluded "Students are given facts to be learned and the material attacks those who question these 'facts' as racist. Students are to adopt and recite [political viewpoints], not debate and challenge such viewpoints."

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AJR 109, introduced for first consideration to the 2023-24 Legislature, restores Merit, Fairness, and Equality not only to hiring and admissions by the University of Wisconsin System, but to all governmental entities in the State of Wisconsin.

The proposed amendment prohibits all governmental entities in Wisconsin from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration. A proposed constitutional amendment requires adoption by two successive legislatures, and ratification by the people of Wisconsin, before it can take effect.

Governmental entities is defined as the state, its political subdivisions including municipalities, the University of Wisconsin System, the Technical College System, any public college or university, and any public school district. It also includes any office, department, independent agency, board, commission, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

This fundamental principle is articulated in our founding documents. Our Declaration of Independence begins, *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."*

It is further established in the Fourteenth Amendment to U.S. Constitution under the equal protection clause, which states, *"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws."*

The principle of a colorblind equality and merit-based decision making is again articulated by one of our greatest civil rights leaders, Dr. Martin Luther King, Jr., who we celebrated earlier this month, in his famous *I Have a Dream* speech, delivered on August 28, 1963 from the steps of Lincoln Memorial, during the March on Washington. *"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character,"* Dr. King thundered, in what has become one of the most famous lines in American history. A call for equality and freedom, it became one of the defining moments of the civil rights movement and one of the most iconic speeches in American history.

Using immutable characteristics like race, sex, color, ethnicity, national origin, and the like to discriminate against, or grant preferential treatment to, any individual or group is

wrong, no matter who it targets or what the reason. It creates distrust and injustice, division and resentments that divide people, instead of uniting them. Past discrimination, however wrong, cannot be corrected with more discrimination. Old wounds cannot be healed by inflicting new ones.

AJR 109 will ensure that we hire, promote, select, and admit people to our public universities, schools, and government agencies the same way choose people for our Olympic team, military, and sports teams; through merit, character, ability, and hard work. Without regard to race, sex, color, ethnicity, or other immutable characteristics. Thank you for the opportunity to testify in support of this important amendment. I am happy to answer questions of the committee.

Thank you for having me here today to testify in favor of this anti-discrimination amendment. My name is Ryan Owens. I'm the George C. and Carmella P. Edwards Professor of American Politics at UW-Madison. I received my Bachelor's degree at UW-Madison in 1998, my JD at UW-Madison in 2011, and practiced law here in Madison. I earned my PhD at Washington University in St. Louis in 2008. From 2008-2011, I taught at Harvard University. Since 2011, I have taught at UW-Madison.

I want to be clear that I make these comments solely in my personal capacity. I am not here on behalf of any entity on campus.

This anti-discrimination amendment codifies what I believe is the American creed—that the government may not wrongfully treat anyone differently because of his or her race, sex, color, ethnicity, or national origin.

I'll focus my remarks on what I observe most—public universities and the racially discriminatory behavior I have seen in some of them. I have seen what happens when well-intentioned efforts to rectify social problems go astray. Many universities have become racially discriminatory in ways unfathomable just a generation ago. And the results are terrifying.

For example, up until very recently, UW-Madison employed something called the "TOP" program—the target of opportunity program. The

original goal of the program was to add diversity to the ranks of the faculty. As originally devised, if there were two similar candidates and one of them was a minority, the UW would provide funds to recruit both so as to diversify the faculty.

The program soon become procedurally opaque and discriminatory.

Unlike standard hiring practices, TOP positions did not have to be posted publicly. There was no nation-wide public listing for the position, with a competition across numerous scholars. Faculty simply reached out to friends and colleagues to determine whether they knew of people from certain groups who might be interested in working at UW-Madison. If interested, they got an interview. And if the faculty believed the candidate passed a vague threshold, they voted to make a job offer.

Ironically, this process was exactly the type of procedural unfairness previous reformers had worked so hard to topple just decades ago. During that time, an "ol' boys' club" selected other members of the "ol' boys' club." They shut people out. It took years of work, but reformers were able to open up the process to greater transparency and access. Hiring decisions became fairer and less discriminatory.

But the TOP program backslid. Its advocates replaced that fairer process with another type of club, equally exclusionary, and biased against people because of their race or sex.

The TOP program was racially discriminatory because it formally excluded white males. By its terms, the program applied only to historically under-represented groups. It precluded white males. I'll say that one more time. The University of Wisconsin formally excluded white males from employment opportunities.

The data bear out the formal language. As one article on the program put it: "Between 2018 and 2020, UW-Madison hired 25 individuals who met the requirements for the [TOP] program. While several white women were hired under the program, no white men were hired." Not a one. That someone would be denied a job or the opportunity to compete for a job because of his sex and the color of his skin is about as un-American as it gets.

That cannot possibly be the way to increase trust and civility among people in our state. And it cannot possibly be the way to improve higher education.

Under duress, the UW recently agreed to halt the TOP program. But if experience is any guide, universities will find a way to engage in the same discriminatory acts under a different name. This anti-discrimination amendment before you says no to that.

I will point to a recent job posting in the Department of Chemical and Biological Engineering (264323-FA) to support further just how pervasive the discriminatory behavior has become. The ad included the following language: "Applicants will be asked to upload a cover letter, curriculum vitae, and statement of research and teaching interests in one complete file upload. **Submitted materials should also include the candidate's thoughts on diversity, equity, and inclusion, including any previous activities and/or plans in these areas, in relevant sections of their application.**"

Nowhere did the materials declare what a good DEI statement would look like or by what metrics hiring authorities would evaluate the statements. One wonders how faculty would react to a job applicant who replied that he or she believed in treating people as individuals and not as members of groups. It seems likely such a person would not get the job. After all, that is the inevitable outcome of a racially charged hiring system. The anti-discrimination amendment before you would block such discriminatory behavior.

I should note that while many universities intentionally have been discriminating based on race and sex, they have, at the same time, turned a blind eye to the lack of intellectual diversity on their campuses. The academy is nearly stripped bare of conservatives or center-right thinkers

who could push back in a meaningful way against these injustices. Such is the consequence of group think.

Simply put, the message from public universities in Wisconsin and elsewhere is clear. If you are a certain race and sex (not to mention a certain ideology) you are either not welcome or less welcome than others. That is wrong.

Justice Gorsuch recently stated: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." I agree.

This anti-discrimination amendment stands for the proposition that when government makes decisions, it may not place a finger—or, more realistically, the weight of an entire institution—on the scales against you or for you because of what you look like, who your parents are, or what reproductive organs God and nature have given you. A diverse set of views, experiences, and beliefs is a good thing. But when government begins to pick winners and losers based on race and sex, history shows that odious things will occur.

Thank you.

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

January 30, 2024

Testimony in Support of Assembly Joint Resolution 109

Chairman Tusler and Members of the Assembly Judiciary Committee,

I am Dan Lennington, Deputy Counsel at the Wisconsin Institute for Law & Liberty. I direct WILL's Equality Under the Law Project, which advocates for a colorblind society through litigation and policy reforms.

Today I am pleased to support Assembly Joint Resolution 109. If approved by the Legislature and the voters, this constitutional amendment would explicitly prohibit any form of race discrimination in public employment, education, contracting, and administration. In practice, this amendment would ban government-sponsored affirmative action, racial quotas and preferences, and so-called Diversity, Equity, and Inclusion (DEI) policies that use racial discrimination.

The United States Constitution and the Wisconsin Constitution are built on a foundation of racial equality. No one should be granted a preference or denied a benefit based on race. All laws must be colorblind to ensure the American Dream for all individuals, otherwise, America will devolve into a racialized society with some racial groups punishing others based on perceived historical grievances. That's not the American Dream, but a nightmare of violence, poverty, and oppression.

Despite the clear and unequivocal mandate of legal equality in our federal and state constitutions, race-based quotas and preferences persist. Wisconsin law contains dozens of race-based programs, quotas, and preferences. These state laws and policies impact Wisconsin citizens and business owners every day. Race discrimination is also present in our counties, cities, and school districts. Rooting out racial discrimination will take a lot of work, but a constitutional amendment will go a long way to advance the cause of equality.

In August, we released a report—the Equality for All Agenda—that identified about twenty specific state laws and another twenty agency programs that discriminate based on race. These discriminatory laws and programs include grants, loans, scholarships, healthcare benefits, drug treatment, busing, housing, and employment opportunities.

I'd like to highlight just one set of programs as an example of discrimination in our state laws: racial preferences in government contracting. Every year, the State of Wisconsin contracts with thousands of businesses to supply goods and services, from roads and bridges to paper clips and staples. In the most recently reported fiscal year (2021), the State spent over $1.3 billion on contractors. This entire system is infected with race discrimination. At least eleven state laws impose racial quotas or preferences in how this $1.3 billion is spent. According to these laws, a certain percentage of spending must be set aside for businesses owned by minorities. This is race discrimination, pure and simple.

Even those who broadly support race-based policies may be surprised to learn how our state laws define the term "minority." In Wisconsin, "minority" does not actually mean "minority." For example, Wisconsin state law discriminates broadly against individuals from Asia (or whose ancestors are from Asia). Although Asia consists of 48 countries and dozens of separate ethnic groups, the Department of Administration only considers individuals from fourteen countries to be truly "Asian." According to DOA, for example, individuals from Indonesia, Malaysia, Myanmar, Nepal, and Mongolia are not "Asian." And while someone from Pakistan is considered "Asian," another person from just over the border in Afghanistan is not. Finally, DOA considers any individual from central Asia, western Asia, or the Middle East (for example, Iran, Iraq, Turkey, Gaza, and Yemen) as not "minority."

What about Latinos? State law only grants racial preferences to "Hispanics." "Hispanics" are narrowly defined under state law as those from a country "whose culture or origin is Spanish." This would exclude individuals who come from Brazil, Guyana, Suriname, or French Guiana, and would likely exclude individuals from English-speaking countries such as the Bahamas, Jamaica, and Belize.

If you are confused by Wisconsin's current race-based contracting preferences, it gets much worse. Several of Wisconsin's other race-based programs have different definitions of the term "minority." Two educational grants, for example, define "Asian" as only those students who come from one of three countries. And the Department of Health Services uses something called "Wallace's Line" to identify Asians. According to scholars, Wallace's Line originated in the 19th century as a tool of "colonial oppression and racial prejudice" because it treats humans like animals and plants, categorizing them based on physical features.

In short, Wisconsin's legal definitions of who is a "minority" simply don't make sense even if you are in favor of racial preferences. Racial line drawing is a

messy business. According to the Supreme Court, "it's a sordid thing, divvying us up by race." Racial classifications are pernicious and demean the dignity of all individuals.

Government-sponsored race discrimination is not limited to state law and agency programs. At WILL, we hear frequently from individuals who have experienced race discrimination at the local level. The City of Milwaukee, for example, uses racial preferences in contracting and hiring, and many school districts embrace DEI policies that implement discipline, grading, and curriculum based on race. Race-based policymaking is pervasive throughout all levels of Wisconsin government.

The tide is clearly turning towards race neutrality and away from race-based DEI and affirmative action. Twenty-five states have now approved or introduced bills prohibiting DEI, and nine states explicitly ban affirmative action through constitutional amendment or statewide referendum. Public opinion strongly supports equality. A recent Gallup poll indicates that 68% of Americans support the Supreme Court's decision to end affirmative action, including 63% of Asian Americans, 52% of African Americans, and 68% of Hispanic Americans. The support is also bipartisan, with majorities of both major parties opposing race-based policies.

WILL strongly supports this proposed amendment to make explicit what we already know: all Americans deserve to be treated equally by their government.

Thank you for your time today, and I'd be happy to answer any questions.

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NAACP
DANE COUNTY
BRANCH 36AB

12:00 PM North Hearing Room
Assembly - Committee on Judiciary

Good morning,

My name is Greg Jones, 1st Vice President of the WI National Association for the Advancement of Colored People (NAACP) and local President of the Dane County NAACP. I speak in opposition to Assembly Joint Resolution 109 Relating to: prohibiting governmental entity discrimination.

Wisconsin Constitution; relating to prohibiting governmental entity discrimination. Specifically, the proposed amendment prohibits governmental entities in the state from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration. The proposed amendment states that governmental entity means the state, its political subdivisions including municipalities, the University of Wisconsin System, the Technical College System, any public college or university, any public school district, and any office, department, independent agency, board, commission, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

What exists in Wisconsin?

1. The Wisconsin Fair Employment Law prohibits employers, employment agencies, labor unions, and licensing agencies from discriminating against employees and job applicants because of any of the following: Age, Arrest and/or Conviction Record, Ancestry, Color, National Origin or Race, Creed, Disability, Genetic Testing, Honesty Testing, Marital Status, Military Service, Pregnancy or Childbirth, Sex, Sexual Orientation, Use or nonuse of lawful products off the employer's premises during nonworking hours.

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The law prohibits discrimination in recruitment and hiring, job assignments, pay, leave or benefits, promotion, licensing, union membership, training, layoff and firing, and other employment related actions.

Employees may not be harassed in the workplace based on a protected status nor retaliated against for filing a complaint, for assisting with a complaint, or for opposing discrimination in the workplace. Read Retaliation Protection under the Fair Employment Law.

2. The Bureau of Equity and Inclusion (BEI) leads the state's affirmative action and equal opportunity employment and inclusion programs. This includes developing standards, procedures, and initiatives to promote and increase inclusive recruitment, hiring and retention practices across state government.

In May 2023, State Agency Underutilization Report Underutilization Analysis: Key Findings

• Fifteen (15) or 37.5% of job groups are underutilized for women enterprise wide. This is a slight increase compared to the 2020-2023 report, which indicated fourteen (14) or 35% of job groups were underutilized for women enterprise wide.

• Eight (8) or 20% of job groups are underutilized for minorities enterprise wide. This is a decrease compared to the 2020-2023 report, which indicated ten (10) or 25% of job groups were underutilized for minorities enterprise wide.

What exists in the United States?

1. The Civil Rights Act of 1964

The Civil Rights Act of 1964 is one of the most significant pieces of legislation in the fight against discrimination in the U.S. Title VII of the act prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It applies to any employers with 15 or more employees, including federal, state, and local governments.

It works by ensuring equal treatment in employment matters, prohibiting harassment, and forbidding retaliation against an individual for exercising their

rights under the law. For example, if an employer refused to hire someone solely because of their race or laid off a worker due to religious beliefs, the affected individuals could file a discrimination lawsuit under this act.

2. The Age Discrimination in Employment Act (ADEA)

ADEA protects workers who are 40 years of age or older from discrimination in employment. This law ensures that age is not a factor in decisions about hiring, firing, pay, promotions, or any other term or condition of employment. For instance, if a company were found to consistently overlook older employees for promotion or laid off older workers while keeping younger ones in similar roles, they could be sued under ADEA.

3. The Americans with Disabilities Act (ADA)

ADA offers comprehensive protections to individuals with disabilities, much like the Civil Rights Act does for individuals facing discrimination based on race, religion, sex, and nationality. It requires employers, public spaces, and services to provide reasonable accommodations for individuals with disabilities and prohibits discrimination against them. A common example of ADA at work might be a company modifying work schedules or duties to accommodate an employee's disability or a restaurant ensuring wheelchair accessibility.

4. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, programs receiving federal financial assistance, and in federal employment. For instance, a federal agency that refuses to accommodate a disabled employee's needs, where such accommodation would not impose undue hardship, could be held liable under this act.

5. I could go on to discuss the Immigration Reform and Control Act (IRCA) which prohibits discrimination on the basis of national origin or citizenship status in employment. For example, if an employer prefers to hire U.S. citizens over equally qualified authorized immigrants, this could be considered discrimination under IRCA. And the Equal Pay Act of 1963 (EPA). EPA requires that men and

women in the same workplace receive equal pay for equal work. The jobs need not be identical, but they must be substantially equal. If a woman is paid less than a man for doing substantially similar work, she could lodge a complaint or sue her employer under the EPA.

Why this proposal is misdirected, out-of-touch, and does not move Wisconsin Forward

1. Statistics typically are used to help establish that a pattern of discrimination based on race, color, or national origin exists. This proposal is based on an unfounded principle and false assumptions.

2. It is critical for agencies to be aware that the exercise of a race-based motive does not mean that the recipient's actions automatically violate Title VI. The Supreme Court has held that strict judicial scrutiny applies to a governmental entity's intentional use of race, a standard that applies through Title VI to any recipient of Title VI funds. This proposal