IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGOT FLINN, *et al.*,	)	
	)	
Plaintiffs,	)	Case Number: 24-cv-04269
	)	
v.	)	Hon. John F. Kness, District Judge
	)	
CITY OF EVANSTON,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, by counsel, respectfully submit this opposition to Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1]

I. Introduction.

Evanston's Rule 12(b)(1) motion boils down to disputes of fact about the city's $20 million reparations program and the eligibility requirements for the program, not any dispute about Plaintiffs or their injuries. Plaintiffs have alleged all facts necessary to state a timely claim that, but for their race, they are eligible to participate in the program and receive $25,000 direct cash payments. The program's eligibility requirements are simple, straightforward, and easy to satisfy, and Plaintiffs have alleged that they were and are "ready and able" to satisfy them at all relevant times. They need not allege anything more to invoke this Court's jurisdiction.

Because the factual disputes about the program and its eligibility requirements relate to

[1] As addressed herein, Evanston factually attacks Plaintiffs' complaint by mischaracterizing its own reparations program. Plaintiffs not only dispute Evanston's assertions but also submit substantial evidence to support their factual allegations contained in the complaint. To the extent the Court believes the evidence has not been sufficiently pled – including the facts related to the September 5, 2024 Reparations Committee Meeting and the ongoing and imminent injuries to Plaintiffs – Plaintiffs respectfully request the opportunity to amend the complaint accordingly.

the merits of Plaintiffs' Equal Protection lawsuit, not Plaintiffs or their injuries, these disputes cannot and do not provide a proper basis for a Rule 12(b)(1) motion. Alternatively, Evanston's own records and statements about the program provide compelling evidence that the program is as Plaintiffs allege, not as Evanston seeks to misconstrue it. Evanston's Rule 12(b)(6) motion lacks merit as well because Plaintiffs' complaint is timely under multiple theories.

II. Evanston's Reparations Program.

Through a series of resolutions adopted by the city council, Evanston created a program that provides $25,000 in direct cash payments to persons who lived in Evanston between 1919 and 1969 and their children, grandchildren, and great-grandchildren. Compl., ¶ 10. The program, entitled "City of Evanston Local Reparations Restorative Housing Program," uses race as a requirement for receiving the payment and purports to remedy housing discrimination experienced by Black and African American residents 55 to 105 years ago. *Id*. Evanston committed an initial $10,000,000 when it created the program in 2021 and committed an additional $10,000,000 in November 2022. *Id.*, ¶ 10. The option to receive a direct cash payment did not exist when the program was originally adopted but was added in March 2023. *Id.*, ¶ 17. Evanston has stated that additional applications will be accepted on a rolling basis following an initial set of applications. *Id.*, ¶¶ 11, 13, 18-21.

Three groups of persons are eligible for the program. *Id*. at ¶¶ 13, 14, and 16. The first group is current Evanston residents who identify as Black or African American and were at least 18 years of age between 1919 and 1969. *Id*., ¶ 13. Evanston refers to this group as "Ancestors." *Id*. The second group is persons who identify as Black or African American, are at least 18 years of age, and have at least one parent, grandparent, or great-grandparent who identifies (or identified) as Black or African American, lived in Evanston between 1919 and 1969, and was at

least 18 years of age at the time. *Id*., ¶ 14. Evanston refers to this second group as "Direct Descendants." *Id*. A Direct Descendant need not be an Evanston resident. *Id.*

Persons in the first and second groups are not required to present evidence that they or their ancestors experienced housing discrimination between 1919 and 1969. *Id*., ¶ 15. Persons in the third group must make such a showing, however, albeit for the period after 1969. They must also show that they are current Evanston residents and are at least 18 years of age. *Id*. The third category is not relevant to Plaintiffs' claim.

But for their race, Plaintiffs fall within the second group: Direct Descendants. *Id*., ¶ 22. Each of them had parents and/or grandparents who lived in Evanston between 1919 and 1969 and were at least 18 years of age at the time. *Id*., ¶¶ 3-8. At all relevant times, other than their race, Plaintiffs satisfied and continue to satisfy all eligibility requirements for participating in the program as Direct Descendants. *Id.*, ¶ 23. But for the program's race-based eligibility requirement, Plaintiffs would be in line to receive $25,000 cash payments. *Id.*, ¶ 24.

III. Argument.

A. Evanston's Rule 12(b)(1) Motion Conflates Merits with Jurisdiction.

"The Supreme Court has cautioned against deciding merits questions when evaluating challenges to jurisdiction." *Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 557 (7th Cir. 2021). Among other reasons, when the merits of a claim are at stake, Rules 12(b)(6) and 56 afford protections to the non-moving party that Rule 12(b)(1) does not. *Boim*, 9 F.4th at 559; *Craftwood II, Inc. v. Generac Power Sys.*, 920 F.3d 479, 480 (7th Cir. 2019). Both *Boim* and *Craftwood II* overturned Rule 12(b)(1) dismissals where the lower courts conflated the merits of the cases with their authority to hear them. Doing so "transgressed these allocations of authority." *Craftwood II*, 920 F.3d at 481.

As in *Boim* and *Craftwood II*, Evanston's motion improperly conflates the merits of Plaintiffs' Equal Protection claim with the Court's jurisdiction to hear the claim. According to the complaint, the only requirements for participating in the program as a "Direct Descendant" are that an applicant demonstrate that he or she is (1) Black or African American; (2) at least 18 years of age; and (3) have (or had) at least one Black or African American parent, grandparent, or great-grandparent who lived in Evanston between 1919 and was at least 18 years old at the time. Compl., ¶ 14. Plaintiffs plainly pled facts satisfying these requirements except for the race components. *Id.*, ¶¶ 3-8, 22. Plaintiffs are injured because they are being denied an equal opportunity to participate in the program and receive the program's benefits based on their race.

Evanston claims that, in addition to the simple eligibility requirements alleged by Plaintiffs, an applicant also must reside in or own real property in the city. Def's Mot., ¶¶ 1, 15-16. Evanston also claims that applicants can only spend program money for housing-related purposes in Evanston, such as purchasing property, paying down a mortgage, or improving an existing property in the city. *Id.*, ¶ 15. Plaintiffs dispute these assertions. Plaintiffs deny that there is any residency requirement for Direct Descendants, and Evanston's claim about using program funds conflates the program's eligibility requirements with the available benefits. These are merits disputes, not disputes about the Court's authority to hear the case.

The case on which Evanston primarily relies, *Carney v. Adams*, 592 U.S. 53 (2020), could not be more different. First and foremost, *Carney* was decided on summary judgment, after the parties had completed discovery. At issue was a legal challenge to a provision in the Delaware Constitution requiring partisan balance in the state's judiciary. *Id*. at 55. The plaintiff, a lawyer, claimed he was injured because he was a political independent and therefore could not apply for a judgeship without joining either the Democratic or Republican party. *Id*. Unlike

here, no factual disputes existed about the relevant eligibility requirements, and the Court was not asked to resolve any such disputes. In affirming the summary judgment ruling, the Court focused on evidence gathered in the course of discovery, including the fact that the plaintiff had changed his party affiliation from being a registered Democrat to an independent only days before he filed suit, making himself ineligible for the judgeship he claimed he wanted, and that he did not seek a judgeship three years earlier when judgeships for Democrats were available. *Id.* at 61-64. In what it described as a "highly fact-specific case," the Court found that the evidence "suggest[ed] an abstract, generalized grievance, not an actual desire to become a judge." *Id.* at 63. In contrast, Plaintiffs cannot change their race, age, or ancestors; and Evanston offers no reason to challenge these straightforward allegations. Evanston's program also was new. Plaintiffs could not have applied previously, even if it were not futile to do so. *Carney* offers no reason not to accept Plaintiffs' well-pled factual allegations about their eligibility.

Plaintiffs' claim is more like the claim in *Boim*. In *Boim*, a judgment enforcement action, the defendant denied the plaintiffs' factual allegation that it was the alter ego of entities against which the plaintiffs had a judgment. *Boim*, 9 F.4th at 550. The Court reversed the trial court's decision granting the defendant's Rule 12(b)(1) motion, finding that the trial court's ruling impermissibly examined the merits of the plaintiffs' claim, not whether the plaintiffs were injured. *Id*. at 554-55. The Court reasoned that, if the plaintiffs succeeded in proving the facts they alleged, they could prevail and that was sufficient for jurisdiction. *Id.* at 555. The same is true here. If Plaintiffs can prove factually that Evanston's program is as they allege, then Plaintiffs are injured because they are being denied equal treatment under the program based on their race. Their injuries are directly traceable to Evanston's use of race, and their injuries can be redressed by judicial relief directing Evanston to stop taking race into account.

Evanston's argument about a purported November 5, 2021 deadline for applications is no different. While Evanston asserts that Plaintiffs "do not allege they were 'ready' to apply for the program" (Def's. Mot., ¶ 18), that assertion is plainly incorrect. Compl., ¶ 23. Evanston also disputes Plaintiffs' factual allegations that further applications will be accepted on a rolling basis and that the program is not closed. *Compare* Compl., ¶ 11 *with* Def's Mot., ¶ 18. Also plainly disputed is Evanston's claim that "there has been no expressed intention to reopen the application period." *Id.* These factual allegations are material because, even if Plaintiffs were not "ready and able" to apply for the program in 2021, they still only need to be "ready and able" to apply in the foreseeable future to have cognizable injuries. *Carney*, 592 U.S. at 63. Evanston's argument is, in effect, a statute of limitations defense that the city seeks to transform into a standing challenge. But a party need not anticipate or plead around its opponents' potential defenses, even for standing purposes. *Craftwood II*, 920 F.3d at 482. The Court in *Craftwood II* reversed the defendant's Rule 12(b)(1) motion for that reason. *Id*. Evanston's argument about the purported, limited timeframe for submitting applications "looks like the makings of a material factual dispute, which a district judge could not resolve at the pleading stage." *Id.* It also lacks merit, as demonstrated *supra*. Neither *Carney* nor any other case Evanston cites stands for the proposition that "ready and able" means being "ready and able" to meet an initial application deadline in a rolling application process as opposed to being "ready and able" to satisfy all substantive eligibility requirements, especially where the benefits change after the initial period passes.

Another line of cases provides an alternate path forward. In *Markle v. Drummond Advisors, LLC*, Case No. 19-2789, 2020 U.S. Dist. LEXIS 26906 (N.D. Ill. Feb. 18, 2020), the plaintiff sued two entities that she alleged were her employers for allegedly unpaid overtime. One of the defendants disputed as a factual matter that it was the plaintiff's employer and argued

in a Rule 12(b)(1) motion that the plaintiff had no standing. The Court, citing *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986), denied the motion, finding that "[b]ecause a factual dispute exists as to not only standing but the merits of Plaintiff's case, this Court provisionally finds that Plaintiff possesses standing and reserves the ultimate determination of standing until later in the proceedings when this Court may benefit from a fuller factual record." *Markle*, 2020 U.S. Dist. LEXIS 26902 at *10. Indeed, the Court in *Crawford* declared, "Maybe in some cases the jurisdictional issue will be so bound up with the merits that a full trial on the merits may be necessary to resolve the issue." 796 F.2d at 929. If the Court does not deny Evanston's motion outright because the factual disputes it raises in its Rule 12(b)(1) motion are bound up with the merits of Plaintiffs' Equal Protection claim, it should provisionally find standing and reserve the ultimate determination until later in the case.

B. Plaintiffs Easily Overcome Evanston's Erroneous Factual Allegations.

Even if the Court chooses to delve into the parties' merits dispute about the program, Plaintiffs can supply ample proof demonstrating that the program is as they allege and therefore that they have standing. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009). Plaintiffs' allegations are supported by Evanston's own records and statements.

i. There is no residency requirement for Direct Descendants.

According to the program guidelines, formally adopted by the Evanston City Council in Resolution 37-R-21, to be eligible as Direct Descendants applicants must only prove their (1) age, (2), race, and (3) relationship to Ancestors.[2] Bekesha Aff., Ex. A (Guidelines) at p. 4. This

[2] The Court may take judicial notice of "matters of public record," including city ordinances, resolutions, meeting minutes, and agendas. *See Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977); *see also Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1062, n.24 (7th Cir. 2016). *See* Exhibits to the Affidavit of Michael Bekesha.

is in direct contrast to the eligibility requirements for the two other categories, for which proof of residency is required.[3] *Id*. The program applications also confirm that there is no residency requirement for Direct Descendants. Bekesha Aff., Ex. B. Statistics published by Evanston provide further confirmation. According to a January 2024 Reparations Committee memorandum, of the approximately 452 verified Direct Descendants, at least 7.1% of them (approximately 32 individuals) are not Evanston residents. Bekesha Aff., Ex. C at p. 2. Nor do any of these records mention an "owns real property in Evanston" requirement.

ii. There is no housing-related requirement.

Evanston's argument about program money being spent on housing-related expenses in Evanston confuses the program's eligibility requirements with the benefits that the program offers. There was and is no such eligibility requirement. The only requirements for Direct Descendants are those that Plaintiffs have identified *supra.* The applications do not state that spending program money on housing-related expenses in Evanston is a requirement; they only ask applicants to identify which of three housing-related expenses they are interested in. Bekesha Aff., Ex. B. An expression of interest is just that. It is not a requirement.

Evanston's own actions also refute its claim that spending program money on housing-related expenses in the city is an eligibility requirement. At some point before March 2023, Evanston provided $25,000 payments to at least two verified and approved Ancestors to use for purposes other than housing-related expenses in Evanston. Bekesha Aff., Ex. D at pp. 2-3 and Ex. E at pp. 2. The March 2023 amendment formalized this practice by adding another way verified and approved applicants could receive program money—the direct cash payment

[3] Resident or Residency is defined as "[a]n individual with an ownership or rental interest in real property in Evanston or otherwise legally occupies real property in Evanston." Bekesha Aff., Ex. A (Guidelines) at p. 4.

options. Specifically, on March 27, 2023, the Evanston City Council adopted Resolution 27-R-23, which states:

> WHEREAS, Evanston Council previously directed that recipients of benefits from the Local Reparations Fund were able to choose whether they receive said funds through home improvement, mortgage payment, grant to beneficiaries or decline said funds if they did not meet the requirements for the other options; and
>
> WHEREAS, City Council recognizes there is a need to expand upon this the (sic) Program and allow beneficiaries to choose direct cash payment as an option.
>
> ***
>
> SECTION 1: Evanston Council hereby amends the Restorative Housing Program to include direct cash payment as an additional option for payment.

Bekesha Aff., Ex. F. The resolution does not state that the requirements for participating in the program were being changed. It simply provides another benefit option from which already verified and approved applicants can choose.

Evanston's implementation of the cash payment option further confirms that recipients are not limited in how they use the money. The city tracks and reports on the different benefit options recipients choose. Bekesha Aff., Ex. G at p. 2. The options are: (1) Home Improvement Benefit; (2) Home Improvement Benefit and Mortgage Assistance; (3) Mortgage Assistance; (4) Home Purchase Benefit; and (5) Cash Benefit. The cash benefit is tracked and reported separately from the other benefits. If the direct cash benefit were the same as the other four housing-related benefits, the city would not track and report it separately.

Evanston also noted that "some recipients have divided their $25,000 reparations funds amongst the four Restorative Housing Program benefits. A recipient, for example, might separate their benefit between the Home Improvement benefit and the Cash benefit." *Id.* As of September 5, 2024, 83 of the 132 Ancestors who have selected a method of payment have chosen the cash benefit. *Id.* at p. 1. As of that same date, 67 of the 71 Direct Descendants who have

selected a method of payment have chosen the cash benefit. *Id*. at p. 4.

Moreover, at a June 6, 2024 Reparations Committee presentation, a committee staff member read a letter from a direct cash payment recipient describing how the recipient used $11,000 of her $25,000 payment to pay her son's college tuition and the remainder for her own educational pursuits, including tuition at the Moody Theological Seminary in Chicago. Bekesha Aff., ¶ 13. Reparations Committee Chair Robin Rue Simmons fought back tears and expressed joy at hearing how the recipient had spent program money. *Id*. She did not reprimand, rebuke, or otherwise suggest that the recipient had been ineligible for the program because she used program funds improperly. *Id.* Clearly, once an applicant is verified and approved, he or she has different options for using the benefit, including, since March 2023, the direct cash payment option. How he or she uses the benefit is not an eligibility requirement.

iii. The application period is not closed.

Evanston claims that it "has no current plans to reopen applications" for the program. Thompson Aff., ¶ 6. But the program guidelines, adopted as part of the resolution that created the program, say otherwise:

> Initial applications will be accepted, reviewed, and funded in the following order:
>
> 1. An Applicant applying as an Ancestor.
> 2. An Applicant applying as a Direct Descendant.
> 3. An Applicant that does not qualify as either an Ancestor or Direct Descendant, however, experienced housing discrimination due to Evanston's policies/practices after 1969.
>
> ***Applications thereafter will be accepted on a rolling basis.***

Bekesha Aff., Ex. A (Guidelines) at p. 6 (emphasis added). Neither the guidelines nor the resolution creating the program say anything about a final end date for accepting applications or

for the program's termination. *Id.*, Ex. A. And while Evanston's website states that applications were *made available* from September 21 to November 5, 2021, it says nothing about a deadline for *submitting* applications or that the program is closed to anyone who did not apply by November 5, 2021.[4] Any such assertion also would be contrary to Evanston's own official statement that additional applications would be accepted on a rolling basis. *Id.*

Evanston's Reparations Committee also has repeatedly told the public to stand by for information about when new applications will be accepted. *See* Bekesha Aff., Exs. H at p. 6, E at p. 13, and I at 4 (encouraging persons who did not previously "sign up for reparations" to join the Reparations Committee listserv for updates). It did so again as recently as September 5, 2024,[5] when City Councilmember and Reparations Committee member Krissie Harris stated that the city is still dispersing the funds for the first set of applications and will open a new round of applications once the first set is completed (Bekesha Aff., ¶ 14, Ex. J at pp. 6-7), as Plaintiffs have alleged. Compl., ¶ 11. Such statements are anything but evidence that Evanston is not going to accept additional applications in the foreseeable future. Even if all currently approved applicants (141 Ancestors; 454 Direct Descendants) are each paid the full $25,000 ($14,875,000 total), Evanston will still have $5,000,000 in funds left over from its $20 million commitment to pay additional applicants. Accordingly, Plaintiffs' injuries are reasonably foreseeable if not actual already. *Carney*, 592 U.S. at 63.

In short, except for their race, Plaintiffs satisfy all eligibility requirements for the

[4] In this regard, Evanston's assertion in its declaration that applications were accepted only from September 21 to November 5, 2021 appears to contradict the website statement about the applications' availability. *Compare* Thompson Aff., ¶ 6 *with* Def's Mot., ¶ 18.

[5] The Chicago Tribune also reports, based on information from Councilmember Harris, that new applications will be accepted when applicants from the first round have been paid. Bekesha Aff., ¶ 15, Ex. K.

program. At all relevant times they were and are "ready and able" to apply but for their race.

C. Evanston's Jurisdictional Discovery Is Improper.

Evanston's proposed interrogatories are irrelevant because none addresses the current dispute – the program's parameters and its eligibility requirements. But for Plaintiffs' names and ages, which Evanston has not disputed, the interrogatories are largely irrelevant because Direct Descendants need not live in, own real property in, or seek to own real property in Evanston to qualify for the program. The interrogatories are also irrelevant because they conflate the program's eligibility requirements with the benefits, and, as Plaintiffs have demonstrated, those benefits changed significantly during the approval process to include the direct cash payment option. Interrogatory 6 is irrelevant because, as Plaintiffs have demonstrated, applying is futile so long as the program is race-based. Interrogatory 7 is irrelevant because it concerns Plaintiffs' status as Direct Descendants, which Evanston has not challenged. It is just harassment.

To the extent the Court determines that Plaintiffs' factual allegations and the evidence they have submitted to support those allegations is insufficient, Plaintiffs respectfully submit that discovery concerning the following subjects, among others, would be necessary: (1) the 7.1% of verified Direct Descendants who do not reside in Evanston but have been determined to be eligible; (2) the use of the cash payments by the Ancestors who chose that option; (3) the anticipated use of the cash payments by those Direct Descendants Ancestors who chose that option; (4) Evanston's policies ensuring that recipients of the cash payments use the money for housing-related expenses within Evanston; (5) the dates every application was received and has been verified to receive payments; (6) all policies and guidelines about receiving applications; and (7) all discussions about re-opening the application process. Plaintiffs believe such focused discovery can be accomplished through limited depositions and written discovery. Of course,

much of this discovery would be indistinguishable from merits discovery, which highlights why Evanston's attempt to cut short Plaintiffs' case at this early stage is improper.

D. Plaintiffs' Claim Is Not Barred by the Statute of Limitations.

A motion to dismiss on statute-of-limitations grounds is a motion to dismiss for failure to state a claim. *Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012). Accordingly, the Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in Plaintiffs' favor.[6] *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010). "A statute of limitations creates an affirmative defense, and only when the plaintiff's submissions reveal a defense to be airtight will dismissal at screening be appropriate." *Hayes v. Hile*, 527 Fed. Appx. 565, 566 (7th Cir. 2013). Evanston's argument is anything but airtight.

Plaintiffs are injured because they are being denied equal treatment based on their race. *Ne. Fla. Ch. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Those injuries did not accrue on November 5, 2021, as Evanston alleges. At that point, Evanston had only received an initial round of applications. It had not begun evaluating them. As of November 2021, Evanston had not verified or approved a single application or made a single payment to anyone. It was still verifying Direct Descendant applications on October 5, 2023, and did not approve a single Direct Descendant application until sometime between October 5, 2023 and January 11, 2024. Compl., ¶¶ 18-19. Presumably, Evanston's verification and approval process involved confirming that applicants were Black or African American. Thus, Plaintiffs were not treated unequally, and their claims did not accrue at the earliest until Evanston completed its verification and approval of Direct Descendant applications, which occurred sometime in late 2023 or early 2024, a period well within the two-year limitations

[6] The Court may also consider information that is properly subject to judicial notice. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

period. *See*, *e.g.*, *Webb v. Indiana Nat'l Bank*, 931 F.2d 435 (7th Cir. 1991).

Moreover, a statute of limitations defense cannot succeed when at least one act of the challenged conduct occurs within the limitations period. *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). "In determining the timeliness of the plaintiff's claim, the court treats the linked acts as one continuous act that ends within the limitations period." *Lewis v. City of Chicago*, 2000 U.S. Dist. LEXIS 7304, *13 (N.D. Ill May 25, 2000). Three fact patterns or theories exist under this "continuing violation" doctrine. *Id*. The first two apply here. The first concerns when a defendant's decision-making process takes place over time. *Id*. The second, referred to as a "systemic continuing violation," concerns cases where a defendant has an express, openly espoused policy that is alleged to be discriminatory. *Id*.

Plaintiffs' claim is timely under both theories. Evanston's decision-making process clearly has taken place over time. Evanston doubled down on the program by committing an additional $10,000,000 in November 2022. Compl., ¶ 10. It added the direct cash benefit in March 2023. *Id.*, ¶ 17. As demonstrated *supra*, it was still verifying Direct Descendent applications in October 2023 and did not complete its verification and approval of Direct Descendant applications until sometime between October 2023 and January 2024. *Id.*, ¶¶ 19-20. Should the Court find that the statute of limitations began to run in November 2021, then these additional acts of committing more funds, expanding the payment options, and verifying and approving applicants—all of which were within the limitations period—constitute a continuing injury. And through all these same acts, Evanston continued to openly espouse—and advance—its plainly race-based program. By either of these measures, Plaintiffs' complaint is timely.

Evanston's program is similar to the hypothetical provided by Judge Easterbrook in *Palmer v. Bd. of Education*. In that case, the Court held, "A wrongful act does not mark the

accrual of a claim. … [T]he time begins with the injury rather than with the act that leads to injury." 46 F.3d 682, 685 (7th Cir. 1995). To illustrate his point, he explained:

> Suppose the school board had voted in 1980 to provide white pupils, but not black pupils, with school books. A child whose parents neglected to sue during his first two years in school would not be doomed to another 10 years of education without books. Each time the teacher passed out books to white children while withholding them from blacks would be a new injury and start a new period to sue. That the school district had committed similar wrongs in the past would not give it an easement across the Constitution, allowing it to perpetrate additional wrongs.

Id. The same applies here. A new injury occurs every time Evanston approves or distributes a $25,000 direct cash payment to a black Direct Descendant but not to a non-black Direct Descendant. Evanston has no statute of limitations defense here.

C. The Program is Unconstitutional.

Evanston's unnecessary "reservation of rights" at the end of its motion neither seeks relief from the Court nor demonstrates that any relief is appropriate, but instead purports to defend the constitutionality of its race-based program. As set forth in the complaint, however, the program's use of a race-based eligibility requirement is presumptively unconstitutional, and remedying societal discrimination is not a compelling government interest. Compl., ¶¶ 37 and 38. Nor has remedying discrimination from as many as 105 years ago or remedying intergenerational discrimination ever been recognized as a compelling government interest. Among the program's other fatal flaws is that it uses race as a proxy for discrimination without requiring proof of discrimination. Plaintiffs look forward to offering a more fulsome response to Evanston's attempted defense of the program at an appropriate time and place.

WHEREFORE, Plaintiffs respectfully request Evanston's motion be denied, or, in the alternative, held in abeyance.

Dated: September 18, 2024

Respectfully submitted,

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