



July 8, 2021

Hon. Bill Nelson
National Aeronautics and Space Administration
300 E. Street SW, Suite 5R30
Washington, DC 20546

Via Electronic Submission: www.regulations.gov

RE: Comments on Behalf of America First Legal Foundation to the National Aeronautics and Space Administration, Request for Information, “Request for Information on Advancing Racial Equity and Support for Underserved Communities in NASA Programs, Contracts and Grants Process,” 86 FR 31735, Document Number NASA-21-038 (June 15, 2021), Docket Number NASA-2021-0002

Dear Administrator Nelson:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and encourage the diffusion of knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

We submit these comments with regard to NASA’s June 15, 2021, Request for Information (“RFI”), 86 FR 31735. The RFI is an attempt to begin implementing President Joseph R. Biden’s Executive Order 13985, entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”

The bedrock principle of American law and government is equality. Yet, the Biden Administration is advancing a new concept intended as a substitute for equality known as “equity.” As we have seen in recent federal programs that explicitly discriminated against citizens based on race—the Restaurant Revitalization Fund and USDA debt relief—this kind of “equity” is the precise opposite of equality. This kind of “equity” is an all-encompassing term used to describe multiple efforts by the Federal Government to preference or punish citizens based on their race or other protected characteristics.

This RFI makes clear that it is the first step of a new and comprehensive effort to make NASA an instrument of federal discrimination against U.S. citizens. For

example, the RFI’s use of the term “environmental justice” is another coded reference to government discrimination. It is a progressive, political buzzword¹ that has no place in a science-based institution.

It is clear from the use of this term that NASA is attempting to inject politics and progressive agendas into what ought to be, and must be, the neutral pursuit of scientific endeavor for the equal benefit of all Americans. We strongly caution against any effort to politicize NASA’s mission or embed any form of discrimination, quotas, barriers or unfair advantages or disadvantages into any NASA program.

NASA is the premier space agency in the world. It is not only one of America’s most celebrated scientific institutions. It is one of the world’s greatest symbols of scientific innovation and creativity in all of human history. It would sully this noble mission, and irreparably degrade its standing in the world, if NASA were to become enrolled in the latest progressive scheme to exclude or punish citizens based on their skin color.

We encourage NASA to remove any and all obstacles to participation and to disseminate information as broadly as possible. Everyone is better off when information is distributed well, when all have a chance to participate and apply for programs. What cannot be tolerated, and what would gravely damage not only NASA but the whole country, would be to incorporate racial preferences or racial punishments into any aspect of NASA or its mission. NASA has always been, and must remain, an agency devoted to science and exploration – not equity-driven discrimination.

I. NASA’s Job is Science, Not Woke Politics

NASA must beware of an insidious mission creep. NASA earned its place as one of the greatest scientific institutions in the world through hard work at the cutting edge of science. Expanding its mission now to include equalization of results across various demographic groups goes beyond NASA’s proper expertise and distracts from its true value-add for the United States.

NASA was created in 1958 as a unique institution: a federal, civilian entity that was to spearhead American efforts to scientifically study and explore space. It was an enormous scientific and technological undertaking. It was also fraught with national security significance. NASA’s broad purposes to study, explore, and discover are now

¹ On the leftist activism associated with environmental justice, *see, e.g.*, Jedediah Britton-Purdy, *An Environmentalism for the Left*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/after-nature-left-environmentalism-jedediah-purdy> (accessed July 8, 2021); Zack Colman, *Environmental Groups’ Greatest Obstacle May Not Be Republican Opposition*, POLITICO (February 2, 2021), <https://www.politico.com/news/magazine/2021/02/05/environmental-movement-racial-reckoning-green-diversity-465501>.

important than ever in a new era of space competition in a time of ever-advancing scientific prowess. The scope of the challenge NASA faces makes it simply dangerous to national security to distract from, or degrade, NASA’s core mission by injecting woke politics—let alone invidious discrimination.

NASA’s organic statutes include a broad-reaching statement of purpose. The current codification gives NASA ten areas of responsibility, including scientific research and education; technological innovation; and the preservation of American leadership in these fields.²

NASA has articulated its mission in various ways over the years. But it has consistently kept its focus on the overriding task of advancing scientific knowledge. Its mission, it has said, is:

- To “lead an innovative and sustainable program of exploration . . . to enable human expansion across the solar system and bring new knowledge and opportunities back to earth.” U.S. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, NASA STRATEGIC PLAN 2018, 6 (2018).

² The statute provides for the following purposes for NASA:

- (1) The expansion of human knowledge of the Earth and of phenomena in the atmosphere and space.
- (2) The improvement of the usefulness, performance, speed, safety, and efficiency of aeronautical and space vehicles.
- (3) The development and operation of vehicles capable of carrying instruments, equipment, supplies, and living organisms through space.
- (4) The establishment of long-range studies of the potential benefits to be gained from, the opportunities for, and the problems involved in the utilization of aeronautical and space activities for peaceful and scientific purposes.
- (5) The preservation of the role of the United States as a leader in aeronautical and space science and technology and in the application thereof to the conduct of peaceful activities within and outside the atmosphere.
- (6) The making available to agencies directly concerned with national defense of discoveries that have military value or significance, and the furnishing by such agencies, to the civilian agency established to direct and control nonmilitary aeronautical and space activities, of information as to discoveries which have value or significance to that agency.
- (7) Cooperation by the United States with other nations and groups of nations in work done pursuant to this chapter and in the peaceful application of the results thereof.
- (8) The most effective utilization of the scientific and engineering resources of the United States, with close cooperation among all interested agencies of the United States in order to avoid unnecessary duplication of effort, facilities, and equipment.
- (9) The preservation of the United States preeminent position in aeronautics and space through research and technology development related to associated manufacturing processes.
- (10) The search for life's origin, evolution, distribution, and future in the universe.

51 U.S.C.A. § 20102 (2021). This is a modestly revised and expanded version of the original National Aeronautics and Space Act of 1958, Public Law 85-568, 72 Stat. 426, sec. 102(c), 1–8.

- “[To s]upport growth of the nation’s economy in space and aeronautics, increase understanding of the universe and our place in it, work with industry to improve America’s aerospace technologies, and advance American leadership.” *Id.*
- To “[d]rive advances in science, technology, aeronautics, and space exploration to enhance knowledge, education, innovation, economic vitality and stewardship of Earth.” NASA, *Mission and Values*, <https://www.nasa.gov/careers/our-mission-and-values> (last accessed June 18, 2021).

As NASA explained in its 2000 Strategic Plan, “NASA is an investment in America’s future. As explorers, pioneers, and innovators, we boldly expand the frontiers in air and space to inspire and serve America and to benefit the quality of life on earth.” U.S. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, NASA STRATEGIC PLAN 2000, 1 (2000).

NASA already has an incredibly broad field of responsibilities. *Not* included among NASA’s responsibilities is the pursuit of “equity” – or any other language that would authorize, let alone encourage, racial preferences, racial exclusions, Critical Race Theory, political agendas, or any other progressive ideology.

NASA already has a heavy responsibility to meet its scientific objectives. If anything, this responsibility—or rather, the set of responsibilities set out in its authorizing statute—is so broad that some observers have long worried that NASA’s vision was too broad and too amorphous. With too amorphous a mission, the agency runs the risk of diffusing its efforts and rendering itself relatively ineffectual. *See, e.g.*, W. D. KAY, *DEFINING NASA: THE HISTORICAL DEBATE OVER THE AGENCY’S MISSION* (2005). NASA cannot possibly hope to maintain focus on its critical and varied responsibilities if it is now further tasked with delivering racial equity – a term whose meaning can only be understood as replacing race-neutral objective policies with racial preferences and progressive social agendas.

II. NASA Should Not Engage in Social Engineering

The use of racial preferences, directly or indirectly, is morally wrong, undermines NASA’s role as a nation unifier, and, by turning NASA into an instrument of social engineering, constitutes a profound diversion from NASA’s true and actual scientific mission. One’s ethnic background, skin color, or ancestry should neither advantage nor disadvantage an application for a position at NASA, nor any other aspect of hiring, retention, recruitment or promotion. Our commitment to civil rights and equal justice as a nation demands nothing less—equality, not “equity,” must be NASA’s guiding light, and that of our whole government.

As NASA reviews its policies and procedures in outreach and hiring, it should keep its mission first and not compromise its pursuit of scientific excellence for the sake of posturing as woke. It is in the best interest of NASA, all the citizens of our country, all current employees, and all future job applicants, that NASA evaluate all of its workforce based on qualifications and work product—never skin color.

III. Race Discrimination is Illegal and Dangerous

Race-based preferences in government hiring and contracting are presumptively illegal. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”); *see also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (requiring the federal government to comply with the constitutional prohibition on racial discrimination on the same terms as the states). We urge NASA to resist pressure from the proponents of so-called racial equity and to avoid any scheme to impose illegal and unconstitutional racial preferences.

Beyond being illegal, the pursuit of racial equity is dangerous. It is essential to recognize that the equity agenda here includes the ability to discriminate based on race. America has a long and tragic history of insidious racial discrimination. But America has made progress as racially-discriminatory laws and policies have been prohibited and race-neutral policies become the norm. But make no mistake, what this executive order seeks to do is empower the federal government to expressly discriminate on the basis of race—and to choose what race is favored and what race is disfavored by a stroke of the President’s pen. The title of the RFI appears to sound noble as it is looking to “advance equity.” Its text claims to want to advance “impartial treatment of all individuals.” But the definition goes on to select a list of groups for special treatment:

Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.³

If the goal is really just to establish impartial treatment, then well and good. But the RFI’s list of groups suggests something more: a willingness to make differentiations on the basis of group membership, to engage in race-based preferential policies. Doing so would not establish impartiality, but partiality. The title could be read to actually

³ 86 FR 31735

say, “Request for information on advancing Black, Latino, and Indigenous and Native Americans in NASA Programs.”

But if the government can list those races and ethnicities, what is to prevent it from later asking how to advance whites through NASA programs? There is no *legal* distinction between the two. Yet the latter is clearly illegal and unconstitutional. So too, then, is the former. By the same token, while the government now seeks to advance one race, it must then, by definition, have the power to disadvantage that race, and the only thing stopping it is the political tides.

A government that has the power to elevate on the basis of skin color also has the power to subjugate on the basis of skin color. Everyone would agree that it would be wrong and illegal for NASA to promote policies expressly aimed at increasing white people in its ranks and discriminating against blacks. But with this RFI, NASA is openly pursuing a policy that is legally indistinguishable from that.

IV. NASA Should Not Be Tasked with Remediating Larger Societal Problems

The way to create a more inclusive society at every level is not through the radical doctrines of Critical Race Theory, through government-sponsored discrimination, through “equity” initiatives, or through any form of race preferences or punishments. Such programs often hurt both those who are excluded and those they intend to help. Everyone is made worse off by policies that reduce people to their skin color and that seek to divide them based on the same.

The way to create a more inclusive society is to address the actual causes of disparate outcomes. But the real action is in areas far afield from NASA’s appropriate tasks: to provide school choice and drastically reform public education; to get politics out of the classroom and vocational training into the classroom; to ensure all citizens—regardless of race or zip code—live and learn and work in physical safety, free from crime or violence; to have trade and economic policies that lift up those who have the least and stop the outsourcing of critical jobs; to have an immigration policy that defends the interests of low-income Americans; and to have a regulatory and financial policy that ensures ordinary Americans—not just Wall Street—have a fair chance to thrive and succeed. These and many other measures are necessary to ensure all people benefit from inclusive economic growth and development. Forcing NASA to engage in racial and ethnic discrimination, and to incorporate progressive ideology into its scientific mission, is not the answer—and will instead only serve to create injustice, division, and disillusionment with NASA’s mission.

V. **Everyone Should Have the Chance to Learn About—and Apply for—Opportunities at NASA**

The appropriate focus for NASA is to ensure that all Americans have the chance to learn about and apply for opportunities *at NASA*. If NASA itself has created unnecessary barriers to entry that are thwarting potential sources of talent, frustrating skilled applicants, then it should investigate and remedy its approach. If NASA is missing opportunities to inform the public, it should learn where it is missing opportunities and correct that. NASA should seek to provide the greatest amount of access possible. NASA's mission, and the American public, would be well served were NASA to focus on expanding its reach and internship opportunities into every high school and college in the country to collaborate with the best, brightest, and most creative young minds in the world.

For the good of NASA's mission, NASA should tap the skills, talents, and potential of all Americans. What NASA should not do, indeed should never do, is judge any person because of what they look like, where their ancestors came from, or what ethnicity they happen to be. If NASA pursues this path, it will have ceased to be a scientific agency, and instead become yet one more blunt instrument of progressive politics.

Conclusion

NASA's new "Equity Mission"—of which this Request for Information is the first part—is fraught with peril, not only for NASA but for the country at large. It threatens to undermine NASA's moral standing in the nation, its role as a source for universal inspiration, and its unique position as an agency admired and respected by all. Jumping off the cliff into the rocky waters of progressive politics will do immense reputational harm to the agency and only pull our country further apart. It will distract from NASA's real expertise and statutory responsibilities. And, based on all that we know about this Administration's equity agenda, and the coded language embedded throughout this RFI, it seems probable that NASA intends to engage in illegal and unconstitutionally discriminatory policies which will not only divert NASA from its objective scientific mission but besmirch the agency by involving it in a scheme that so plainly violates every moral and legal tenet of American law and justice.

NASA must not merely comply with, it must celebrate and embrace, the principles of equal justice and equal treatment for all—where the same rules and same standards apply to every person, from every background, and every station of life. This is about more than science: it is about our ethics, our character, and our purpose as a nation. NASA should learn how to best reach out to Americans of all backgrounds and experiences. But it should never hurt, denigrate or damage citizens of this country because of what they look like or where their ancestors came from. America First Legal intends to very closely monitor NASA's actions in this area.