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May 30, 2023

Mr. David L. Smith
Bexar County Commissioners Court
Office of the County Manager
101 W. Nueva
10th Floor
San Antonio, TX 78205

Ms. Laurie Vignaud
President and CEO
LiftFund, Inc.
2014 S. Hackberry St.
San Antonio, Texas 78210

RE: Small Business Assistance Program

Dear Mr. Smith and Ms. Vignaud:

The Equality Under the Law Project is a nationwide initiative of the Wisconsin Institute for Law & Liberty, Inc. The Project's mission is to protect equal rights for all Americans and to promote a colorblind society. Today, I am writing on behalf of our client, Mr. R. Greg Gomm, who is President of DigitalDesk in San Antonio, Texas.

As you know, the Bexar County Small Business Assistance Program provides grants to small business owners impacted by the pandemic. The program is funded with $10 million from the American Rescue Plan Act of 2021 and is administered by LiftFund. The Program offers grants of up to $50,000 for qualifying small businesses.

In January 2023, Mr. Gomm applied for a grant on behalf of DigitalDesk. Like most businesses in America, DigitalDesk was significantly impacted by the pandemic, experiencing decreasing sales and labor uncertainty. As explained in its application, DigitalDesk meets all the qualifications for a grant. The company is located in Bexar County and in good standing with the Texas Comptroller's Office, reports gross sales between $10,000 and $3 million, and was in operation before 2020.

Because there are more applicants than funds available, Bexar County created a "scoring methodology" to determine which applicants will be funded first. According to your website, "applications with the highest score based on the methodology below will be considered first."

Scoring Methodology

Applications will not be considered on a first come, first served basis. Applications with the highest score based on the methodology below will be considered and funded first.

Ownership	**18 Max Points**
Veteran Owned	6
Women Owned	6
Minority Owned	6
Geography	**12 Max Points**
Located in Unincorporated/Suburban City Business Location	12
Not Located in Unincorporated/Suburban City Business Location	0

Your scoring methodology is illegal and unconstitutional. As shown above, businesses owned by racial minorities and women are given a preference. Businesses owned by white males, such as DigitalDesk, are not on equal footing with the other applicants.

"A racial classification, regardless of purported motivation, is presumptively invalid." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). When confronted with such a racial classification, "[a]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). Gender discrimination is likewise unconstitutional. When a gender classification is imposed, government officials "must demonstrate an exceedingly persuasive justification for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996).

In 2021, the United States Court of Appeals for the Sixth Circuit struck down race and gender preferences in a program remarkably like the ones imposed now by you. In *Vitolo v. Guzman*, the Small Business Administration issued grants from the Restaurant Revitalization Fund, which was a limited pot of money designed to assist restaurants impacted by the pandemic. Like here, SBA prioritized grants to women and minorities.

In striking down the preferences, the court held that race and gender discrimination is unconstitutional, and the government may not justify these preferences by pointing to "societal discrimination" or disparities in business ownership. The government may only target a specific episode of intentional discrimination that the government participated in.

In this case, you have no justification for imposing race and gender preferences. Bexar County has not made any findings, issued any reports, or otherwise offered any public evidence that County officials have intentionally discriminated against women and minorities in the past, and therefore this program is necessary to cure those prior discriminatory episodes. Therefore, these preferences are unconstitutional. Under 42 U.S.C. § 1983, victims of race and gender discrimination, like Mr. Gomm, may sue individuals and entities acting under the color of law. Furthermore, other federal laws also impose liability upon both public and private actors, such as 42 U.S.C. §§ 1981 and 1985.

Under these statutes, Mr. Gomm and DigitalDesk would be entitled to compensatory and punitive damages, as well as attorney fees, if these preferences are imposed. In other words, if Mr. Gomm is not considered on equal footing with minority and women-owned businesses, then you will be found liable for damages and attorney fees. Moreover, *any* business owned by a white male that applied for this program would be entitled to similar relief. Imposing these preferences could lead to millions of dollars of potential liability for Bexar County and LiftFund.

On behalf of Mr. Gomm and DigitalDesk, I am asking that you withdraw these preferences and award grants based on a first-come, first-serve basis. If you do not, then we will file a federal lawsuit against Bexar County and LiftFund to address these grave constitutional and statutory violations, and to seek appropriate damages and fees.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Daniel P. Lennington
Deputy Counsel