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MEMORANDUM

To: American Coalition for Equality
From: Harry Korrell & David Nordlinger
Date: January 10, 2022
Subject: Analysis of Proposed Executive Order

I. INTRODUCTION

You asked us to analyze the "WENA Proposed 'EQUITY NOW!"' Executive Order ("the Proposed Executive Order"), which would rescind Governor's Directive 98-01. In 2021, the Proposed Executive Order received support from the King County Council and Seattle City Council. On January 7, 2022, Governor Inslee stated his intention to rescind and replace Governor's Directive 98-01, but he did not indicate whether the new Executive Order would incorporate any of the directives of the Proposed Executive Order. This memorandum summarizes the history leading up to the Proposed Executive Order, analyzes whether the Proposed Executive Order's directives violate RCW 49.60.400 or the Equal Protection Clause of the U.S. Constitution, and concludes they do. This is not a legal gray area: Washington law and the U.S. Constitution generally prohibit government decision-making based on race, and the Proposed Executive Order would direct government agencies to make decisions in violation of these important protections for the civil rights of Washington residents.

II. SUMMARY

The legality of any executive order depends on whether the legislature has given its express or implied authorization to the executive. The Proposed Executive Order states that it complies with RCW 49.60.400 because the statute has been misinterpreted by the executive for the past 23 years. A court will likely not take the executive's claim of authority on its face but will examine whether the executive's interpretation of the statute, and its directives pursuant to that statute, are actually authorized by the statute and the intent of the legislature and citizens of Washington.

The Proposed Executive Order misreads *Parents Involved*. The Proposed Executive Order states that RCW 49.60.400 prohibits state agencies from using race or gender as the *sole* factor to select a lesser qualified candidate over a more qualified candidate. Neither RCW 49.60.400 nor the Washington Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wn.2d 660, 72 P.3d 151 (2003), limits the protections of the statute to a "sole factor" test. In fact, courts have interpreted both RCW 49.60.400 and the Washington Law Against Discrimination ("WLAD") generally to prohibit state agencies from using a protected

characteristic such as race or sex as a "substantial factor" in a covered state agency decision. Further, just two years ago, Washington voters rejected an attempt to limit RCW 49.60.400's protections to times when a defined trait is the "sole qualifying factor" in a covered state agency decision. There would have been no need to propose this change if this is what the statute already provided.

The Proposed Executive Order purports to direct a number of practices that are not authorized by, and would violate, RCW 49.60.400. The Proposed Executive Order authorizes race-conscious university admissions practices, preference points, price preferences, tying bid responsiveness to diversity goals, and binding goals. These practices are the types of preferences voters rejected when they adopted Initiative 200 ("I-200") and again when they rejected Initiative 1000 ("I-1000"). While the Proposed Executive Order purports to limit these practices to fit its definition of "preferential treatment," it is unclear how these directives are workable without violating RCW 49.60.400.

The Proposed Executive Order does not address Equal Protection Clause issues. Merely because a proposed policy is arguably allowed under RCW 49.60.400 does not mean the policy will be allowed under the Equal Protection Clause of the U.S. Constitution. The Proposed Executive Order would direct state agencies to move from race-neutral policies to race-conscious policies. In a challenge under the Equal Protection Clause, a court would review these policies using "strict scrutiny." Yet, there is no serious discussion in the Proposed Executive Order of compelling state interests or how these directives are narrowly tailored, both of which are essential components of the strict scrutiny analysis. Based on U.S. Supreme Court precedent, the race-based directives in the Proposed Executive Order would fail a court's strict scrutiny and, thus, violate the Equal Protection Clause of the U.S. Constitution.

III. THE PROPOSED EXECUTIVE ORDER

The Proposed Executive Order would rescind Governor's Directive 98-01 and supersede Executive Order 12-02. Therefore, understanding the context and directives of the Proposed Executive Order requires an understanding of what it seeks to change.

A. Initiative 200, Governor's Directive 98-01, and Executive Order 12-02

In 1998, Washington citizens voted to enact I-200, now codified as RCW 49.60.400 within the WLAD statutory framework. RCW 49.60.400(1) provides the general rule that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." RCW 49.60.400 provides certain exceptions to this general rule; for purposes of this memorandum, the most pertinent exception is that it "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." RCW 49.60.400(6).

In response to the passage of I-200, Governor Locke issued Governor's Directive 98-01. Because the new statute was designed to halt a number of affirmative action practices in public employment, education, and contracting, Governor's Directive 98-01 brought the state into compliance with the new law. The Governor's Directive began by acknowledging I-200 and reaffirming Washington's commitment to outreach and recruitment efforts to encourage diversity. The Governor

acknowledged that "[i]n cases of a direct, irreconcilable conflict, [he] will read I-200 as implicitly repealing or overriding pre-existing law." Governor's Directive 98-01 at 1. To this end, Governor's Directive 98-01 directed a number of changes across state government:

> In Public Employment: Governor's Directive 98-01 stated that prohibited factors may not be used in the final selection of applicants, and it discontinued the following four practices: (1) the plus 3 system, (2) exception testing, (3) exam screening adjustment, and (4) binding goals. *Id*. § I.A-C.
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> In Public Contracting: Governor's Directive 98-01 stated that prohibited factors may not be used in the final selection of applicants, and it discontinued the following practices: (1) adding preference points or price preferences for meeting Minority and Women Businesses Enterprises ("MWBE") goals, (2) requiring attainment of MWBE goals as a condition of responsiveness, (3) otherwise awarding a contract to a bidder who did not submit the lowest bid but met MWBE goals, and (4) enforcing mandatory goals with sanctions. *Id*. § II.A-B.
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> In Public Education: Governor's Directive 98-01 stated that prohibited factors may not be used as preferences in the final selection of applicants. It also recommended that "institutions of higher education that do not use state agencies in employment or contracting consider [the] directive to ensure consistency across state government in the application of I-200." *Id*. § III.A-B.

Fourteen years later, in 2012, Governor Gregoire issued Executive Order 12-02 directing the Office of the State Human Resource Director ("HR Director") to take responsibility for establishing diversity policies and strategies as part of Washington's overall talent management framework. Executive Order 12-02 tasked the HR Director with certain practices, such as reviewing, evaluating, and approving agency and institution workforce diversity plans and delivering an annual report to the Governor. Executive Order 12-02 also directed each agency, board, and commission to engage in various activities related to overseeing and implementing a diverse workforce, such as delivering trainings and implementing diversity recruiting, hiring, development, and retention strategies.

B. Initiative 1000 and Referendum 88

Washington citizens recently rejected the kinds of changes to the law contained in the Proposed Executive Order. In 2019, in voting on Referendum 88, Washington voters rejected I-1000, a bill brought forward by the legislature to amend RCW 49.60.400. Referendum 88's question was posed to voters as follows: "Initiative 1000 would allow the state to remedy discrimination for certain groups and to implement affirmative action, without the use of quotas or preferential treatment (as defined), in public education, employment, and contracting." *State of Washington Voters Pamphlet, General Election November 5* at 9 (2019). Even though the Proposed Executive Order makes no mention of this 2019 referendum, many of the Proposed Executive Order's directives are substantially similar to the proposed (and rejected) amendments found in I-1000, including the following:

- Defining preferential treatment as the use of one or multiple covered traits "as the sole qualifying factor to select a less qualified candidate over a more qualified candidate for

public education, public employment, or public contracting opportunity." Affirmative Action and Diversity Commission Initiative Measure, Wash. Initiative 1000, Part II § 3(11)(d).

- Defining affirmative action to include covered traits as factors considered in selection for public employment, contracting, and education, as well as recruitment, hiring, training, promotion, outreach, setting and achieving goals and timetables, and other measures designed to increase Washington's diversity. *Id.* § 3(11)(c).

- Amending the federal funds exception to allow the director of the office of financial management to determine that ineligibility will result in a material loss of federal funds. *Id.* § 3(6).

- Expressly authorizing the state to remedy discrimination against, or merely underrepresentation of, disadvantaged groups pursuant to a "disparity study" or proof in a court of law. *Id.* § 3(8).

- Expressly authorizing the state to implement affirmative action laws, regulations, and policies such as participation goals or outreach efforts that do not include quotas or preferential treatment. *Id.* § 3(9).

- Expressly authorizing the state to implement affirmative action laws, regulations, and policies that are not in violation of state or federal statute, final regulation, or court order. *Id.* § 3(10).

Washington voters rejected I-1000 and thus voted to maintain RCW 49.60.400's language as originally adopted in I-200.

C. Justification for, and Contents of, the Proposed Executive Order

The Proposed Executive Order states that its directives are consistent with the language, and Washington Supreme Court interpretation, of RCW 49.60.400, and it contends that the executive has incorrectly interpreted the statute for the past 23 years. In addition to the changes to RCW 49.60.400 discussed above, the Proposed Executive Order includes directives establishing affirmative action goals, statutory interpretations of RCW 49.60.400, and certain practices that use classifications based on race and gender. The express goal of some of these measures is to accomplish a preferred racial balance in public employment. Directives relevant to this memorandum's analysis include the following:

- "[R]eaffirm[ing] Washington state's commitment and immediate implementation of all Affirmative Action programs which replace systemic racism with systemic equity, without quotas and without any preferential treatment which uses solely race or gender to select a lesser qualified candidate over a more qualified candidate for a public education, employment or contracting opportunity." Proposed Executive Order at 2.

- Defining preferential treatment as "government action which uses ***solely*** race or gender to select a less qualified applicant over a more qualified applicant." *Id.* § III(1) (emphasis added).

- Authorizing the consideration of race, sex, color, ethnicity and national origin when hiring an applicant for public employment, education, and contracting, as long as these are not the ***sole factors*** used to select a lesser qualified candidate over a more qualified candidate for an employment opportunity. *Id*. §§ IV(A), V(A), VI(A) (emphasis added).

- Directing the Office of Financial Management to "establish an interagency Healing, Reconciliation & Compensation task force, Co-Chaired by the Director of the Office of Financial Management and Director of the Office of Equity" to recommend to the Governor "financial relief which Washington may extend to those certified small, minority and women owned contractors who suffered nearly $4 billion of lost contracting opportunities." *Id*. § II(3).

- Authorizing binding affirmative action plans in public employment and public contracting. *Id*. §§ IV(B), V(B).

- Authorizing preference points and price preferences for meeting MWBE goals, requiring attainment of MWBE goals as a condition of responsive bids, and otherwise awarding a contract to a bidder who did not submit the lowest bid but who met MWBE goals. *Id*. § V(B).

- Directing Washington state government to adopt the public employment goal that by June 30, 2024, the gender and racial diversity of Washington state workforce reflects no less than the percentage of women and people of color who reside in Washington state. The Office of Financial Management would establish new goals each year until employment/population parity is reached. *Id*. § IV.

- Directing the intensification of recruitment and outreach diversity programs in public employment and public contracting, *id*. §§ IV(C), V(C), and encouraging the intensification of recruitment and outreach programs in public education, *id*. § VI(B).

This context is important in understanding the fatal flaws in the Proposed Executive Order. These flaws leave the Proposed Executive Order open to challenges under both RCW 40.60.400 and the Equal Protection Clause of the U.S. Constitution, challenges that it will fail.

IV. ANALYSIS

A. The Legality of Executive Orders Depends on Legislative Authorization.

"The legislative authority of the state of Washington shall be vested in the legislature . . . ." WASH. CONST. Art. II, § 1. A fundamental function of the Legislature is "to set policy and to draft and enact laws." *Wash. State Legislature v. Inslee*, 2021 WL 5227428, 498 P.3d 496 (2021) (quoting *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009)). "The Legislature is prohibited from delegating its purely legislative functions[,]" which "include the power to enact, suspend, and repeal laws, and the power to declare general public policy." *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). This is because separation of powers is a "foundational constitutional principle . . . which 'ensures that the fundamental functions of each coordinate branch of government remain inviolate.'" *Inslee*, 498

P.3d at 508 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). While the Executive Branch cannot wield purely legislative powers, the citizens of Washington State can through the initiative process. The power of the initiative process is "[o]ne of the foremost rights of Washington State citizens." *Maleng v. King Cty. Corr. Guild*, 150 Wn.2d 325, 330, 76 P.3d 727 (2003). In enacting a statute through the initiative process, citizens exercise "the same power of sovereignty as exercised by the Legislature." *Id.* (quoting *Love v. King County*, 181 Wash. 462, 469, 44 P.2d 175 (1935)).

The Constitution vests the Executive Branch with the power to faithfully execute the law. WASH. CONST. Art. III, § 5; *see Authority of Governor to Issue Executive Order Having the Force and Effect of Law*, AGO 1991 No. 21 at 5-6 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The level of executive power vested in the Governor depends upon whether the Legislature gave the Governor express or implied authorization to pursue a particular policy. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). In his famous concurrence, Justice Jackson detailed three situations the President might face:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. . . .

Id. at 635-38 (footnotes omitted); *see also* AGO 1991 No. 21 at 5-6 (describing and applying Justice Jackson's concurrence in the context of the Governor of Washington's executive power). Therefore, to determine whether the Governor has the authority to issue the Proposed Executive Order, it is necessary to analyze whether its proscriptions and prescriptions are in harmony or conflict with any express or implied authorization of the Legislature. And as the citizens acted as the Legislature when voting on the initiatives at issue here, the voice of the citizens of Washington State is also an important indicator of legislative authorization.

Even though the Proposed Executive Order claims it is faithfully executing RCW 49.60.400, such declarations are not necessarily taken at face value. Reviewing the various directives in the Proposed Executive Order, some directives are in accordance with the law, but a number of directives and interpretations of RCW 49.60.400 are incompatible with the expressed will of the Legislature and citizens of Washington, and, thus, would likely constitute unauthorized exercises of legislative power by the Governor.

B. The Proposed Executive Order Misreads *Parents Involved* to Narrow the Protections Afforded by RCW 49.60.400.

The Proposed Executive Order is predicated upon reading *Parents Involved* to define preferential treatment as meaning only "government action which uses *solely* race or gender to select a less qualified applicant over a more qualified applicant." Proposed Executive Order § III(1) (emphasis added). There is a large practical and legal difference between a prohibition on using a factor and a prohibition on "solely" using a factor. If RCW 49.60.400's prohibition was limited to times where the state made a decision based *solely* on a prohibited factor, courts would apply a "but-for" test. This would mean that the state would only violate RCW 49.60.400 if race or gender was the only reason for the state's decision. *See Gross v. FBL Fin. Servs., Inc.* 557 U.S. 167, 176 (2009) (analyzing the phrase "because of" in the context of the Age Discrimination in Employment Act of 1967). However, as explained below, RCW 49.60.400 bars the use of a prohibited factor, and in similar situations, courts apply a "substantial factor" test. This means the state would violate the statute if race or gender was a "significant motivating factor" in the state's decision. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). This is a broader prohibition on the state's use of factors such as race and gender.

RCW 49.60.400(1) prohibits the state from discriminating against, or granting preferential treatment to, any individual or group *on the basis of* race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. *Id*. (emphasis added). In interpreting this provision, *Parents Involved* held "RCW 49.60.400 prohibits reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." 149 Wn.2d at 689-90. *Parents Involved* does not state that RCW 49.60.400's reverse discrimination prohibition is limited to times where the Government *solely* used race or gender. If the Legislature or Court had meant "sole use" of a prohibited factor, at least one of them would have stated so explicitly. *Cf. Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (courts "must not add words where the legislature has chosen not to include them") (citation & internal quotation marks omitted).

That RCW 49.60.400 bars the state's use of a prohibited trait as a "substantial factor" in public education, employment, and contracting decisions is supported by later court interpretation of *Parents Involved*. In *Dumont v. City of Seattle*, 148 Wn. App. 850, 200 P.3d 764 (2009), the Washington Court of Appeals, Division I, considered a claim by a white City of Seattle fire fighter that the City of Seattle fire chief violated RCW 49.60.400 by promoting a less qualified candidate over him on the basis of race. *Id*. at 854-55. The Court allowed the claim to proceed to trial, holding that the plaintiff had shown that "the jury could reasonably conclude that Chief Morris actually promoted Lanier instead of Dumont *substantially* because Lanier is African American." *Id.* at 863 (emphasis added).

Legislative intent of RCW 49.60.400 confirms that its protections are not limited by a "sole factor" test. When a statute is ambiguous, courts will look to legislative intent. *See Parents Involved*, 149 Wn.2d at 683. To analyze legislative intent, courts may look to "the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (citation & internal quotations marks omitted). RCW 49.60.400 is part of the WLAD statutory scheme, which prohibits a number of discriminatory practices. WLAD provides a private cause of action and "a

plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority." *Jin Zhu v. N. Cent. Educ. Serv. Dist.—ESD 171*, 189 Wn.2d 607, 614, 404 P.3d 504 (2017) (citation & internal quotation marks omitted). It is well-settled law that WLAD is to be "construed liberally." RCW 49.60.020; *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 505, 441 P.2d 1203 (2019), *cert. denied*, *Arlene's Flowers, Inc. v. Wash.*, 141 S. Ct. 2884, 210 L. Ed. 2d 991, *reh'g dismissed*, 142 S. Ct. 521 (2001). It is also well-settled that courts apply the "substantial factor" test to WLAD claims. *See Arlene's Flowers, Inc.*, 193 Wn.2d at 502 ("that the discrimination occurred 'because of' the plaintiff's status or, in other words, that the protected status was a substantial factor causing the discrimination"). In affirming the application of the "substantial factor" test to WLAD claims, the Washington Supreme Court stated that to hold the determining factor test applied to WLAD claims "would be contrary to Washington's 'resolve to eradicate discrimination.'" *Scrivener*, 181 Wn.2d at 445 (quoting *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995)). Therefore, limiting the prohibition in RCW 49.60.400 to situations in which race or sex is the "sole factor" in a government decision would be inconsistent with not only the plain language of the statute but also settled precedent regarding the statutory scheme within which RCW 49.60.400 resides.

Finally, in 2019, Washington voters rejected I-1000, which would have added the language "sole qualifying factor" to the definition of preferential treatment in RCW 49.60.400. If Washington voters had intended RCW 49.60.400 to apply a "sole factor" test, they would have voted to do so when they had the chance in 2019. Since the time that amendment was considered and rejected, the legislature has not amended RCW 49.60.400 to insert any similar limiting language.

In summary, when I-200 was approved in 1998, the reasonably informed voter understood its language to bar Washington state agencies from using race or gender as a "substantial factor" in public employment, contracting, and education decisions. Since *Parents Involved*, courts have applied the "substantial factor" test to RCW 49.60.400 and other WLAD claims. And, just two years ago, the citizens of Washington rejected adding the language "sole qualifying factor" to the statute. Therefore, a court is not likely to conclude that there is any express or implied authorization by the legislature to the executive to apply a "sole factor" test. Court decisions, including *Parents Involved*, undercut rather than support the Proposed Executive Order's interpretation of RCW 49.60.400.

C. The Executive Order Contains Directives That Are Inconsistent with RCW 49.60.400.

1. Race-Conscious Admissions Practices in Higher Education Likely Violate RCW 49.60.400.

The Proposed Executive Order would direct public institutions of higher education to abandon race-neutral admissions policies and adopt race-conscious policies, including considering race for scholarship and financial aid determinations. As a predicate matter, under the U.S. Constitution, universities may only use race-conscious admissions practices for the purpose of attaining a critical mass of diverse students to unlock "the educational benefits of student body diversity." *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003). The permissible purpose is to give educational benefits to fellow students, not to remedy a perceived racial imbalance or past societal discrimination. There is no requirement under the law that universities attain a critical mass of diverse students.

Moreover, universities cannot use race-conscious policies for the sake of diversity alone. It is well-settled that racial balancing would be an unauthorized motive for considering race in admissions. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). Yet, the Proposed Executive Order makes no mention of educational benefits and focuses instead on racial balancing.

Apart from these Equal Protection Clause considerations, RCW 49.60.400 prohibits the use of race-conscious admissions practices by Washington's public institutions of higher education. Even though the Proposed Executive Order claims that RCW 49.60.400 only prohibits the use of race as a ***sole*** factor, as described above, the existing statute prohibits the use of race as a ***substantial*** factor in admissions. This means that race may not be a significant motivating factor in admissions decisions. But when a university sets a goal of attaining a critical mass of diversity, and considers race in furtherance of this goal, race appears to be a significant motivating factor, in violation of RCW 49.60.400, which expressly forbids the state from granting a preference based on race. So even if a race-conscious admissions policy were designed to be permissible under the Equal Protection Clause of the U.S. Constitution (such as a policy, approved in *Grutter*, of considering race as a "plus" factor in pursuit of diversity), it likely violates RCW 49.60.400. Similarly, considering race in decisions to grant financial aid or scholarships would constitute a preference that violates RCW 49.60.400.

2. Preference Points, Price Preferences, and Mandatory MWBE Goals Are Likely Prohibited by RCW 49.60.400.

The Proposed Executive Order would expressly authorize certain preferences in public contracting: (1) preference points, (2) price preferences, (3) requiring attainment of MWBE goals as a condition of a responsive bid, and (4) otherwise awarding a contract to a bidder who did not submit the lowest bid but met MWBE goals. These preferences would be authorized so long as none of these practices is used to select a lesser qualified candidate over a more qualified candidate solely based on race or gender. However, even with this limit, it is likely these practices would violate RCW 49.60.400. I-200's ballot statement expressly criticized the government's "use of racial quotas, *preferences* and set-asides." *State of Washington Voters Pamphlet, General Election, November 3* at 14 (1998) (Statement for I-200) (emphasis added). It is unclear how the state could argue these proposed practices are not what voters had in mind when they passed I-200. "Preference points" and "price preferences" are preferences by definition. Furthermore, courts typically avoid interpreting statutes in ways that lead to a strained or absurd result. *Burns v. City of Seattle*, 161 Wn.2d 129, 150, 164 P.3d 475 (2007). There is a strong argument that RCW 49.60.400 cannot reasonably be read to allow these practices, especially preference points and price preferences.

Additionally, it is unclear how these directives could be workable given existing law. Even if we were to accept the Proposed Executive Order's definition of preferential treatment, it is unlikely that any of these practices could be implemented without selecting a lesser qualified candidate over a more qualified candidate. For example, the Proposed Executive Order calls for conditioning bid responsiveness on attaining MWBE goals. MWBE goals focus on "participation by minority and women-owned and controlled businesses." RCW 39.19.020. To attain a MWBE certification, a business must show that it is owned or controlled by a "socially disadvantaged individual," which is defined as "[a] person who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities." WAC 326-02-030(26)(a). Individuals are presumed to be socially

disadvantaged if they are women or identify as one of a number of minority racial groups. WAC 326-20-048. If bid responsiveness is conditioned on attaining MWBE goals, then the state agency would have to reject a lowest bidder who meets all requirements apart from MWBE goals. That lowest bidder arguably would be the most qualified candidate and would have been selected but-for race or gender considerations as laid out in MBWE goals. RCW 49.60.400 expressly prohibits conditioning who is "qualified" for a government contract based on race or gender.

3. Conditioning Government Expenditure to Public Contractors on the Basis of Race or Gender Likely Violates RCW 49.60.400

The Proposed Executive Order would direct the establishment of a "Healing, Reconciliation & Compensation task force" to recommend to the Governor "financial relief which Washington may extend to those certified small, minority and women owned contractors who suffered nearly $4 billion of lost contracting opportunities due to the past 23 years of Washington's incorrect implementation of Initiative 200." Proposed Executive Order § II(3). The premise of this task force is that minority and women owned contractors have suffered from Governor's Directive 98-01, therefore minority and women owned contractors should be compensated by the state. This would mean that non-minority, male owned contractors would be ineligible for state money. It is a mystery how such a policy could possibly be compatible with RCW 49.60.400, regardless of whether one applies the "substantial factor" or "sole factor" test. The state's providing money to contractors only if they are of a minority race or female is preferential treatment to those contractors and discrimination against ineligible contractors.

Proponents may argue that providing state money to contractors on the basis of race or sex falls within RCW 49.60.400(6)'s federal program eligibility exception. However, for this exception to apply, the state would have to provide a showing that it has "a strong basis in evidence" to believe it will be liable under a disparate-impact statute and that its actions are necessary to comply with federal law. *Ricci v. DeStefano*, 557 U.S. 557, 584 (2009). This burden is not met by a disparate impact showing alone; rather, the state would need to show that its past practices "were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative." *Id.* at 587. Rather than make this showing, the Proposed Executive Order assumes that compensation is appropriate and thus directs resources in furtherance of this compensation goal.

4. Intensifying Outreach and Recruitment Efforts Is Arguably Consistent with RCW 49.60.400.

The Proposed Executive Order would direct state agencies to intensify outreach and recruitment efforts in public employment, education, and contracting. Outreach and recruitment efforts do not likely fall violate the RCW 49.60.400's prohibition of preferences based on race or sex. Governor's Directive 98-01 directed the state government to conduct outreach and recruitment efforts over the past 23 years, and there has not been a significant legal challenge to this. It is unlikely that Washington courts would expand the holding of *Parents Involved* to bar such efforts. That is not to say the Governor is free to make any directive concerning outreach and recruitment. The executive could overstep its bounds by making certain goals mandatory or binding or by applying apply the force and effect of law to coerce accomplishment certain goals. We would need to review the details of any specific program to determine if it violates RCW 49.60.400.

D. The Proposed Executive Order Violates the Equal Protection Clause.

The Proposed Executive Order would direct the state to replace longstanding race-neutral policies with race-conscious policies. Many of its directives would likely violate the Equal Protection Clause of the U.S. Constitution even if a court were to find they do not violate RCW 49.60.400. Even where the motive behind a government policy is well-intentioned, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). A court will analyze a racial classification under strict scrutiny, that is: "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. It is the state's burden to demonstrate that "race-neutral alternatives that are both available and workable do not suffice." *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) (citation & internal quotation marks omitted).

RCW 49.60.400 prohibits reverse discrimination, but the Equal Protection Clause prohibits a broader category of practices. The policy at issue in *Parents Involved* provides such an example. The Washington Supreme Court found that the Seattle School District's racial classification did not constitute reverse discrimination prohibited by RCW 49.60.400, but the United States Supreme Court still held that the practice violated the Equal Protection Clause because it was not narrowly tailored to accomplish a compelling governmental interest, in that case the goal of fostering the educational and socialization benefits of diversity in schools. *Parents Involved*, 551 U.S. at 725-27 (plurality opinion).

The stated goals in the Proposed Executive Order likely fail the strict scrutiny courts would apply in a challenge under the Equal Protection Clause. The Proposed Executive Order's main justification for these directives appears to be the claim that Washington has wrongly interpreted RCW 49.60.400 for 23 years. Even if the proponents of the Proposed Executive Order are correct in their evaluation of RCW 49.60.400 and Governor's Directive 98-01, the fact that a ***state*** statute does not prohibit a racial classification does not create a compelling interest sufficient to justify the use of racial classifications for purposes of the ***federal*** Equal Protection Clause analysis. The Proposed Executive Order references a racial imbalance in public employment, but it is well-settled that racial balancing is "patently unconstitutional." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311, 133 S. Ct. 2411 (2013) (quoting *Grutter*, 539 U.S. at 330). "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.* (quoting *Parents Involved*, 551 U.S. at 732 (plurality opinion)).

Additionally, the Proposed Executive Order cites to past disparity in public contracting opportunities as justification for racial preferences including a Healing, Reconciliation & Compensation task force, preference points, price preferences, and mandatory MWBE goals. The U.S. Supreme Court has held that some remedial policies can justify preferential treatment on the basis of race. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion). However, the government has to meet three criteria: "First, the policy must target a specific episode of past discrimination. . . . Second, there must be evidence of *intentional* discrimination in the past. . . . Third, the government must have had a hand in the past

discrimination it now seeks to remedy." *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (citations omitted). Alleviating the effects of broad societal discrimination is not a compelling interest, however. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986)).

Recently, federal courts have enjoined the U.S. Congress's attempts to link COVID-19 relief money to racial classifications because the federal government could not show a compelling interest to justify the practice. *See Vitolo*, 999 F.3d at 361-64; *see also Faust v. Vilsack*, 519 F. Supp. 3d 470, 475-76 (E.D. Wis. 2021). Like Congress's race-based COVID relief programs, the Proposed Executive Order does not satisfy the *J.A. Croson* standard. The Proposed Executive Order points to societal discrimination, especially regarding COVID-19, as a justification, but "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* (quoting *Shaw*, 517 U.S. at 909-10). Moreover, the evidence stated in the Proposed Executive Order is weak. General assertions of racial disparity in public contracting is the type of industry-wide evidence that courts have deemed insufficient. *See id.* at 361-62 (quoting *J.A. Croson*, 488 U.S. at 498). And "[a]n observation that prior, race-neutral efforts failed to reach minorities is no evidence at all that the government enacted or administered those polices in a discriminatory way." *Id.* at 362.

In addition, even if the state could satisfy the compelling interest prong of strict scrutiny, the Proposed Executive Order shows little evidence of narrow tailoring, which the state must also prove to meet its burden under a strict scrutiny analysis. The Executive Order does not appear to give any consideration to race-neutral alternatives. The *Faust* court enjoined the United States Department of Agriculture from implementing a loan-forgiveness program based solely on racial classifications for a similar reason. *Faust*, 519 F. Supp. 3d at 476-77. There, the Government argued that the loan-forgiveness program was necessary to remedy past discrimination in other USDA programs, specifically statistical evidence purportedly showing that recent agriculture subsidies and pandemic relief funds did not go to minority farmers. *Id*. at 475-76. With respect to narrow tailoring, the court said "[t]he obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin." *Id.* at 476. Absent more evidence of a compelling interest and that race-neutral alternatives have been considered in good faith, a court will likely find that many of the directives in the Proposed Executive Order violate the Equal Protection Clause.

Of course, if the Proposed Executive Order violates the Equal Protection Clause (and it does), that exposes state agencies and political subdivisions to liability under 42 U.S.C. § 1983. *See, e.g.*, *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978) (municipalities and other local governmental units among those persons to whom § 1983 applies); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992) (setting out elements of § 1983 claim), *abrogated on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 702-03, 451 P.3d 694 (2019), *as amended* (2020).