IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

DO NO HARM, *Plaintiff*, v. PFIZER INC., *Defendant.*	Case No. 1:22-cv-07908-JLR **ORAL HEARING REQUESTED**

PLAINTIFF DO NO HARM'S REPLY
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

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The Court should reject Pfizer's attempts to evade liability for its race-based exclusion of white and Asian Americans. Do No Harm (DNH) has standing. Pfizer's racially exclusionary criterion violates §1981, Title VI, §1557, and New York laws. And DNH and its members will suffer irreparable harm such that the balance of harms and the public interest favor granting immediate relief.

I. Do No Harm has Article III standing.

DNH has associational standing. DNH has standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Pfizer contests only the first and third elements.[1] Opp. 7 & n.5. Pfizer is wrong on both counts.

A. Members A and B have standing.

Members A and B are injured because Pfizer's eligibility criteria involve a "discriminatory classification [that] prevent[s]" them "from competing on an equal footing." *Ne. Fla. Chapter of Assoc. Gen. Contractors v. Jacksonville*, 508 U.S. 656, 667 (1993); *Moore v. U.S. Dep't of Agric.*, 993 F.2d 1222, 1224 (5th Cir. 1993) ("direct, overt racial discrimination" creates standing).[2] Members A and B cannot satisfy Pfizer's racially exclusionary criterion because they are white and Asian Americans. So Members A and B cannot "compete on an equal footing." *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015). Member A's and B's injury is concrete, particularized, and caused by Pfizer's exclusionary criterion. *Id.* And an injunction would redress it. *See id.* at 50-51.

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[1] The second element is met. The interests DNH "seeks to protect here"—protecting its members' from racial classifications in Pfizer's Fellowship—"are germane to the organization's broad purposes." *Hosp. Council of W. Pa. v. Pittsburgh*, 949 F.2d 83, 88 (3d Cir. 1991); Rasmussen Decl. ¶3 (Doc. 5-1).

[2] This equal-protection caselaw applies to civil-rights statutes. *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001); *SFFA v. Pres. & Fellows of Harv. Coll.*, 980 F.3d 157, 185 (1st Cir. 2020); *Chen-Oster v. Goldman, Sachs & Co.*, 2022 WL 814074, at *19 (S.D.N.Y. 2022).

1. Member A's and Member B's declarations are sufficient.

Members A's and B's declarations are more than sufficient to establish standing. Pfizer's arguments to the contrary all fail.

First, contrary to Pfizer's assertion, Opp. 8, courts do not weigh other qualifications at this stage. If a discriminatory practice deprives a plaintiff of an ability to compete on an equal footing, he or she satisfies the requirements of standing by stating that he is "'able and ready' to apply" when the discrimination stops. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Ne. Fla. Chapter*, 508 U.S. at 666 (relying on the same standard for standing). Members A and B are "able and ready to apply" "if Pfizer stops categorically excluding" white and Asian applicants. Mem. A Decl. ¶9; Mem. B Decl. ¶9. Article III requires no more in this context, lest applicants be forced to pointlessly apply and directly subject themselves to the racial discrimination they're challenging. "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination." *Teamsters v. U.S.*, 431 U.S. 324, 365-66 (1977).

Second, Pfizer erroneously complains that the declarations do not establish that, "but for their race, the members are otherwise among those who would be viable candidates for the highly competitive Fellowship." Opp. 8. Pfizer speculates that the Members have not "'demonstrated exceptional leadership qualities and commitment to community engagement.'" Opp. 8. But Member A "hold[s] leadership positions in student organizations" and has "previously led and organized volunteer programs." Member A Decl. ¶6. Similarly, Member B is "involved in campus life and hold[s] leadership positions in various campus activities, including student government." Mem. B Decl. ¶6. Members A and B have shown "exceptional leadership potential." Ex. A at 4; Ex. B at 2. In any event, Pfizer cannot escape liability by unilaterally asserting that it would have found some other, nonracial reason to deny their applications had they qualified. *See Ne. Fla. Chapter*, 508 U.S. at 666 (standing does not turn on "the ultimate inability to obtain the benefit"); *Reagents of Univ. of Cal. v. Bakke*, 438 U.S.

265, 2743 n.14 (1993) ("even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing"); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[A] plaintiff who challenges an ongoing race-conscious program … need not affirmatively establish that he would receive the benefit in question if race were not considered.").

Third, Pfizer falsely asserts that the declarations "fail to show" that Members A and B have "demonstrated interest and intent to pursue an MBA." Opp. 9. They have expressed that intention. Mem. A Decl. ¶¶8, 10; Mem. B Decl. ¶8. And *Faculty v. Harvard Law Review Association*, 2019 WL 3754023 (D. Mass. Aug. 8, 2019), does not help Pfizer. That case involved "threadbare recitals" of information that law-school student members of an association "intend[ed] to apply for membership" in the Law Review and "w[ould] face discrimination" absent an injunction. *Id.* at *6. Here, by contrast, Members A and B "included several paragraphs of specific factual allegations," just as the members of a membership organization did in *SFFA v. President & Fellows of Harvard College*, No. 14-cv-14176 (D. Mass.), which the *Faculty* court approvingly cited. *Id.*

2. Anonymous declarations from an association's nonparty members are permissible at the preliminary-injunction stage.

Pfizer's argument that "[t]he declarations are deficient because they are anonymous" is meritless. Opp. 9. Associational standing cases do not "require an organization to *name* the member who might have standing." *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 606 & n.48 (S.D.N.Y. 2019) (finding organizational plaintiffs had standing based on "unnamed" "members"), *aff'd in part* 139 S.Ct. 2551, 2565-66 (2019) (relying on state plaintiffs for standing); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) ("Nor must the association name the members on whose behalf suit is brought."); *Disability Rts. Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (similar). Member A and Member B are "not of course parties to the litigation," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958), so the general rule that the *parties* should be named does not apply. *See Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1234 n.7 (D. Colo. 2012) (disagreeing that "[an

association] cannot rely on anonymous [members] to show standing" and distinguishing between "the anonymity of *named Plaintiffs*" and "the anonymity of *members of Plaintiff associations*"); *see also Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114, 1129 (11th Cir. 2022) (allowing the organization to show standing with Students A, B, and C declarations at the preliminary-injunction stage).

And *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), is not to the contrary. There, an organization failed to identify any member and instead asserted that the organization had "'thousands of members in California who use and enjoy the Sequoia National Forest.'" *Id.* at 497. The Court rejected a theory that would have required "accepting the organization's self-description of the activities of its members." *Id.* By contrast, the declarations at issue here are not DNH's alone but also its members' *own declarations*. The mere addition of their names would serve no Article III purpose. *New York*, 351 F. Supp. 3d at 606 n.48 (member's "name" was "unnecessary to determine … Article III standing"). But it could chill civil-rights challenges by inviting retaliation and undermine a "fundamental purpose of the associational standing doctrine – namely, protecting individuals who might prefer to remain anonymous." *Id.*; *see also NAACP v. Trump*, 298 F. Supp. 3d 209, 225-26 (D.D.C. 2018) ("anonymous affidavit[s]" from DACA-recipient members were sufficient for associational standing). And it could prejudice Member A and B's ability to have their applications treated fairly should they win this motion and apply to the Fellowship.

3. Member A's and Member B's declarations satisfy 28 U.S.C. §1746.

Pfizer also erroneously argues that the Members' declarations "do not satisfy 28 U.S.C. §1746." Opp. 10. Nothing in the text of section 1746 forbids anonymous declarations. *See Springer v. IRS*, 1997 WL 732526, at *5 (E.D. Cal. Sept. 12, 1997) (section 1746 "does not prohibit the use of nicknames, aliases, or pseudonyms"). It requires that declarations be "in writing," "subscribed," declared "under penalty of perjury, and dated." §1746. The Members' declarations satisfy those requirements. The decisions Pfizer cites prove the opposite of its argument. In *McGehee v. Neb. Dep't of Corr. Servs.*, "the

declaration was not made by a *person*"—it was signed "Pharmacy N." 2019 WL 266423, at *5 (D. Neb. Jan. 17, 2019) (emphasis added). When Pharmacy N submitted another declaration signed by the "President of Pharmacy N" under a "pseudonym," the Court was "satisfied that the Declaration me[t] the requirements of § 1746." 2019 WL 1227928, at *2 (D. Neb. Mar. 15, 2019). And after the President signed the declaration, the Court thought Pfizer's other decision inapposite. *Id.* at *1 (quoting *Doe v. L.A. Unified Sch. Dist.*, 2017 WL 797152, at *9 (C.D. Cal. Feb. 27, 2017)). This is not a case where "the signature block is redacted." *Doe*, 2017 WL 797152, at *9.

B. Participation by Members A and B is not required.

Neither DNH's claims nor the relief it requests "requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Pfizer's exclusionary criterion facially discriminates based on race. *Cf. Comm. for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995) (organization has standing because "the claim made" was "a broad facial challenge"). DNH's discrimination claims "depend[ ] on a purely legal analysis of the [criterion] and the law . . . ; it [is] factually indisputable that [whites and Asians] c[annot] compete equally with [others] for" the Fellowship. *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993). And "'individual participation' is not normally necessary when," as here, "an association seeks prospective or injunctive relief for members." *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996); *see Warth v. Seldin*, 422 U.S. 490, 515 (1975) (similar).

II. DNH is substantially likely to succeed on the merits.

A. DNH is likely to succeed on its §1981 claim.

DNH has standing to bring its §1981 claim. Pfizer is liable under §1981. And Pfizer's "affirmative action" defense fails.

1. DNH has standing to bring its section 1981 claim.

Pfizer argues that associations categorically cannot have standing to bring civil-rights claims on behalf of their members. Opp. 11-12 & n.6. That assertion contradicts binding Supreme Court

precedent. *See Warth*, 422 U.S. at 511 (explaining in a §1981 case that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members"). Hence why courts have held that associations can bring claims on behalf of their members under §1981. *E.g.*, *Loc. 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864, 865-66 (7th Cir. 1976) (rejecting the argument that "a more restrictive standard should be applied to … §1981."); *SFFA v. Univ. of Tex.*, 37 F.4th 1078 (5th Cir. 2022) (finding standing in a case involving §1981).[3]

Pfizer relies on Second Circuit decisions that do not concern §1981. Opp. 11. In *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), the court held that associations cannot bring §198**3** claims for their members. *Id.* at 1099-100. That decision preceded and contradicts *Warth* and *Hunt*. Some panels have continued to apply the pre-*Hunt* rule in the §1983 context. *Nnebe v. Daus*, 644 F.3d 147, 156 & n.5 (2d Cir. 2011). Other panels, however, have applied *Hunt* and found associational standing in the §1983 context. *Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 170 n.1, 181-82 (2d Cir. 2006), *rev'd on other grounds* 552 U.S. 196 (2008).

Regardless of this confusion, this Court must apply Supreme Court precedent in the absence of controlling Second Circuit case law on §1981. *See Warth*, 422 U.S. at 511; *Hunt*, 532 U.S. at 343. Because the pre-*Warth*/*Hunt* holding of *Aguayo* and its progeny concerns only §1983, this Court is not bound to extend it to §1981. *See Klocke v. Watson*, 936 F.3d 240, 248-49 (5th Cir. 2019) (a decision was "not binding" because the decision "interpret[ed] a different statute"). Pfizer incorrectly asserts that §1981 and §1983 were both "enacted as part of the Civil Rights Act of 1866." Opp. 11. Section 1981 was originally part of the Civil Rights Act of 1866, *Runyon v. McCrary*, 427 U.S. 160, 168 (1976), but §1983 was part of the Civil Rights Act of 1871, *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Because §1981 and §1983 are different statutes, this Court can and should conduct an independent analysis.

[3] *Cf. Libertad v. Welch*, 53 F.3d 428, 439-40 (1st Cir. 1995) (association has standing under §1985).

Pfizer further asserts that the rights in §1981 "are personal," Opp. 11 & n.6, but the Second Circuit already recognizes that associations can bring civil-rights claims for violations of personal rights, *see Torres*, 462 F.3d at 170. And the Supreme Court has unambiguously rejected the argument that the rights of organizations themselves must be violated. *See Hunt*, 432 U.S. at 341-44. For example, associations can bring equal-protection claims on behalf of members for the "personal" harm of being "subjected to a racial classification." *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 263, 268-71 (2015) (cleaned up). "No reason has been suggested why a more restrictive standard should be applied to the claim under [section] 1981," *Standard Brands*, 540 F.2d at 865-66, which similarly "combat[s] racial discrimination," *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).[4]

2. Pfizer is liable under section 1981.

"It is apparent that the racial exclusion practiced by" Pfizer for admission to its Fellowship "amounts to a classic violation of [section] 1981." *Runyon*, 427 U.S. at 172. Members A and B seek "to enter into a contractual relationship" with Pfizer, but Pfizer fails to admit applicants "on equal basis." *Id.* at 172-73. And Pfizer cannot racially exclude Members A and B because they are members of racial groups that Pfizer disfavors. *Id.* (race-based exclusion from a school violated §1981); *see also Gratz*, 539 U.S. at 270, 276 & n.23 (holding that an affirmative-action plan violated §1981). *Runyon* concerned §1981, and it directly establishes Pfizer's liability.

Pfizer incorrectly asserts that a burden-shifting analysis applies to DNH's §1981 claim. Opp. 12. "[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Air. v. Thurston*, 469 U.S. 111, 121-22 (1985). "[W]hen a policy is 'discriminatory on its face,' the defendant's motive is irrelevant." *Feemster v. BSA Ltd. P'ship*, 548 F.3d

[4] Pfizer argues that DNH "has no standing to bring a §1981 claim" because it "does not (and cannot) claim rights under any alleged prospective contractual relationship with Pfizer." Opp. 12. That argument is a red herring. DNH is not suing on its own behalf; it is suing Pfizer on behalf of its members for violations of *their* rights. *See Hunt*, 432 U.S. at 342.

1063, 1070 (D.C. Cir. 2008). No burden shifting occurred in *Gratz*, for example, because the university admitted that race was a factor in its affirmative-action policy. 539 U.S. at 275-76 & n.23. In the same way, "there is direct evidence that" Pfizer intentionally discriminates because its criterion "is discriminatory on its face." *Thurston*, 469 U.S. at 121-22.[5]

Pfizer erroneously argues that DNH cannot show but-for causation because Members A and B have not shown they would have been accepted to the Fellowship. Opp. 16. Section 1981 prohibits "a private offeror" from "refus[ing] to extend" to a racial group "the same *opportunity* to enter into contracts as he extends to" others. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S.Ct. 1009, 1016 (2020) (emphasis added; cleaned up); *see also id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment) ("An equal 'right … to make contracts' is an empty promise without equal opportunities to present or receive offers." (cleaned up)). Contrary to Pfizer's arguments, "but for race" Members A and B would have had "the same opportunity to enter into contracts" as the members of Pfizer's preferred racial groups. *Id.* at 1016, 1019.

3. Pfizer's purported "affirmative action" defense fails.

Pfizer attempts to justify its exclusion of white and Asian-American applicants as an innocuous "affirmative action" plan. These attempts fail for multiple, independent reasons.

First, the text of §1981 is unremitting: "[a]ll persons … shall have the same right … to make and enforce contracts" regardless of race. It leaves no room for Pfizer's race-based exclusion of white and Asian-American applicants.

Second, even if §1981 contains Pfizer's defense, strict scrutiny applies. While Congress initially passed §1981 under the Thirteenth Amendment to prohibit racial discrimination by private actors, §1981's subsequent amendment "'reflect[s] the language of the Fourteenth Amendment.'" *Gen. Bldg.*

[5] Even if the burden-shifting analysis were to apply, Pfizer is liable because its purported "affirmative action" plan is invalid. *See infra* II.A.3. Pfizer thus cannot articulate a legitimate, non-discriminatory reason for categorically excluding white and Asian-American applicants from the Fellowship.

Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 386 (1982). Any racial classifications in §1981 cases must therefore be assessed under equal-protection cases, which employ strict scrutiny. *See Gratz*, 539 U.S. at 276 n.23 (explaining that "purposeful discrimination that violates the Equal Protection Clause … will also violate §1981" and applying strict scrutiny); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 557 (3d Cir. 2011) ("§1981" is "coextensive with … the Equal Protection Clause."). Pfizer doesn't even try to satisfy strict scrutiny, *see* Opp. 19 n.12, nor could it since blanket racial exclusions are never narrowly tailored, *see Gratz*, 539 U.S. at 270 (automatic, race-based points not narrowly tailored). Pfizer contends that Title VII's less demanding affirmative-action defense applies to §1981. Opp. 12-16. But while §1981 claims sometimes rely on the *McDonnell-Douglas* "scheme of proof" if a plaintiff has no direct evidence of discrimination, *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989), *superseded on other grounds by* §1981(b), it does not incorporate substantive Title VII law in toto, *see Johnson v. Ry. Express Agency*, 421 U.S. 454, 461 (1975) (Title VII and §1981 are "separate, distinct, and independent"). Given §1981's text, history, and surrounding caselaw, Pfizer's racial exclusion is legal only if it can survive strict scrutiny.

Third, even if Title VII's affirmative-action defense applied, Pfizer could not satisfy its requirements. Racial discrimination is still illegal under Title VII. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 579, 581-82 (2009) (Title VII bans "express, race-based decisionmaking" and actions taken "with the intent of obtaining [a] preferred racial balance."). Even if *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), may allow for certain types of affirmative action plans in a narrow set of circumstances,[6] Pfizer falls short on each prong of that test.

[6] Multiple Justices have observed that *Weber* and *Johnson* contradict Title VII's text. *See Johnson*, 480 U.S. at 657-76 (Scalia, J., dissenting). And "[s]ome underpinnings of … *Johnson* were removed by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)." *Hill v. Ross*, 183 F.3d 586, 589 (7th Cir.1999); *Finch v. City of Indianapolis*, 886 F. Supp. 2d 945, 961 n.15 (S.D. Ind. 2012) (questioning whether *Johnson* remains good law); *cf. Ricci*, 557 U.S. at 584-85 (requiring employers who seek to avoid disparate-

Manifest imbalance/traditional segregation prong. Pfizer's racial exclusion is not justified by a "'manifest imbalance' … in the employer's work force" that "relate[s] to a 'traditionally segregated job category.'" *Johnson*, 480 U.S. at 630-31. Because *Weber* and *Johnson* narrowly concern efforts to remedy "traditionally segregated" job categories, "a non-remedial affirmative action plan"—unconnected 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). Nowhere does Pfizer say that it is remedying *its own* past racial segregation or discrimination. *See* Bruce Decl. ¶4 (Doc. 32). Because Pfizer's attempt to achieve a preferred racial balance is non-remedial, *Johnson* and *Weber* cannot save it.

Moreover, Pfizer fails to show a statistical "'manifest imbalance'" in its workforce. *Johnson*, 480 U.S. at 631-32. The appropriate "comparison of the percentage of minorities . . . in [Pfizer's] work force" is "with those in the labor force who possess the relevant qualifications." *Id.* The Fellowship specifically leads to "Analyst" and "Manager-level position[s]." Bruce Decl. ¶¶14, 16. Between 2019 and 2021, the racial breakdown of Pfizer's analysts and managers was on par with the industry-wide breakdown. *See id.* ¶¶7, 10. Those statistics do not reflect a *manifest* imbalance in Pfizer's workforce. In *Johnson*, "*none* of the 238 positions was occupied by a woman" in the job category. 480 U.S. at 636. In *Weber*, "only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black," compared to 39% in the area. *Id.* at 628. As there is "manifestly no imbalance" in Pfizer's own statistics, Pfizer cannot justify excluding whites and Asian Americans. *Hammon v. Barry*, 826 F.2d 73, 78 (D.C. Cir. 1987).

Rights of others prong. Pfizer's policy also "'unnecessarily trammel[s] on the rights of'" excluded individuals. *Johnson*, 480 U.S. at 630-31. The *Weber/Johnson* framework still requires "fair treatment" in using race as a consideration. *J.A. Croson v. City of Richmond*, 822 F.2d 1355, 1361-62 (4th Cir. 1987). A plan cannot "'create an absolute bar'" for any racial group. *Johnson*, 480 U.S. at 670. Race, in other

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treatment liability to make a heightened showing that a race-based employment decision was necessary to avoid disparate-impact liability under Title VII, but expressly reserving whether such a defense "would satisfy the Equal Protection Clause").

words, "cannot be dispositive." *Hill*, 183 F.3d at 588. *Weber/Johnson* permit race to be used only as a "factor[ ] in a more complex calculus." *Id.* In *Weber*, "half of those trained in the program [were] white." 443 U.S. at 208-09. Similarly, in *Johnson*, "[*n*]*o* persons [were] automatically excluded from consideration; *all* [were] able to have their qualifications weighed against those of other applicants." 480 U.S. at 637-38. Neither *Weber* nor *Johnson* sanctioned categorical exclusions of certain racial groups.

Pfizer's racially exclusionary criterion "unnecessarily trammel[s] on the rights of" white and Asian-American applicants and "create[s] an absolute bar to their" application. *Id.* Pfizer's program is worse than a forbidden "hard-core, cold-on-the-docks . . . mandatory racial quota." *Hammon*, 826 F.2d at 79. The Fellowship excludes all white and Asian Americans, Opp. 4, so it "stands in complete contrast to the plan at issue in *Johnson*," *Hammon*, 826 F.2d at 79. And the different programs "which appear[ ] to be open to all applicants" are "nowhere as comprehensive as the Fellowship's investment in and commitment to the Breakthrough fellows." VC ¶¶38-41 (Doc. 1). Moreover, the trammeling here is certainly unnecessary, given the lack of manifest imbalance in Pfizer's workforce. *See Hammon*, 826 F.2d at 78, 81 (explaining that, under *Johnson*, the "remedy crafted to cure a violation" must "be tailored to fit the violation"). For these reasons, Pfizer cannot make the showing under *Weber/Johnson*.[7]

B. DNH is likely to succeed on its Title VI and §1557 claims.

Tacitly admitting that its policy would be illegal under Title VI and §1557, Pfizer argues only that it "is not subject to" those statutes. This argument is meritless.

1. Pfizer is principally engaged in the business of providing healthcare.

Pfizer is "principally engaged in the business of providing . . . health care." 42 U.S.C. §2000d-4a(3)(A)(ii). "Principally engaged" means "the primary activities" of an entity. *Doe v. Salvation Army*,

[7] Pfizer relies on *Doe v. Kamehameha Schools*, 470 F.3d 827 (2006), where a sharply divided Ninth Circuit held that a school did not violate §1981 by giving racial preference to native Hawaiians at the exclusion of non-native Hawaiians. That decision is wrong and not binding. It admittedly had to "modif[y]" and bend the *Johnson* factors to reach that outcome. *Id.* at 843. In all events, Pfizer's wholescale exclusion of two large racial groups violates *Johnson*, even if the program in *Kamehamea* did not.

685 F.3d 564, 571 (6th Cir. 2012). This does not turn on percentages. *Id.* Because Congress did not define "health care" in Title VI, this Court must adopt its ordinary meaning. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738-39 (2020). To "provide" means "to supply or make available." *Provide*, Meriam-Webster Online Dictionary, bit.ly/3RCTuwQ. The ordinary meaning of "health care" broadly includes "efforts made to maintain or restore physical, mental, or emotional well-being" of persons. *Health Care*, Merriam-Webster Online Dictionary, bit.ly/3M8S6Bh. Pfizer's primary activities include supplying and making available efforts to maintain and restore well-being. Pfizer "is engaged in the business of developing, manufacturing, marketing, selling, and distributing" medicine. Gramling Decl. ¶3 (Doc. 33). The medicines it "develops and manufactures" are "for patients across the globe." Compl. ¶15 (Doc. 1), *Pfizer, Inc v. HHS*, No. 1:20-cv-04920 (S.D.N.Y. 2020).

Pfizer offers a narrow definition. Opp. 17-18. Pfizer argues a corporation is a "healthcare provider" only if it offers direct patient treatment. *Id.* But such a definition is not found in Title VI or §1557. Such a reading would vitiate §1557. Pfizer, which even participates in the federal *healthcare* programs, is plainly a "health program or activity." 42 U.S.C. §18116(a). And even if this Court were to adopt Pfizer's interpretation, Pfizer provides "direct assistance to individuals." *Drachman v. Bos. Sci. Corp.*, 258 F. Supp. 3d 207, 212 (D. Mass. 2017). Pfizer offers direct medical treatment to patients in its clinical trials "involving hundreds of thousands of people."[8] Those hundreds of thousands of instances of medical treatment also constitute Pfizer's "primary activities." *Doe*, 685 F.3d at 571.

2. Pfizer receives federal financial assistance as a whole.

Pfizer does not deny that it participates in various federal healthcare programs because it does. *See, e.g.*, Pfizer-HHS Corporate Integrity Agreement 3 (last visited November 8, 2022), bit.ly/3UfVEoA. Pfizer also does not dispute that it reaps a windfall from "[t]he federal government, through Medicare" every year. *Pfizer, Inc. v. HHS*, 42 F.4th 67, 70-72 (2d Cir. 2022); Pfizer Compl.,

[8] *See* Pfizer, *Frequently Asked Questions–What are clinical trials?* (last visited Nov. 8, 2022), bit.ly/3DTf2AI.

supra, ¶¶75. Pfizer also does not dispute that Medicare and Medicaid reimbursements constitute "federal financial assistance" under Title VI and §1557. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569 (2022); DNH Br. 11-12 (Doc. 5-8). Although Pfizer says that it "does not receive any Medicare or Medicaid reimbursements *directly from the federal government*," Grambling Decl. ¶10 (Doc. 33) (emphasis added), it doesn't dispute that it is an indirect recipient of federal funds. Pfizer also has no response to the established rule that "[e]ntities that receive assistance, whether directly *or through an intermediary*, are recipients" of federal funds. *NCAA v. Smith*, 525 U.S. 459, 468 (1999); *Grove City Coll. v. Bell*, 465 U.S. 555, 564-68 (1984) (rejecting the argument that only those who "receive checks directly from the federal government" are covered). Pfizer thus receives federal financial assistance from the federally reimbursed "drugs [it] sold." *See Doe One v. CVS Pharmacy, Inc.*, 2022 WL 3139516, at *13 (N.D. Ca. Aug. 5, 2022).

Pfizer also concedes that it receives through the "public-private partnerships" for research largely funded by the federal government. Opp. 18. Although Pfizer tries to downplay this, Pfizer is in the business of providing healthcare through developing medications. These federally funded research partnerships thus are central to Pfizer's purpose and constitute assistance as a whole.

C. DNH is likely to succeed on its New York State and City law claims.

DNH's state-law claims succeed.[9] ***First***, Pfizer erroneously asserts that the NYSHRL/NYCHRL claims fail because there is no allegation that the members felt an impact in New York. Opp. 20-21. But this argument mischaracterizes New York law. Courts have repeatedly held that failure-to-hire claims involving discrimination necessarily create negative impact in New York. *See, e.g.*, *Chau v. Donovan*, 357 F. Supp. 3d 276, 283-84 (S.D.N.Y. 2019) ("Because Chau alleges she would have taken a position in New York City had she not been discriminated against, she has satisfied

[9] Pfizer's other arguments against the employment discrimination claims, Opp. 21, depend on their erroneous section 1981 arguments. *See supra*, at 7-11.

the requirement that the alleged discriminatory act had an impact within the boundaries of New York City."); *Anderson v. HotelsAB, LLC*, 2015 WL 5008771, at *2-3 (S.D.N.Y. 2015) (similar). Pfizer is a New York City company refusing to hire white and Asian-American applicants for positions "based in New York [City]." PI Ex. B, at 2 (Doc. 5-6). Members A and B declared that they "would have taken a position in New York City had [they] not been discriminated against." *Chau*, 357 F. Supp. 3d at 283-84; VC ¶¶55, 65. In any event, Members A and B are residents of the State of New York, and one of them lives in New York City, and they feel the impact of Pfizer's discrimination in New York State and City. Supp. Rasmussen Decl. ¶3 (Ex. A).

Second, Pfizer's arguments against the advertising claims are meritless. Opp. 21-23. Pfizer argues that the members lack standing because they do not allege personal injury. Opp. 21. The Second Circuit has rejected similar arguments before, "agree[ing]" that "'advertisements [that] indicate a racial preference to the ordinary reader'" causes "'injury in precisely the form that [the relevant statutes] [were] intended to guard against.'" *Ragin v. Harry Macklowe Real Est. Co.*, 6 F.3d 898, 904 (2d Cir. 1993). Contrary to Pfizer's assertions, Members A and B do not argue "that any reader of a discriminatory advertisement, *regardless of intent or lack of intent to* [*apply*], has standing," because they are ready and able to apply only if Pfizer stops discriminating. *McDermott v. N.Y. Metro LLC*, 664 F. Supp. 2d 294, 301 (S.D.N.Y. 2009); *cf. Wilson v. Glenwood Intermountain Prop., Inc.*, 98 F.3d 590, 595 (10th Cir. 1996) (standing requires alleging "advertisements deterred [plaintiffs] from seeking to rent the apartments").

Pfizer's argument that its facially discriminatory criterion is facially neutral borders on frivolous. Opp. 22-23. Because Pfizer's ads, FAQ, and the informational video all facially indicate the requirements that the applicant be Black/African American, Latino/Hispanic, or Native American, Pfizer resorts to obfuscation. Pfizer asserts that "nothing in the materials about the Fellowship" "categorically bans any applicant from *applying*," Opp. 22 (emphasis added). This is incorrect and does not shield Pfizer from liability. *See Teamsters*, 365-66 ("If an employer should announce his policy of

discrimination by a sign reading 'Whites Only' … his victims would not be limited to the few who ignored the sign."). The ads make it a futile gesture for white and Asian-American applicants to apply because they do not belong to Pfizer's preferred racial groups. *Id.* And Pfizer tells people who are not "from a minority group[s] identified" to apply to *other*, less impressive programs, PI Ex. B. at 1, evidencing that the criteria are *not* race-neutral. DNH is likely to succeed. *See* DNH Br. 24-27.

III. The remaining equitable factors warrant issuing a preliminary injunction.

"'Victims of discrimination suffer irreparable injury, regardless of pecuniary damage.'" *Gresham v. Windrush Partners*, 730 F.2d 1417, 1423-24 (11th Cir. 1984). The "irreparable harm" is the members' "inability to compete. *Planned Parenthood v. HHS*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018). And "monetary damages are inadequate to ensure that [they] may compete" on an equal footing. *Id.* Moreover, Pfizer's application will open in January 2023 and end three weeks later. Bruce Decl. ¶¶25-26. Because being a college junior is a requirement, the members will lose their opportunity to compete absent immediate relief. VC ¶¶11, 33; Mem. A Decl. ¶3; Mem. B Decl. ¶3. Once the deadline passes, "'there can be no do over and no redress.'" *Planned Parenthood*, 337 F. Supp. 3d at, 343; *Gresham*, 730 F.2d at 1423-24 (harm irreparable because "available housing where the discrimination is occurring could become filled during the pendency of a lawsuit").

The balance of harms and the public interest favor granting relief. DNH Br. 22-24. Because Pfizer's discrimination is unlawful, it cannot "claim to be harmed" if an injunction is issued; Pfizer "brought any and all difficulties occasioned by the issuance of [such an] injunction" on itself. *Kos Pharms. v. Andryx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004). And the public interest in enforcing antidiscrimination statutes weighs in favor of granting relief. *Runyon*, 427 U.S. at 175-76 (Congress made "discrimination unlawful" because there is no legitimate interest in discriminating); *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 594 (1983) (antidiscrimination is "a fundamental public policy").

CONCLUSION

For the foregoing reasons, this Court should grant DNH's motion.

Dated: November 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed the foregoing via ECF, which will electronically notify all counsel of record.

Dated: November 8, 2022

/s/ Cameron T. Norris