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Office of the Attorney General

State of Washington
AGO 2017 No. 2
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LAW AGAINST DISCRIMINATION—AFFIRMATIVE ACTION—DISCRIMINATION —CONTRACTS—CONTRACTORS AND SUBCONTRACTORS—Use Of Race-Or Sex-Conscious Measures Or Preferences To Remedy Discrimination In State Contracting

***1** 1. **Initiative 200 does not categorically prohibit all uses of race- or sex-conscious measures in state contracting. The measure allows the use of measures that take race or gender into account in state contracting without elevating a less qualified contractor over a more qualified contractor. In narrow circumstances, an agency may be allowed to use a narrowly tailored preference based on race or sex when no other means is available to remedy demonstrated discrimination in state contracting. State agencies may also employ race- or sex-based preferences when necessary to do so in order to avoid losing eligibility for programs providing federal funds.**

2. **The conclusions summarized above do not solely depend on whether an agency receives federal funds. The conclusion that Initiative 200 allows race- or sex-conscious measures that do not amount to preferences applies without regard to whether the agency receives federal funds. The conclusion that agencies may use preferences based on race or sex in order to remedy sufficiently documented discrimination in state contracting also applies without regard to whether the agency receives federal funds. The conclusion that an agency may employ a preference when necessary to do so in order to avoid the loss of eligibility for federal funds necessarily depends upon the agency's receipt of federal funds in that program or some other program.**

Chris Liu
Director
Department of Enterprise Services
1500 Jefferson Street SE
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Dear Director Liu:

By letter previously acknowledged, you have requested our opinion on the following questions:

1. Does Initiative 200 prohibit the State from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities?

2. Does the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act of 1964?

BRIEF ANSWERS

1. Initiative 200 (I-200) does not categorically prohibit all race- and sex-conscious actions regarding state contracting. I-200 draws a distinction between (1) preferences that have the effect of using race or gender to select a less qualified contractor over a more qualified contractor, and (2) race- or sex-conscious measures that do not have that effect. I-200 conditionally prohibits the former, with important exceptions, but does not prohibit the latter. We therefore draw three conclusions in response to your first question:

***2** a. I-200 prohibits only situations in which government uses race or gender to select a less qualified contractor over a more

qualified contractor. We use the word "preference" to describe such measures. It does not prohibit measures that, although race- or sex-conscious, do not use race or gender to select a less qualified contractor over a more qualified contractor. This category of measures that are not prohibited is open to innovation, but examples could include aspirational goals, outreach, training, use of race or gender as a tiebreaker between equally qualified contractors, and similar measures that do not cause a less qualified contractor to be selected over a more qualified contractor. RCW 49.60.400(1).

b. Under very narrow circumstances, I-200 may allow agencies to use preferences based on race or gender that may elevate a less qualified contractor over a more qualified contractor. Such circumstances could arise based upon evidence of discrimination in state contracting that cannot be resolved through race- or sex-neutral means. We do not suggest that a statistical disparity documented through a valid disparity study is necessarily sufficient to justify the use of a preference. We do conclude, however, that evidence of discrimination in state contracting that race- or sex-neutral measures are insufficient to remedy may justify the use of a race- or sex-conscious preference to remedy that disparity. RCW 49.60.400(1), (3).

c. Finally, we conclude that agencies may employ preferences based on race or gender when necessary to avoid losing eligibility for programs providing federal funds. RCW 49.60.400(6).

2. Our answer to your first question depends only partially upon whether the contracts at issue are being awarded by a state agency that receives federal funds. Our conclusions summarized in items 1(a) and 1(b) above do not depend on whether the agency receives federal funds. Our conclusion in item 1(c) above is based upon RCW 49.60.400(6), which provides an exception to I-200's prohibition against the use of preferences when necessary to avoid a loss of federal funds.

ANALYSIS

In 1998, Washington voters approved I-200, which added one section to the Washington Law Against Discrimination. Laws of 1999, Reg. Sess., ch. 3, § 1 (*codified as* RCW 49.60.400). The initiative provides: "The 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(1). It then includes a number of clarifications, exceptions, and other provisions. RCW 49.60.400(2)-(10). The Washington Supreme Court has construed the statute to "prohibit[] reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 149 Wn.2d 660, 689-90, 72 P.3d 151 (2003). Your questions address the application of this statute in the context of public contracting, assuming that significant racial and gender disparities are documented in a disparity study and that race-neutral measures are insufficient to remedy those disparities.

***3** Three preliminary observations are in order before turning to your questions.

First, our analysis is necessarily general. You have not asked us to offer any views on the factual or legal sufficiency of any disparity study as evidence of underlying racial or gender disparities, and properly so. Our opinions process is not well-suited for consideration of factual questions. A valid disparity study evaluates statistical evidence, other factual evidence, and legal standards to determine whether a legally significant disparity exists. *See* 49 C.F.R. § 26.45. We accordingly accept the assumption in your question that a disparity study documents disparities without attempting to evaluate any specific circumstance.

Second, our opinion expresses no view as to what the law *should* be, but rather simply provides our best analysis of what the law *currently is*, without advocating public policy. *See* AGO 2016 No. 1, at 3 (describing the focus of our opinions process); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014) ("In matters of statutory construction, we are tasked with discerning what the law is, not what it should be.").

Finally, the use of race- and sex-conscious measures to address contracting disparities is also covered by a body of United States Supreme Court precedent applying federal constitutional principles. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (rejecting on equal protection grounds a requirement that construction contracts satisfy a set-aside[1] requirement for minority subcontractors). Your questions specifically concern I-200, and therefore this opinion assumes for the sake of discussion that any measures at issue would be limited to ones that fall within federal

constitutional parameters. This analysis is limited to construing I-200.

With those points in mind, we turn to your questions.

1. Does Initiative 200 prohibit the State from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities?

I-200 does not prohibit all race- and sex-conscious measures.[2] Rather, it prohibits only measures that have the effect of elevating less qualified contractors over more qualified contractors. *Parents Involved*, 149 Wn.2d at 689-90. Not all race- or sex-conscious measures would have this effect (*id.*), as discussed more fully below.

Additionally, if significant disparities are adequately documented in a disparity study *and* race- and sex-neutral measures are insufficient to remedy those disparities, there are two limited circumstances in which I-200 would allow the use of narrowly tailored preferences as remedies. First, if an agency concludes that there is a strong basis in evidence to support a claim against the state for discriminatory contracting practices within the program in question and can demonstrate that a preference based on race or sex is necessary to avoid illegal race or gender discrimination, then I-200 may not prohibit granting preferential treatment as a remedy. Second, if a race- or sex-conscious remedy is necessary in order to establish or maintain eligibility for a federal program where ineligibility would result in a loss of federal funds to the state, I-200 would not prohibit the use of preferences in contracting.

***4** Analysis begins with the text of I-200, which reads, in pertinent part:
(1) The 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.

....

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.

....

(6) This section 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(1), (3), (6). The three quoted paragraphs establish the statute's general rule, a limitation on that general rule, and one of several exceptions to the general rule.[3]

a. RCW 49.60.400(1) And (3) Prohibit Only "Reverse Discrimination" In Which Government Uses Race Or Gender To Select A Less Qualified Contractor Over A More Qualified Contractor

The Washington Supreme Court has construed RCW 49.60.400(1) and (3) in the context of considering a program for assigning students to specific high schools within a public school district. *Parents Involved*, 149 Wn.2d at 682-90. *Parents Involved* concerned a process that the Seattle School District used in assigning students to the various high schools in the district, which involved consideration of race as one of several "tie breakers" when more students wanted to attend a particular school than that school could accommodate. *Parents Involved*, 149 Wn.2d at 666-68.

The educational context of *Parents Involved* affected the court's analysis because the court relied in part on the mandate of the Washington Constitution for the state to provide a general and uniform basic education to all children regardless of race. *Parents Involved*, 149 Wn.2d at 679-82 (discussing Const. art. IX, § 1). The Court reasoned that "the justifications for racial integration are strong and lie close to the central mission of public schools." *Parents Involved*, 149 Wn.2d at 680. Nonetheless, the reasoning of *Parents Involved* applies more broadly than the educational context, because ultimately the Court's task was to construe the language of RCW 49.60.400. By its terms that statute applies to "operation of public employment, public

education, [and] public contracting" without distinction. RCW 49.60.400(1). The Court's reliance upon article IX, section 1 of the Washington Constitution adds weight to the Court's analysis, but does not suggest that the words of RCW 49.60.400 mean anything different in the educational context than they do when applied to public employment or public contracting.

The decision in *Parents Involved* focused on the phrases "discriminate against" and "grant preference to," occurring in both RCW 49.60.400(1) and (3). *Parents Involved*, 149 Wn.2d at 684. "Grant preferential treatment" denotes giving an advantage to members of one race over another. *Id.* at 685. "Discriminate" has two common meanings: "to distinguish between" or "to show prejudice against." *Id.* at 686. Based on legislative history and other interpretive aids, the Court accepted the second meaning as applicable to I-200, holding that it prohibits only "reverse discrimination," elevating a less qualified applicant over a more qualified applicant. *Id.* at 687.

***5** Applying the maxim that courts construe statutes to give effect to all their terms, the Court concluded that some race-conscious decisions are acceptable under I-200 because otherwise the statute would contain surplusage. *Id.* at 684-85 (citing *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)). "Subsection (3)," the Court reasoned, "unequivocally states that some government action within the subject area of the initiative would not be affected, and thus strongly suggests ... that some race conscious action by the government is permissible." *Id.* at 685.

RCW 49.60.400(1) and (3), taken together, leave room for race- and sex-conscious measures that do not actually elevate less qualified potential contractors over more qualified potential contractors. If subsection (1) stood alone as the only language included in I-200, it is possible that a court might construe it to preclude any consideration of race or sex at all. But the general rule of subsection (1) is limited by subsection (3), which clarifies that I-200 does not affect actions that do not discriminate against, or grant preferential treatment to, any person or group. RCW 49.60.400(3). This leaves room for measures that, although race- or sex-conscious, do not discriminate against or grant a preference to anybody. *Parents Involved*, 149 Wn.2d at 685. Such measures might include aspirational goals for minorities or women, solicitation of women and minority businesses to participate in public contracting, training and outreach targeted to women- and minority-owned firms, or other measures designed to increase participation in public contracting by underrepresented groups. Use of race or sex as a tiebreaker between equally qualified applicants, as approved in *Parents Involved*, or the use of other non-dispositive factors, may also be candidates for inclusion in this category. *See Parents Involved*, 149 Wn.2d at 666-68; *see also Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2210, 195 L. Ed. 2d 511 (2016) (approving under equal protection analysis the use of race as a non-dispositive factor in University admissions). For example, consistent with *Parents Involved*, an agency could potentially rank applicants as "exceptionally well qualified," ""well qualified," "qualified," and "not qualified," and use race or gender as a tiebreaker between applicants who fell within the same category.[4] So long as such measures do not elevate a less qualified applicant over a more qualified applicant, they do not fall within the prohibition of RCW 49.60.400(1) as limited by RCW 49.60.400(3). As the Washington Supreme Court concluded, "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." *Parents Involved*, 149 Wn.2d at 689-90. More explicitly, the statute does not prohibit a measure "based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant." *Id.* at 690.

***6** There is a potential contrary view under which it could be argued that RCW 49.60.400 prohibits any race- or sex-conscious actions even if they are merely in the nature of goals and outreach. The counter argument would likely draw upon California case law that construes that state's Proposition 209, an initiative that was similar to I-200. Proposition 209 added a provision to the California Constitution that contains the same language as RCW 49.60.400(1), but without any limitation comparable to RCW 49.60.400(3). Cal. Const. art. I, § 31 (Proposition 209). The California Supreme Court construed Proposition 209 to prohibit any race- and sex-conscious remedies even if such remedies are permissible under the federal constitution. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 568-69, 12 P.3d 1068, 101 Cal. Rptr. 2d 653 (2000). California cases have also interpreted "preferential treatment" as including not only fixed participation goals but also outreach efforts specifically aimed at minority and women contractors. *Id.* at 563-64; *see also Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 46, 51, 112 Cal. Rptr. 2d 5 (2001) (holding that outreach and inclusion efforts violate Proposition 209). But the Washington Supreme Court has already interpreted ""preferential treatment" more narrowly, and in doing so has concluded that RCW 49.60.400 does not ban all race-conscious decisions or actions. *Parents Involved*, 149 Wn.2d at 684-85. Our Court also distinguished California case law based on the fact that Proposition 209 amended the state constitution, while I-200 is statutory. *Id.* at 688-89. And, noting the absence of any provision comparable to RCW 49.60.400(3), our Court has held that California cases construing Proposition 209 are of limited value in construing I-200 because the text and context of the two states' measures are dissimilar. *Id.* at 688.

We therefore conclude that RCW 49.60.400(1) and (3) do not prohibit actions that, although race- or sex-conscious, do not elevate a less qualified contractor above a more qualified contractor. Such measures are not "preferences" prohibited by RCW 49.60.400(1). *Parents Involved*, 149 Wn.2d at 689-90.

b. RCW 49.60.400(1) And (3) Allow Preferences Based On Race Or Gender To Avoid Discrimination Against Women And Minorities Under Some Circumstances

RCW 49.60.400(1) and (3) also leave room under very narrow circumstances for actions that *do* favor female or minority contractors over other contractors. We conclude that a proper construction of RCW 49.60.400 combined with a strong parallel to a line of reasoning applied by the United States Supreme Court in interpreting a federal civil rights law support the conclusion that some preferences used to remedy demonstrated disparities may be allowed under narrow circumstances. This is so because otherwise circumstances could arise in which agencies find it impossible to simultaneously comply with two prohibitions set forth in RCW 49.60.400(1). We emphasize, however, that for reasons explained in our analysis these circumstances may be strikingly rare; we nonetheless consider them in order to fully respond to your question.

***7** RCW 49.60.400(1) prohibits *both* discrimination *against* women and minorities and preferential treatment *in favor* of women and minorities. This dual prohibition could lead to legally and factually complex choices for a state agency if a facially neutral policy (such as contracting rules) has the result of discriminating against women or minorities, but the agency has been unable to overcome that through measures short of preferences. For example, if a disparity study documented significant evidence of disparities based on race or gender in the state's contracting practices, the study could be evidence of discrimination that could violate the first prohibition in RCW 49.60.400(1). But to use a preference in favor of that group as a remedy could similarly violate the second prohibition against the use of preferences. The result would be to leave the state without any option that complies with the law.

Evidence of discrimination based on race or gender in this scenario may result from a disparate impact analysis. Under federal law, disparate impact evidence may be used to prove discrimination under Title VI of the federal Civil Rights Act. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 702-03 (9th Cir. 2009). The Washington Supreme Court has applied disparate impact analysis in cases arising in the employment context under the Washington Law Against Discrimination (WLAD). *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 681-82, 724 P.2d 1003 (1986). Though the Washington Supreme Court has never addressed whether RCW 49.46.400 similarly prohibits disparate impact discrimination, it is reasonable to assume that it does. RCW 49.60.400 uses the word "discriminate," which is the same word long understood to give rise to disparate impact liability elsewhere in WLAD. *See, e.g., Shannon v. Pay'n Save*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985). The Court had already interpreted the WLAD to prohibit disparate impact discrimination before the enactment of I-200, and so it would reasonably have incorporated that prior interpretation. *See Buchanan v. Int'l Brotherhood of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (the legislature is presumed aware of case law); *see also State v. Watson*, 160 Wn.2d 1, 8, 154 P.3d 909 (2007) (case law is also presumptively available to citizens). And RCW 49.60.400 specifies that it applies to "public employment, public education, or public contracting" without suggesting any difference in treatment among those three. RCW 49.60.400(1). This analysis would also be consistent with the federal courts' approach of analyzing disparate impact claims in contracting under Title VI in a similar manner to disparate impact claims under Title VII in employment. *See Darensburg*, 636 F.3d at 519.

Thus, if a plaintiff had evidence of discrimination in the state's contracting practices, the plaintiff could have a cause of action against the state under both RCW 49.60.400 and Title VI. Disparate impact theory allows a plaintiff to challenge seemingly objective practices that have a discriminatory effect without proof of discriminatory intent. *Shannon*, 104 Wn.2d at 727 (applying WLAD in the employment context). To establish a disparate impact claim, a plaintiff must demonstrate a prima facie case that (1) a facially-neutral policy (2) falls more harshly on a particular class. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 503, 325 P.3d 193 (2014). But merely showing a prima facie case is not enough to establish liability. "Once the plaintiff establishes the prima facie case, the burden shifts to the defendant to show that the challenged requirement has a 'manifest relationship' to the position in question." *Shannon*, 104 Wn.2d at 727. As a third step in the analysis, if "the employer meets this burden, the plaintiff may still prevail by showing that other less discriminatory alternatives can equally serve the employer's legitimate business requirements." *Id.*

***8** An agency could therefore face the choice of either discriminating against a group based on race or sex that cannot be

remedied by other means, or employing a preference to remedy that discrimination. The context of I-200 leaves room for an agency to use a narrowly tailored preference based on race or gender to resolve the dilemma. *See Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244-45, 350 P.3d 647 (2015) (considering statutory context in determining the plain meaning of a statute). The voters who enacted I-200 directed that it be codified as part of WLAD, which makes it part of a law that is to be liberally construed for the purpose of eliminating and preventing discrimination. Laws of 1999, Reg. Sess., ch. 3, § 3 (codification instruction for I-200); RCW 49.60.010 (legislative purpose of WLAD); RCW 49.60.020 (liberal construction of WLAD). Given this context, a Washington court would be unlikely to construe RCW 49.60.400(1) to preclude the use of a narrowly tailored preference when no other means of remedying discrimination in the state's contracting practices presents itself. This is particularly clear if the opposite course, of continuing to discriminate in order to avoid use of a preference, would result in liability under federal law, such as Title VI.

A city faced much the same dilemma under a federal civil rights statute in *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009). The city in that case discarded the results of a promotional test for captains and lieutenants in its fire department based on allegations that the test results showed that the test was discriminatory. White and Hispanic firefighters, who likely would have been promoted based on the examination results, sued alleging disparate treatment based on race. The city defended based on the argument that using the exam results would have resulted in disparate impact liability. *Ricci*, 557 U.S. at 562-63. The Court therefore faced the question of "whether the purpose to avoid disparate-impact liability excused what otherwise would be prohibited disparate-treatment discrimination." *Id.* at 580. This is much like the situation the state could face if it believed that its contracting practices resulted in discrimination against a protected class, but that simultaneously the only available remedy would also be prohibited as preferential treatment in favor of a protected class. RCW 49.60.400(1). The Court in *Ricci* concluded that the city's action in discarding the examination was justified if, but only if, the city had "*a strong basis in evidence*" for concluding that a race-conscious remedy was necessary to avoid liability for disparate impact based on race. *Ricci*, 557 U.S. at 582 (emphasis added). That is, the city in *Ricci* could defend its disparate treatment based on race, in violation of one prong of the federal law, if it had a strong basis in evidence its action was necessary to avoid violating another prong of the same law. *Id.* at 582-83.

***9** We recently advised that "a Washington court would apply a standard similar to the' strong basis in evidence' standard" in determining when a municipality may disregard state law in order to comply with a requirement imposed by federal law. AGO 2016 No. 1, at 9 (discussing *Ricci* in the context of the federal Voting Rights Act). We there advised that a city could violate a state statute if it had a strong basis in evidence for believing that doing so was necessary to avoid violating federal law. AGO 2016 No. 1, at 9. As applied here, a strong basis in evidence supporting disparities and other requisite evidence of discrimination in state contracting sufficient to give rise to a disparate impact claim that could not be avoided through other means would likely provide a lawful basis for taking an action that would otherwise be precluded as "preferential treatment" under I-200. RCW 49.60.400(1) (prohibiting both discrimination against and preferential treatment for protected classes); RCW 49.60.020 (requiring liberal construction of WLAD to prevent and eliminate discrimination).

Assuming that a Washington court would apply the *Ricci* standard in this context, it does not follow that I-200 would permit a state agency to use a preference based on race or sex any time that the agency has statistical evidence of a disparity. In *Ricci* itself, the Court held that merely establishing a statistical disparity "is far from a strong basis in evidence" for liability under Title VII. *Ricci*, 557 U.S. at 587. The Court concluded that the city lacked the requisite strong basis in evidence in that particular case, and ultimately held that discarding the results of the promotional test at issue constituted disparate treatment based on race. *Ricci*, 557 U.S. at 585-86. If RCW 49.60.400 was construed to permit preferences any time using them would be permissible under federal equal protection principles, then I-200 would become essentially meaningless. *See In re Det. of Strand*, 167 Wn.2d 180, 189, 217 P.3d 1159 (2009) (statutes should not be deemed inoperative or superfluous unless it is the result of obvious mistake or error). More must be required. In addition to a statistical disparity, an agency would have to examine whether the disparity was caused solely by elements of its contracting process that are "consistent with business necessity" and "manifestly related" to the qualifications and skills required to perform the contract. *Ricci*, 557 U.S. at 587; *Shannon*, 104 Wn.2d at 727. If the disparity were caused in part by other factors, the agency could have a strong basis to conclude that its practices amount to disparate treatment. And even if the disparity were caused solely by factors "consistent with business necessity" and "manifestly related" to the qualifications and skills required to perform the contract, the agency could have a strong basis to conclude that its practices have an unacceptable disparate impact if it could use other means to achieve its business goals that caused less of a disparity.

***10** For these reasons, we conclude that RCW 49.60.400(1) and (3) leave room for using preferences to remedy a disparate

impact based on race or gender under narrow circumstances. These circumstances could arise if an agency had a strong basis in evidence for concluding that a narrowly tailored preference was the only means available to remedy discrimination in its contracting practices. In practice these circumstances could be narrow indeed, because an agency finding that its own policies cause a disparate impact must also exhaust available alternatives to the use of preferences. RCW 49.60.400(3); *see also Shannon*, 104 Wn.2d at 727 (discussing further issues arising after a disparity is established). In many cases the obvious solution to a disparity may be to abandon requirements or procedures that unnecessarily burden a protected class or to use non-preferential remedies such as aspirational goals, training, or outreach. The justification for using race- or gender-based preferences under this theory may therefore rarely arise.

c. RCW 49.60.400(6) Makes An Exception To The Prohibition Against Reverse Discrimination Where Necessary To Prevent A Loss Of Federal Funding

We turn next to the effect of RCW 49.60.400(6). Subsection (6) provides that I-200 does not prohibit any "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." Put simply, I-200 does not prohibit preferential treatment when necessary to "establish or maintain eligibility" for a federal program under which the state receives federal funds.

Title VI of the federal Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[5] 42 U.S.C. § 2000d. Other federal statutes prohibit discrimination on the basis of sex in programs receiving federal funding. *See, e.g.*, Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (education funds); Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (health care funds); Federal-Aid Highway Act of 1973, 23 U.S.C. § 324 (funds to state transportation agencies). Several courts have concluded that this ban embraces disparate impact discrimination under rules adopted by federal funding agencies. *See, e.g., Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984).

Federal funding agencies have adopted Title VI regulations that require recipients of federal financial assistance to implement affirmative action to address the effects of prior discrimination. The specific terms of applicable federal regulations therefore affect the inquiry. For example, the Department of Health and Human Services has a regulation stating: "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."[6] 45 C.F.R. § 80.3(b)(6)(i). If a state agency has evidence of prior discrimination, such as through a disparity study, these regulations would require the agency to take measures to remedy the prior discrimination. Similarly, the U.S. Department of Transportation requires states, as a condition of receiving federal transportation funds, to establish a program to ensure participation by "Disadvantaged Business Enterprises" in state transportation contracting, and the plan must be approved by the federal government. *See, e.g., W. States Paving Co. v. Washington State Dep't of Transp.*, 407 F.3d 983, 988-90 (9th Cir. 2005); *Mountain W. Holding Co. v. Montana*, No. CV 13-49-BLG-DLC, 2014 WL 6686734, at *1-2 (D. Mont. Nov. 26, 2014).

***11** State agencies commonly receive some federal funding. *See, e.g.*, Laws of 2015, 3d Spec. Sess., ch. 4 (biennial state operating budget for 2015-17, showing federal sources for numerous appropriations to state agencies). Title VI applies to any "program or activity" receiving federal financial assistance. 42 U.S.C. § 2000d. Congress has defined "program or activity" broadly. 42 U.S.C. § 2000d-4a. Congress did so to apply Title VI to all activities of a state agency or institution if any part of the agency or institution receives federal funding. S. Rep. No. 100-64, at 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 4. Courts have consistently applied Title VI in this manner. *See, e.g., Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1188 (9th Cir. 2012) (interpreting "program or activity" under Title VI); *Thomlison v. City of Omaha*, 63 F.3d 786, 789 (8th Cir. 1995) (interpreting "program or activity" under the Rehabilitation Act); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) (interpreting "program or activity" under Title IX). But the state as a whole is not subject to Title VI just because some of its agencies or institutions receive federal funding. *Ass'n of Mexican-American Educators v. California*, 183 F.3d 1055, 1067-68 (9th Cir. 1999), *rev'd in part on other grounds en banc*, 231 F.3d 572 (9th Cir. 2000). This means that if part of an agency's budget is federally funded, the entire agency is subject to Title VI, but not all of state government. U.S. Dep't of Justice, *Title VI Legal Manual* § VII(D), https://www.justice.gov/crt/title-vi-legal-manual#State (last visited Jan. 24, 2017).

Thus, if an agency receives federal funding, the entire agency is at risk of losing federal funding if the agency discriminates on the basis of race, color, or national origin in any of its programs. This includes programs that do not receive federal funds. It

therefore follows that an agency with evidence of disparate impact discrimination may be required under federal law to take affirmative action to resolve any significant disparities, even in programs that are not themselves federally funded. *See, e.g., Larry P.*, 793 F.2d at 982-83.

If a disparity study documents significant disparities in contracting, an agency may face a risk of losing federal funds. That said, the requirements for maintaining eligibility for federal funds differ from one federal agency to another, based on the relevant statutes and rules involved, and RCW 49.60.400(6) exempts only those actions 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." Thus, a purely theoretical risk of a loss of federal funding, without more, is likely insufficient to invoke the exemption under RCW 49.60.400(6).

Washington courts have not yet addressed the degree of likelihood of loss of federal funding that would be required to fall within RCW 49.60.400(6). A California court, construing virtually identical language in Proposition 209, concluded that an agency need not wait to take race-conscious measures until it has actually been deemed in violation of federal law or faces an express federal threat to withdraw funding. *See C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 299, 18 Cal. Rptr. 3d 715 (2004). But the court also concluded that an "[a]n agency's determination that [race- or sex-based preferences are] necessary to maintain federal funding must be supported by substantial evidence" and must take into account the specific federal requirements at issue. *Id.* It is difficult to know whether Washington courts would apply the same test, given that the Washington Supreme Court has already discounted the value of California precedent in construing I-200. *Parents Involved*, 149 Wn.2d at 688. But we believe that Washington courts would require something like what the California courts have, namely "substantial evidence" that the agency will lose eligibility to participate in a program involving federal funding if it does not implement race or gender preferences.

***12** We therefore conclude that if a disparity study documents significant disparities, then RCW 49.60.400(6) could exempt the agency from I-200's prohibition against using preferential treatment as a remedy for those disparities. But we emphasize that the extent of the showing an agency would need to make in order to satisfy that exemption has not yet been established by the courts, and would likely depend on both the facts of the agency's situation and the relevant federal statutes and regulations at issue.

2. Does the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act of 1964?

You next ask whether our answer to your first question depends on whether the agency at issue receives federal funds, making the agency subject to Title VI of the Civil Rights Act of 1964. Our answer depends only in part on this factor. Our conclusion in part 1(a) above that RCW 49.69.400(1) and (3) allow race- or sex-conscious measures that do not elevate a less qualified contractor over a more qualified contractor, such as aspirational goals, outreach, and training, does not at all depend upon whether the agency receives federal funds. Our conclusion in part 1(b) above that RCW 49.60.400(1) and (3) could leave room for preferences based on race or sex under narrow circumstances also does not at all depend upon whether the agency receives federal funds. Only our conclusion in part 1(c) above, that RCW 49.60.400(6) provides an exemption when necessary to prevent a loss of federal funds, necessarily applies only to agencies receiving federal funds.

Substantial overlap is likely between situations in which the use of preferences could be permitted or required based on the analysis under parts 1(b) and 1(c) above. But a different showing is needed to satisfy each. An agency could use preferences under part 1(b) above based on evidence of discrimination with regard to state contracting that cannot be resolved through race- or sex-neutral means, without a necessity for showing that federal funds are at risk. RCW 49.60.400(1), (3). But I-200 similarly permits the use of preferences based on race or sex if needed to avoid a loss of eligibility for a program providing federal funds, without separately demonstrating discrimination. RCW 49.60.400(6). If the agency is at risk of losing federal funds, this may be true because of evidence of prior discrimination, but RCW 49.60.400(6) does not itself require such evidence.

We trust the foregoing will be useful to you.

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Footnotes

1 A "set-aside" means that an entire contract or project is set aside in the procurement process so that a designated category of contractor is allowed to bid. *See* 49 C.F.R. §§ 26.5, 26.43. A goal means that a certain percentage of dollars, or a certain percentage of contracts, or both, are designated as a target for the participation of a certain category of contractor. *See* RCW 39.19.020(5); 49 C.F.R. § 26.45. When we refer to a goal as being "aspirational," we refer to objectives that are not mandatory.

2 We use the phrase "race- or sex-conscious measure" in this opinion broadly, to describe measures taken with conscious awareness of race or gender. The term is sometimes used more narrowly to mean either an expressly race- or sex-based classification or a classification that is facially race- and sex-neutral but results in discriminatory effects as implemented. *See Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2212-14, 195 L. Ed. 2d 511 (2016) (discussing the overtly race-conscious aspects of the holistic review that is part of the University's admissions process, and the facially race-neutral top 10 percent plan that has a race-conscious purpose); *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525, 192 L. Ed. 2d 514 (2015) (discussing disparate impact claims and noting that "mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset").

3 Other paragraphs not quoted establish other exceptions to the general rule, but they are not at issue.

4 Such an approach would involve legal risk, however, not only because *Parents Involved* was decided in the education context rather than contracting, but also because use of a tiebreaker would raise significant constitutional issues beyond those raised by measures like targeted outreach. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 551 U.S. 701, 733-35, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (striking down Seattle's use of a racial tiebreaker as violating the Equal Protection Clause because it was not narrowly tailored). Thus, any state agency considering such an approach should consult with our office before doing so.

5 The federal statute provides:
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
42 U.S.C. § 2000d.

6 This language is identical to the model regulation adopted by the U.S. Department of Justice. 28 C.F.R. § 42.104(b)(6)(i). We would therefore expect to see the same phrasing recur in regulations adopted by other funding agencies. The Department of Justice has posted additional agency-specific civil rights information here: https://www.justice.gov/crt/agency-specific-civil-rights-information (last visited Jan. 24, 2017).

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