

Equity Considerations in Contracts and Program Funding

**Austin Music Commission
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Purpose

- Discuss legal risks associated with using race, gender and protected-class criteria in determining awards of contracts and program funding.



Why Now?

- Recent federal court decisions that put race-focused programs at risk.
- Law Department deliberative process.
- Briefing to City Council.



Acknowledgement

- History of intentional racial segregation – 1928 Master Plan and “Negro District.”
- Oppression of BIPOC – 1954 Federal Housing Act, “urban renewal,” and seizing of Black-owned land.
- City Council has committed the City to correcting its racist practices. (Resolution 20210304-067)



City's Programs

- As part of Project Connect, community members developed displacement mitigation strategies and an equity tool to guide decision making. (“Nothing About Us Without Us”)
- EDD also wants an equity focus for the Cultural Arts and Heritage Tourism grant programs.



Legal Foundation

- 14th Amendment – Equal Protection Clause
- No government may “deny to any person within its jurisdiction the equal protection of the laws.”



“Tiered Scrutiny”

- **Strict Scrutiny** (Race, National Origin, Religion, Alienage) – Government must demonstrate the policy is *narrowly tailored* to meet a *compelling* purpose.
- **Intermediate Scrutiny** (Gender, Sex, Sexual Orientation?) – Government must demonstrate the policy is *substantially related* to an *important* purpose.
- **Rational Basis** (Age, Disability, Wealth, Felony Status) – The policy must have a *rational connection* to a *legitimate interest*.



Strict Scrutiny

Any government program that takes race into consideration faces strict scrutiny by the courts.

Strict scrutiny is the most rigorous judicial review.

Courts start with presumption that policy is invalid and government must prove its interests.



Compelling Government Interest

The government must demonstrate:

- actual discrimination in the relevant market, and
- that the government either actively or passively perpetuated the discrimination.



Narrowly Tailored

The government must demonstrate:

- it considered other race-neutral policies;
- race-neutral policies failed to achieve the compelling interest.



City of Richmond v. J.A. Croson Co.

- “Generalized assertions” of past racial discrimination would not justify “rigid” quotas;
- 30 percent quota could not be connected to “any injury suffered by anyone;”
- Race-neutral measures must be seriously considered.



Evidence Acceptable to a Court

Disparity studies are conducted to determine if there is discrimination in the studied market and if the government is an active or passive participant in that discrimination.

Disparity studies are the court-accepted way to prove a compelling governmental interest.



Recent “Pandemic” Cases

The pandemic has hit communities of color and disadvantaged people more severely.

Reasonably, governments have sought to create programs that address this in a direct manner.

Unfortunately, these programs draw lawsuits, injunctions, and frozen funds.



Greer's Ranch Café v. Guzman

- SBA offered a host of studies, reports and Congressional testimonies showing the disparate impact of COVID-19 on minority and women-owned businesses.
- The court rejected all of this and granted the injunction.
- Sixth Circuit invalidated prioritization based on race and sex; upheld it based on veteran's status.



Black Farmers

- Significant amount of documented history and evidence of racism against Black farmers.
- As part of ARPA, Congress appropriated \$4 billion debt relief program for “socially disadvantaged” farmers and ranchers.
- USDA asserted that its compelling interest was correcting its own past and present discrimination.



Black Farmers

The court found:

- that there may have been intentional discrimination in the past, but that the USDA is not currently discriminating against Black Farmers,
- the disparity in current funding for Black Farmers was not clearly linked to discrimination,
- the government has not shown it narrowly tailored the program, and
- the court wanted to see race-neutral options that were tried and failed before going to this race-conscious program.



College Admissions Cases

- U.S. Supreme Court will hear challenges to admission policies at Harvard and UNC.
- *Grutter v. Bollinger* – settled law for 20 years.
- Universities may use race as part of a “holistic” admissions program.
- Foreshadowing of other established cases, such as *Croson*?



Questions?

