State of West Virginia
Office of the Attorney General
Patrick Morrisey
Attorney General

August 21, 2024

Katherine Adams
Senior Vice President and General Counsel
Apple Inc.
One Apple Park Way
Cupertino, CA 95014

Dear Ms. Adams:

Apple recently opened applications for another series of "Entrepreneur Camps," a program during which Apple will offer "unprecedented access to Apple engineers and leaders," alongside training and guidance on tech development. *See Apple Entrepreneur Camp*, APPLE DEV. (2024), https://developer.apple.com/entrepreneur-camp/ (last visited Aug. 16, 2024). Unfortunately, Apple has chosen to bar founders and developers from applying for the program if they are men who do not identify as women and are also white, Asian, Middle Eastern and Northern African, or Native Hawaiian or Pacific Islander. Apple explains that it has fashioned this segregated program because it wants to support "underrepresented" individuals in technology. *Id.*

Apple should abandon this wrong-headed and exclusionary approach. As it stands, the program reflects a troubling fixation on race and sex—and looks to run afoul of anti-discrimination laws. While supporting up-and-coming developers may be a laudable goal, this harmful strategy is not the way to do it. And given how you sell your products in our States—and recruit developers, engineers, and others from our States, too—we cannot give tacit approval to your methods. Indeed, by hosting some of these camps remotely, we think Apple is effectively exporting discrimination to our States.

Start with some basics. "Racial discrimination [is] invidious in all contexts." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). And as the Supreme Court reminded us just last year, "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) ("*SFFA*"). Thus, "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017). And unjustified sex classifications should earn the same scorn.

State and federal law puts muscle behind these important principles. Title VII of the Civil Rights Act of 1964, for example, prohibits racial discrimination in the employment context. Perhaps most relevant here, Title VII declares it an "unlawful employment practice for any employer … to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d). Likewise, 42 U.S.C. § 1981 prohibits persons from discriminating based on race when contracting with others. And parallel anti-discrimination provisions abound in state and local law.

Your home state of California has taken a *more* aggressive stance against so-called affirmative-action programs and the like than many other places have. Decades ago, California voters rejected "the myth that 'minorities' and women cannot compete without special preference." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1083 (Cal. 2000) (quoting Ballot Pamphlet, Gen. Election (Nov. 5, 1996) argument in favor of Proposition 209). In place of that superstition, they declared by fundamental law their conviction "that however it is rationalized, a preference to any group constitutes inherent inequality" and is "anathema to the very process of democracy." *Hi-Voltage*, 12 P.3d at 1083 (cleaned up).

Despite all that, Apple is going ahead with these exclusions—and fooling no one. These Entrepreneur Camps involve intentional discrimination—in other words, "direct evidence of intent is supplied by the policy itself." *Hassan v. City of New York*, 804 F.3d 277, 295 (3d Cir. 2015) (cleaned up).

Apple can't wipe its discriminatory intent away by analogizing this program to the sorts of limited affirmative-action programs that were once endorsed in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). For one thing, there's good reason to think those cases are no longer good law. *See*, *e.g.*, *SFFA*, 600 U.S. at 289 (Gorsuch, J., concurring) (reasoning that *SFFA*'s rationale would extend to Title VII). For another, *Weber* and *Johnson* addressed specific efforts to rectify "traditionally segregated" job categories, *see Johnson*, 480 U.S. at 628; in contrast, "a non-remedial affirmative action plan" that is not connected to past discrimination by that employer "cannot pass muster." *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1550 (3d Cir. 1996). Yet Apple does not suggest this "camp" is motivated by its own past discrimination. And Apple broadly touts how its workforce is "more diverse than ever." *See Inclusion & Diversity*, APPLE (2024), https://www.apple.com/diversity/ (last visited Aug. 16, 2024) (comparing Apple's employee demographics with general U.S. race and ethnicity statistics). Lastly, and perhaps most obviously, this program appears to do the very thing *Johnson* stressed could not be done: "unnecessarily trammel[] the rights of other" races and sexes while "creat[ing] an absolute bar to their advancement." *Johnson*, 480 U.S. at 626.

Judging by its public materials, Apple created this program because it believes the race and gender makeup of the "app developer" community is still imbalanced. Yet there's no reason to suppose that a community hitting certain statistical benchmarks for race or sex is fairer or more desirable than a community balanced along other lines. After all, people are far more than the sum of their physical features—and far more than the color of their skin. *Cf. Grutter v. Bollinger*, 539 U.S.

306, 330 (2003) (noting, in Equal Protection context, that "outright racial balancing … is patently unconstitutional).

But even if seeking the "right" mix of race or gender diversity made sense ethically, it wouldn't be legal. "[A]bsence of [] malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). And in the related Equal Protection context, the Supreme Court has warned that "an effort to alleviate the effects of societal discrimination" doesn't serve "a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). That's because two wrongs don't make a right; they just add fuel to the fire. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (holding that to allow "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group"). So Apple cannot claim a pass merely because it purports to have acted with the best of intentions.

Quite simply, the "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and [it] has been repeatedly rejected." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (cleaned up). Rightly so.

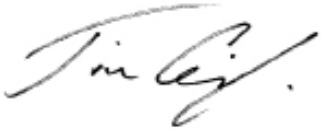
If Apple wants to open the doors to underrepresented persons, we can conceive of plenty of ways to do so without engaging in ugly race- and sex-based classifications. It could target those who don't hail from elite educational institutions. It could target those from lower socio-economic classes. It could target persons from parts of our country that haven't yet experienced a boom in app development. What Apple may not do is choose the worst of all options—an option that promises social advancement but instead sows only social division.

We look forward to hearing from you soon about what steps Apple plans to take to put itself on the right path going forward.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General



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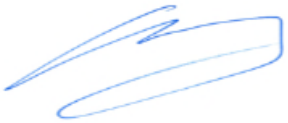

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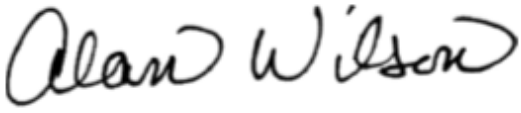

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