

THE CHANGING LEGAL LANDSCAPE FOR STATE ARTS AGENCY GRANT MAKING

NASAA ASSEMBLY 2024

This document contains notes from a legal briefing provided to state arts agencies in October of 2024. The goal of this briefing was to acquaint state arts agencies with recent court rulings holding the potential to affect grant making by public and private entities, including arts funders. The information is intended to be educational, not prescriptive.

For current information about state arts agency strategies for attaining broad distribution of grant funds and policy trends affecting that work, please contact Kelly Barsdate at NASAA. For legal counsel, state arts agencies are always encouraged to consult their assigned state attorneys. For federal compliance guidance, refer to resources from the National Endowment for the Arts Office of Civil Rights.





The Changing Legal Landscape for Grant Making

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Tony has over 30 years of experience representing government contractors and commercial businesses. His practice encompasses all aspects of federal government contracting. Tony also works closely with attorneys in the Firm's Business & Transactions Group on corporate transactions and the Labor & Employment Group to address employer-employee challenges in the highly regulated market of government contracting. Tony has also achieved an "AV Preeminent" rating from Martindale-Hubbell, which is the highest peer rating, signifying many of Tony's peers rank him at the highest level of professional excellence for his legal knowledge, communication skills, and ethical standards.

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Equal Protection Under the Constitution

- “[N]or deny to any person within its jurisdiction the equal protection of the laws.”
- Applies whenever a person’s race, national origin, and immigration status are considered by a government actor, whether for an advantage or disadvantage
- Must overcome “strict scrutiny”:
 - Compelling Governmental Interest
 - Narrowly Tailored

Students for Fair Admissions v. Harvard (U.S. 2023)

- Harvard and UNC considered race among several factors in admitting students
- Race was used as a plus factor, so the Equal Protection clause was implicated
- Did not survive strict scrutiny, because promoting diversity was not a “measurable goal” and did not have a “logical endpoint”
- Holding: The universities cannot consider race by itself, only how race affects the individual applicant’s life in a broad discussion about an applicant’s character

Ultima Services v. USDA, SBA (E.D. Tenn. 2023)

- The Small Business Administration employed a “rebuttable presumption” of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups
- A white woman-owned business sued for violation of the Equal Protection Clause
- Holding: SBA may no longer use a rebuttable presumption in determining social disadvantage

Nuziard v. Minority Business Development Agency (N.D. Tex. 2024)

- Minority Business Development Act (“MBDA”) provides assistance to Minority Business Enterprises (“MBEs”)
- The statute defines certain races as presumptively MBEs, others had to prove their status
 - The Agency implementing the MBDA did not provide any mechanism for proving status
- Holding: The Agency is prohibited from considering an applicant’s race

Vitolo v. Guzman (6th Cir. 2021)

- SBA administered the American Rescue Plan Act, which provided grants to “socially and economically disadvantaged” restaurant owners
 - Defined by reference to the SBA
- Holding: The SBA is prohibited from considering an applicant’s race or sex

American Alliance for Equal Rights v. Fearless Fund (11th Cir. 2024)

- Section 1981 prohibits private parties from racially discriminating in making or enforcing contracts
- Fearless Fund is a venture capital fund that holds the Fearless Strivers Grant Contest, which awards winners \$20,000 and mentorship opportunities
- Applicants must be women of color
- Holding: Fearless is preliminarily enjoined from using race in accepting submissions for the contest

American Alliance for Equal Rights v. Founders First (N.D. Tex. 2024)

- Section 1981 prohibits racial discrimination from private parties racial discrimination in making or enforcing contracts
- Founders First runs the Texas Job Creators Grant which awards \$50,000 to businesses in Texas
- Applicants must be Latinx, Black, Asian, Women, LGBTQIA+, a Military Veteran, or someone located in a low- to moderate-income area
- AAER represented an applicant who met none of the above criteria
- Holding: Founder First is preliminarily enjoined from continuing the contest or enforcing the contest's racial eligibility requirements until further Order from the Court

When Is the Equal Protection Clause Implicated?

- The Equal Protection Clause is implicated whenever race is considered, regardless of use
- Courts generally don't consider how race was used, whether as eligibility criteria, one factor among many (weighted or not), or if only a presumption
- Harm is the obstacle of one's race, not the ultimate denial of award

What Is a “Compelling Interest”?

- An interest is compelling if it passes three criteria:
 - The government has identified specific instances of racism
 - General “societal discrimination” is insufficient
 - Must have measurable goals that remedy those instances of racism
 - The government can prove that there has been intentional discrimination
 - Must show more than statistical disparities, need causal factors
 - Statistical disparities that control for contributing factors may be sufficient
 - The government participated, whether actively or passively
 - Government must have participated in the relevant industries

What Is “Narrowly Tailored”?

- Courts consider many factors:
 - The flexibility and duration of the relief
 - Is the use of race necessary?
 - Can the remedy be flexible to achieve other goals?
 - Does the program have a logical end?
 - Necessity
 - Are there specific goals that the government is trying to accomplish?
 - Over- and under-inclusive
 - Are the racial classifications supported by evidence?
 - Race-neutral alternatives were considered
 - Impact on third parties
 - Are there any adverse impacts for groups not a target of the remedy?

Concluding Thoughts

- When using race in grant programs, the Equal Protection clause will almost always be implicated
- Federal programs targeting racial discrimination must be supported by strong evidence
 - E.g., statistical disparities in the relevant industries that control for other contributing factors
- The government must have participated, at least, passively
- The programs must have set and measurable objectives

Questions?



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