

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DIGITALDESK, INC., and
R. GREG GOMM,

Plaintiffs,

v.

BEXAR COUNTY, and
LIFTFUND INC.,

Defendants.

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Case No. 23-CV-_____

VERIFIED COMPLAINT

Plaintiffs state their verified complaint against Defendants as follows:

INTRODUCTION

1. The Bexar County Small Business Assistance Program, funded and operated by Defendants, “picks winners and losers based on the color of their skin.” *Students for Fair Admissions, Inc. v. Harvard*, No. 20-1199, Slip. Op. at 38 (June 29, 2023). This is forbidden. The United States Constitution demands the “absolute equality of all citizens of the United States politically and civilly before their own laws.” *Id.* at 10 (2023) (quoting the Congressional record). “The law in the States shall be the same for the black as [it is] for the white.” *Id.* (quoting *Strauder v. W. Virginia*, 100 U.S. 303, 307–309 (1879)). In other words, the “equal protection clause requires equality of treatment before the law for all persons without regard to race or color.” *Id.* at 13 (quoting *Browder v. Gayle*, 142 F. Supp. 707, 715 (M.D. Ala. 1956)).

2. Plaintiffs are a white male and his software company. They applied for assistance under Defendants' grant program, but because of a "scoring methodology" that gave preferences based on race and gender, Plaintiffs' application was put at the back of the line. Their application was denied.

3. Defendants' treatment of Plaintiffs is unconstitutional and illegal under federal law. In fact, Defendants' scoring methodology is similar to a race-based preference scheme used in the Small Business Administration's Restaurant Revitalization Fund, which was struck down in 2021. *See Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021). For the same reasons explained in that decision, Defendants here violated Plaintiffs' constitutional and statutory rights by imposing an illegal race-based scoring methodology.

PARTIES

4. Plaintiff DigitalDesk, Inc. is a software company based in San Antonio, Texas, that creates and sells educational software. DigitalDesk's goal is to ensure that educators have access to the best learning tools available. The company's educational software, which includes in-person and remote learning features, powerful analytics, and a comprehensive assessments platform, is used by higher educational institutions around the country.

5. Plaintiff R. Greg Gomm is the President and Founder of DigitalDesk. He resides in Bexar County, Texas. He founded DigitalDesk in 2011.

6. Defendant Bexar County is a political subdivision of the State of Texas and is a person for the purposes of 42 U.S.C. § 1983. Bexar County is responsible for

the policies, customs, practices, and procedures of the Bexar County Small Business Assistance Program. The employees who operate and developed the Bexar County Small Business Assistance Program did so with the authority and approval of Bexar County.

7. Defendant LiftFund Inc. is a non-profit Community Development Financial Institution and Community Development Corporation that offers small business loans and technical support to small businesses. LiftFund is a Texas corporation and operates in San Antonio, Texas, among other locations. LiftFund administers the Bexar County Small Business Assistance Program on behalf of, and with the approval of, Bexar County.

JURISDICTION AND VENUE

8. Jurisdiction may be exercised by this Court under 28 U.S.C. § 1331 because the claims in this complaint arise under the Constitution and laws of the United States.

9. Venue is appropriate in this Court under 28 U.S.C. § 1391(b) because Defendants reside in this district and a substantial part of the events giving rise to this claim occurred in this district.

FACTUAL BACKGROUND

10. On January 3, 2023, Bexar County began accepting applications for the Bexar County Small Business Assistance Program. The purpose of the Program is to provide grants from between \$10,000 to \$50,000 to small businesses impacted by the pandemic. The funds must be used for business-related expenses, including payroll,

working capital, business rent, supplies, equipment, and other operating costs. *See* Exhibit 1 (screenshots from Bexar County's website from July 5, 2023).

11. LiftFund administers and operates the fund on behalf of Bexar County.

12. The Program is funded with \$10 million from the American Rescue Plan Act of 2021.

13. Plaintiffs applied for a grant on January 6, 2023. LiftFund acknowledged Plaintiffs' application with an email. Exhibit 2.

14. Plaintiffs' application demonstrated eligibility for a grant as follows: (1) DigitalDesk employs fewer than 500 employees and meets the Small Business Administration standard for small business; (2) DigitalDesk does not conduct a prohibited activity, as defined by the Program requirements; (3) DigitalDesk has annual gross sales between \$10,000 and \$3 million; (4) DigitalDesk's gross sales in either 2020 or 2021 were less than gross sales in 2019; (5) DigitalDesk operated prior to January 1, 2020, with documented financials in 2019; (6) DigitalDesk is currently in operation; (7) DigitalDesk has not filed for bankruptcy; (8) DigitalDesk is in good standing with the Texas Comptroller's Office; (9) DigitalDesk is located within Bexar County limits; (10) DigitalDesk does not operate within any prohibited category of business, as determined by the Program; and (11) Plaintiff Gomm is a majority owner of the business.

15. Plaintiffs provided all the documents required for the application, including a current driver's license, corporate documents, tax returns, bank statements, and business utility bills.

16. In all respects, Plaintiffs submitted a complete application demonstrating eligibility for a grant under the program.

17. Based on financials provided, Plaintiffs were eligible for a grant of \$50,000.

18. Because the Program was funded with only \$10 million, Bexar County anticipated that there would be more applicants than funds available. Bexar County created a “scoring methodology” to prioritize grant applications. Under the methodology, eligible applicants with higher scores would be funded before eligible applicants with lower scores. Some applicants, despite being otherwise eligible, would not receive a grant because of their relatively low score under the “scoring methodology.” As explained on their website, “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.”

19. The “scoring methodology,” used and approved by Bexar County and implemented by LiftFund, contained race-based and sex-based qualifications. Below is an accurate screenshot of the “scoring methodology,” taken from the Bexar County Small Business Assistance Program website:

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

20. According to the “scoring methodology,” applicants owned by minorities would receive more points than those businesses not owned by minorities.

21. Plaintiffs were not entitled to any points for the categories of “minority owned” because Gomm is white, or any points for “women owned” because Gomm is a man.

22. On May 30, 2023, counsel for Plaintiffs wrote a letter to Defendants explaining that their “scoring methodology,” which used racial classifications, was unconstitutional or otherwise illegal under federal law. Exhibit 3. Plaintiffs specifically informed Defendants that a similar race-based priority methodology—also used to distribute funds from the American Rescue Plan Act of 2021—was struck

down by the Sixth Circuit Court of Appeals. *See Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021).

23. Defendants did not respond in any way to Plaintiffs' letter.

24. On June 21, 2023, Plaintiffs received the email below. According to the email, Plaintiffs' grant application was denied. The email confirms that the "scoring methodology" was used in determining which applicants received a grant. Also attached hereto as Exhibit 4.¹



¹ The letter is addressed to "Robert" because Plaintiff R. Greg Gomm's first legal name is Robert.

COUNT I: VIOLATION OF SECTION 1983

25. Plaintiffs reallege and incorporate the allegations above.

26. Defendant Bexar County is a person who, under the color of any statute, ordinance, regulation, custom, or usage, subjected, or caused to be subjected, Plaintiffs to the deprivation of the rights, privileges, or immunities secured by the Constitution and the laws of the United States.

27. By implementing and administering the Program, Defendant LiftFund acted under the color of law, conspired with Bexar County, acted in concert with Bexar County, and otherwise was a willful participant in a joint activity with Bexar County. In other words, Defendant LiftFund's actions, as alleged above, are "fairly attributable" to Bexar County, thereby making Defendant LiftFund a "person" for purposes of Section 1983 and liable under that statute. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

28. By employing a racial preference, Defendants violated Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment.

29. When the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). Defendants must justify the racial preferences by demonstrating that the preference is narrowly tailored to achieve a compelling government interest. *Id.*

30. Defendants cannot justify the racial preferences under the applicable standards, making these preferences unconstitutional and therefore a violation of 42 U.S.C. § 1983.

31. Defendants' scoring methodology also includes an illegal gender-based preference, which is similarly illegal under *United States v. Virginia*, 518 U.S. 515 (1996).

32. Defendants are therefore liable to Plaintiffs for violations of the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. § 1983.

COUNT II: VIOLATION OF SECTION 1981

33. Plaintiffs reallege and incorporate the allegations above.

34. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The term "make and enforce contracts" includes the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

35. The rights protected in Section 1981 "are protected against impairment by nongovernmental discrimination and impairment under color of state law." 42 U.S.C. § 1981(c).

36. Section 1981 prohibits racial discrimination in the making and enforcing of contracts and applies equally to all races. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

37. The grants offered by the Bexar County Small Business Assistance Program, and the attending documents and agreements, constitute a contract or a contractual relationship governed by Section 1981.

38. By imposing a racial preference in the program, Defendants impaired or otherwise interfered with Plaintiffs' rights under Section 1981.

COUNT III: VIOLATION OF SECTION 1985

39. Plaintiffs reallege and incorporate the allegations above.

40. Defendants, by agreeing and implementing the racial preferences in the Program, conspired to deprive, either directly or indirectly, Plaintiffs' right to the equal protection of the laws. 42 U.S.C. § 1985(3).

41. Defendants' conspiracy to violate Plaintiffs' equal protection rights involved multiple acts done in further of the object, including the creation and implementation of the "scoring methodology."

42. Defendants' imposition of the "scoring methodology" injured Plaintiffs and deprived them of the equal protection of the laws.

43. By choosing to benefit certain races over other races, Defendants' actions in implementing the "scoring methodology" constitutes a racial animus towards disfavored racial groups, including Plaintiffs. "The conspiracy, in other words, ... aim[s] at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

REQUEST FOR RELIEF

Plaintiffs therefore request the following relief:

A. Declare that Defendants have violated Plaintiffs' equal-protection rights under 42 U.S.C. §§ 1981, 1983, & 1985;

B. Permanently enjoin Defendants from violating Plaintiffs' equal-protection rights;

C. Award damages, both compensatory and punitive, to Plaintiffs;

D. Award Plaintiffs their attorney fees under 42 U.S.C. § 1988 or otherwise as permitted by federal law; and

E. Award costs and all other relief as determined appropriate by this Court.

Dated: July 17, 2023

s/ Fernando M. Bustos

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Attorneys for Plaintiffs



LiftFund
DREAM IT. FUND IT.



The Bexar County Small Business Assistance Program

The **Bexar County Small Business Assistance program** will provide grants to micro and small business owners who have been impacted by the pandemic. The program, funded by Bexar County and administered by LiftFund, has dedicated **\$10,000,000 Million in funding** to support for-profit small businesses with grants **up to \$50,000**.

ACCEPTING APPLICATIONS

Tuesday, January 3 at 10:00 AM through Friday, January 20 at 5:00 PM Central Standard Time

Below you will find more details about this program, including eligibility, documents required, scoring methodology and timeline.

Grant Awards

The grants will range from **\$10,000 to \$50,000** to eligible small, for-profit businesses.

The funds must be used for business-related expenses, including payroll, working capital, business rent, inventory, supplies, equipment, and other operating costs.

THE GRANT DOES NOT HAVE TO BE REPAID

EXHIBIT

1

REDUCTION IN NET REVENUE	MAXIMUM GRANT AMOUNT
\$0 - \$25,000	\$10,000
\$25,001- \$50,000	\$25,000
\$50,000+	\$50,000

Grant amount will not exceed 2019 gross sales.

The following limitations apply:

- Applicants are eligible to receive only one grant award
- Only one grant may be awarded per business with more than one location
- Limited to one grant per physical address within Bexar County.

Eligibility

To be eligible for this program, businesses must:

- Employ fewer than 500 employees and meet the **SBA size standard for small business**
- Not conduct a **prohibited business activity**.
- Annual gross sales in 2019 between \$10,000 and \$3 million
- Gross sales in *either* 2020 or 2021 must be less than gross sales in 2019. Gross sales are based on Line 1 of Schedule C or Line 1a of 1120, 1120S or 1065.
- Operating prior to January 1, 2020 with documented financials in 2019. "Operational" is defined as a positive amount of gross receipts or sales on the 2019 tax return (Line 1 of Schedule C or Line 1a of 1120, 1120S or 1065)
- Be currently in operation. "Currently operational" is defined as having positive business sales related deposits on the most recent business bank statement.
- Not have filed for bankruptcy at time of application
- Be in good standing with the TX Comptroller's office, if applicable.
- Be located within Bexar County limits. To check if your business address is located within the county, click **here**.
- Not be in the following categories: non-profits, gambling/gaming businesses, sexually oriented businesses; payday lenders, or real estate investment.
- Applicant must be majority owner of business

List of Required Documents

- Current Driver's license or government-issued photo ID
- DBA/Assumed name certificate filed with Bexar County or certificate of formation/incorporation filed with TX Secretary of State.
- Business utility bill (water, gas, electric). Home based businesses may provide a home utility bill.
- 2019, 2020, and 2021 business tax returns. Acceptable return formats are Schedule Cs, 1120, 1120S and 1065. If 2021 business return has not been filed, other documents, such as a profit and loss statement may be requested. Applicants without a *filed* business tax return for 2019 and 2020 are not eligible.
- Most recent business bank statement
- DD 214 proof of military discharge (veterans only)

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

Program Timeline

Application Period: January 3 @ 10 am – January 20 @ 5 pm.

Applicants will be able to save their progress during the application period. Applications must be completed and submitted along with all the documentation required for verification before 4:59:59 PM CST on Friday January 20, 2023.

Applicants will receive a confirmation email when they submit the application.

Application review: January 30- May 1, 2023

The grants team will reach out to applicants by phone or email if additional documents or clarification is needed. If additional documents are requested, applicants will have 5 business days to submit.

Award notifications: March 30- June 30, 2023

Eligible applicants with the highest scores based on the methodology above will be notified earlier within the award notification time frame, followed by lower scoring applicants. All applicants, even if ineligible or not selected for funding, will be notified by June 30.

Selected recipients will be notified of approval and prompted to accept the grant via an emailed DocuSign form.

Grant disbursements: April 7– June 23, 2023

Eligible applicants with the highest scores based on the methodology above will be funded earlier within the grant disbursement time frame, followed by lower scoring applicants.

Grant Follow Up

All recipients will be required to complete follow-up surveys in May 2024 and May 2025. Grant recipients must keep detailed receipts for expenditure of grant funds.

Thursday, May 25, 2023 at 07:28:58 Central Daylight Time

Subject: Thank you for submitting your application

Date: Friday, January 6, 2023 at 11:30:50 AM Central Standard Time

From: noreply@bmisw.com

To: rggomm@digitaldeskinc.com

Dear Robert,

Thank you for submitting your grant application. You can download your submitted application here.

<https://liftfundforms.cloud.bmisw.com/Grant/BexarCounty5SmallBiz/011f936e-11bf-4274-a7d7-bfcaf08b8d95/Show/PDF>

The application period closes on January 20 at 5:00 PM CST. All applicants will be notified by mid-February by e-mail if they were selected. If any additional information is needed to assess your application, a LiftFund team member will contact you by email or phone. This email serves as confirmation of receipt of your application and attached documents. You do not need to contact LiftFund to confirm receipt.

If you have any questions, please call 800-923-9551 or email sbgrants@liftfund.com

Sincerely,

The LiftFund Grants Team





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Dan@will-law.org

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
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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

[Click here](#) to view this message in a browser window.



Robert,

Thank you for your interest in the Bexar County Small Business Assistance grant program.

The overwhelming response received far exceeded the available funds. The grant application review process was completed using the methodology outlined on the *Bexar County Small Business Assistance Grant* [website](#) in the Scoring Methodology section.

At this time, all grant funds have been allocated and your business will be unable to receive funding from this program.

While your business is unable to access funding from this program, other opportunities may be found in the Additional Resources section of the [website](#), including utility assistance and other grant programs.

Feel free to contact LiftFund at sbgrants@liftfund.com with questions or for information about our low interest loan products.

LiftFund is a nonprofit financial organization that provides funding and guidance to diverse business owners to help them strengthen their businesses, stabilize and increase their profits and assets, create jobs, and contribute to the economic revitalization of their communities.

[APPLY](#) | [DONATE](#) | [LEARN](#) | [BLOG](#) | [REFER](#)

www.liftfund.com | info@liftfund.com | 888.215.2373

2014 S. Hackberry St, San Antonio, Texas 78210, USA

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(You can also send your request to **Customer Care** at the email address above.)

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