CITY AND BOROUGH OF JUNEAU
ALASKA'S CAPITAL CITY

LAW DEPARTMENT

DATE: 12/21/2022
TO: Greg Smith, Chair Assembly Human Resources Committee
FROM: Adam Gottschalk, Assistant Municipal Attorney
SUBJECT: Ord. 2022-64: Parks and Recreation Reorganization

Through Ordinance 2022-64, three boards—the Treadwell Arena Advisory Board, the Aquatics Board, and the Jensen-Olson Arboretum Board—would be consolidated into the Parks & Recreation Advisory Board ("PRAC"). As a practical matter, consolidation would decrease the number of perennial vacancies and meetings cancelled due to lack of quorum. While consolidation *would* decrease the overall number of seats, each seat will likely attract a greater number of qualified applicants as each appointed officer would have a greater voice. As an advisory board, PRAC appointments are subject to Resolution 2686, which prohibits discrimination and requires diversity.

Procedural Background

On December 13, 2022, the Systemic Racism Review Committee ("SRRC") reviewed Ordinance 2022-64. SRRC's primary concerns were that there would be fewer seats and that nothing within the text of the proposed ordinance ensured positive steps would be taken to fill seats with racially diverse officers. SRRC was informed Ordinance 2022-64 was subject to Resolution 2686, which prohibits discrimination and requires diversity. Still, SRRC made the following recommendation[1] to cure Ordinance 2022-64 of potential systemic racism:

SRRC flags Ordinance 2022-64 for potential issues of systemic racism. SRRC is supportive of the underlying intent of the ordinance, however, SRRC has concerns about actual application and actual practice and potential aggravation of systemic racism within the community. Therefore, SRRC puts forth to the Assembly some recommendations to include in the ordinance in order to help mitigate:

(1) language that goes above and beyond Resolution 2686 to actually have intentions or goals for inclusion and representation, particularly of marginalized communities, race being the core…;

(2) requirements or intentions for outreach to the community, and/or;

[1] Because this recommendation was made orally, immaterial edits have been made for clarity.

(3) a potential sunset clause or review clause after some period of time to ensure this is going the way SRRC had hoped.

Legal Issues

Under the Fourteenth Amendment of the United States Constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws."[2] This guarantee is known as the Equal Protection Clause. If a particular piece of legislation is challenged as being in violation of the Equal Protection Clause, the legislation will be subject to judicial review. There are three key standards of review; strict scrutiny, intermediate scrutiny, and rational basis review.[3] Higher standards of review place greater burdens on the government to justify challenged legislation.[4] Strict scrutiny is the highest standard of review, and it is appropriate when legislation involves suspect classifications (i.e., classifications based on race, national origin, or alienage) or legislation burdens fundamental rights (e.g., voting, litigating, or the exercise of intimate personal choices).[5] In order for legislation subject to strict scrutiny to survive, the government's burden is to show the legislation furthers a compelling government interest and the legislation is necessary to achieve that interest.[6] This is a far greater burden than rational basis review, in which the government merely needs to show it has a legitimate interest and the legislation is rationally related to achieving that interest.[7] It is rare for legislation subject to the strict scrutiny standard of review to survive.[8]

The equal protection clause in Alaska's Constitution affords greater protection to individual rights than its federal counterpart.[9] Alaska's Constitution also contains a civil rights clause expressly prohibiting discrimination based on certain inalienable traits such as race.[10] Thus, as with challenges under the federal equal protection clause, race is considered a suspect classification and any ordinance involving race-based classifications will be subject to the strict

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[2] U.S. Const. amend. XIV, § 1 ("No state shall…nor deny to any person within its jurisdiction the equal protection of the laws.").
[3] *See, e.g.*, *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 626 (Alaska 1993).
[4] *See id.*
[5] *State v. Ostrosky*, 667 P.2d 1184, 1192 (Alaska 1983).
[6] *Id.*
[7] *Id.*
[8] *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 626 (Alaska 1993) ("Laws often fail to survive strict scrutiny, prompting one commentator to label the test '"strict" in theory, and fatal in fact.'") (quoting Gerald Gunther, *The Supreme Court Term 1971—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972)).
[9] *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (quoting *Malabed v. N. Slope Borough*, 70 P.3d 416, 420 (Alaska 2003)) (quotes removed). *Compare* Alaska Const. art. I, § 1 (relevantly providing, "all persons are equal and entitled to equal rights, opportunities, and protection under the law"), *with* U.S. Const. amend. XIV, § 1 (relevantly providing, "No state shall…nor deny to any person within its jurisdiction the equal protection of the laws.").
[10] Alaska Const. art. I, § 3 (relevantly providing, "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin.").

scrutiny standard of review.[11] To survive strict scrutiny, discriminatory legislation must further a compelling government interest and the enactment itself must be necessary to achieve that interest.[12] Note, "discrimination" in this context means "differential treatment," and an ordinance may be discriminatory on its face (i.e., through its express terms)[13] or facially neutral but with a discriminatory purpose.[14] Note also, Alaskan courts employ a sliding-scale test to determine standards of review, ranging from strict to relaxed, rather than the three discrete standards of review used in federal equal protection challenges.[15] However, Alaska's sliding-scale test is more helpful when analyzing burdens on non-fundamental rights; any legislation involving suspect categories will automatically trigger strict scrutiny review and require a compelling government interest.[16]

If Ordinance 2022-64 were adopted with a requirement that a certain amount of seats be reserved for people of color (i.e., an ordinance following SRRC's first recommendation), the ordinance would be facially discriminatory.[17] Because the ordinance would be discriminating based on race—a suspect classification—the ordinance would be subject to strict scrutiny.[18] The intentions for the racial classification do not lessen the level of scrutiny.[19] Thus, the CBJ's burden would be to show the legislation, with its use of a racial classification, supports a compelling government interest.[20] Presumably, the CBJ's interest would be along the lines of, "Requiring a racially representative committee would facilitate broader community access to public resources and lessen the perpetuation of systemic racism."[21] However, interests such as remedying the effects of societal discrimination are consistently struck down as non-compelling.[22] Race-based

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[11] *Malabed*, 70 P.3d, at 428 (Matthews, J., concurring) ("Because by the express terms of the civil rights clause of the Alaska Constitution race is a suspect category, the ordinance must be subjected to strict scrutiny in order to determine whether it is permissible under the equal rights and civil rights clauses.").

[12] *Ostrosky*, 667 P.2d, at 1193.

[13] *Alaska Civil Liberties Union*, 122 P.3d, at 788.

[14] *State v. Schmidt*, 323 P.3d 647, 659 (Alaska 2014).

[15] *See Orstrosky*, 667 P.2d, at 1192-93. The three-step test weighs the nature of the interest impaired, the government's interest served by the challenged ordinance, and the particular means chosen to achieve the goals of the ordinance. *Alaska Civil Liberties Union*, 122 P.3d, at 789. The weight of the interest impaired determines the government's burden in justifying the discriminatory legislation. *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396 (Alaska 1997).

[16] *See State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978). This variance is also the reason for the two analyses in *Malabed*; the majority performed an interests or rights analysis (the right to seek and obtain employment) whereas the concurring justice performed a suspect classification analysis (Native American as a racial classification). *See Malabed v. N. Slope Borough*, 70 P.3d 416 (Alaska 2003).

[17] *Alaska Civil Liberties Union*, 122 P.3d, at 788 ("When a 'law *by its own terms* classifies persons for different treatment,' this is known as a facial classification.") (quoting J. Nowak and R. Rotunda, Constitutional Law § 14.4, at 711 (7th ed. 2004) (emphasis added)).

[18] *See Ostrosky*, 667 P.2d, at 1192.

[19] *See, e.g.*, *Malabed*, 70 P.3d, at 428-29 (Matthews, J., concurring); *see also Alaska Civil Liberties Union*, 122 P.3d, at 788.

[20] *See Ostrosky*, 667 P.2d 1184, at 1193.

[21] This purpose statement is based on SRRC's duties and the body's discussion regarding the proposed ordinance.

[22] *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S.

government action may be justified when it can be shown the action is necessary to remedy prior intentional discrimination *by the government unit involved*; however, it is unlikely the CBJ can show this without specific factual evidence, such as significant statistical evidence,[23] and provided longstanding anti-discrimination code provisions (e.g. CBJC 41.05.005-.045 ("Equal Rights")) and anti-discrimination provisions advisory board rules resolutions (e.g., Resolution 2686, Resolution 2662, Resolution 2246).[24] A compelling government interest *could* be found if a federal law, such as the Indian Child Welfare Act ("ICWA"), mandated differential treatment.[25] But in the present case, there is neither past specific-to-this-government intentional discrimination to remedy[26] nor a federal law mandating differential treatment. As mentioned above, Alaska's equal protection and civil rights clauses are even *more* protective of individual rights than their federal counterparts. Further, Alaska's Supreme Court has historically been hostile toward any race-based discrimination; the Court would likely find the CBJ lacks not only a compelling interest, but even a legitimate one.[27] Without a compelling interest,[28] it is not necessary to analyze whether this legislation is necessary and narrowly tailored to achieve a compelling interest.[29]

If Ordinance 2022-64 were adopted with certain outreach requirements (i.e., an ordinance following SRRC's second recommendation), the ordinance would likely be facially

469, 499 (1989) ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

[23] *See J.A. Croson Co.*, 488 U.S., at 501. Finding a sufficiently "gross statistical disparity" between applicants and appointees may be particularly challenging in this case as consolidation is largely sought because there are too few applicants—so it is unlikely a gross statistical disparity can be shown as, presently, virtually all qualified applicants are appointed.

[24] *See Wygant*, 476 U.S., at 278 n.5. Theoretically, racially discriminatory legislation or practices pre-dating the 1970 establishment of the CBJ would be insufficient as these would regard a different governmental unit (if not also sufficiently remote in time to have graduated into "societal discrimination").

[25] *See Malabed*, 70 P.3d 429 n.9. Notably, the constitutionality of ICWA is currently being challenged in before the U.S. Supreme Court in *Brackeen v. Haaland*.

[26] *See, e.g.*, *Mallory v. Harkness*, 895 F.Supp. 1556, 1559 (S.D. Fla. 1995) (finding that possible explanations for a lack of diversity in judicial nominating commissions are insufficient to show "direct findings of racial bias in the nomination process"). *Mallory* is also noteworthy because the case regarded official appointments, which had no apparent effect on the standard of review (classification still warranted strict scrutiny review). *See id.* at 1559. *See also Back v. Carter*, 933 F.Supp. 738, 755-59 (N.D. Ind. 1996) (challenging race and gender quotas regarding membership to county's judicial nominating commission).

[27] *See, e.g.*, *Malabed*, 70 P.3d, at 426-27 (stating, "Because the borough is a political subdivision of Alaska, its legitimate sphere of municipal interest lies in governing for all of its people; preferring the economic interests of one class of its citizens at the expense of others is not a legitimate municipal interest, regardless of whether we view its ordinance as drawing distinctions founded on political status or race.").

[28] Note also, racial diversity alone would not be considered a compelling government interest. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007).

[29] *See id.* Further, an attempt to perform a means-to-fit analysis on a particular piece of legislation that seeks to remedy systemic racism presents its own set of conundrums (i.e., How do you show *this* legislation is necessary to remedy systemic racism?). Note also quotas, percentages, or goals are reliably struck down as not narrowly tailored to achieve compelling interests. *See, e.g.*, *Regents v. Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978); *see also Mallory*, 895 F.Supp., at 1560-62.

neutral.[30] This could be achieved by requiring notices of vacancies to be posted at a certain number of spots, or certain spots with high traffic, or posted for a certain amount of time. In order for a plaintiff to prove facially neutral legislation violates the equal protection clause, the plaintiff must show the legislation was applied in a discriminatory manner and there was an unlawful intent to discriminate.[31]

The concern then is to what extent, if any, does SRRC's first recommendation—that a certain amount of seats be reserved for people of color—"taint" a facially neutral version of Ordinance 2022-64 by indicating an illegitimate government objective?[32] It is not clear, but Alaska's Supreme Court has acknowledged that due to "the extreme difficulty of proving discriminatory intent," even weak evidence may be sufficient to create a genuine factual dispute.[33] Critically, SRRC does not appoint officers, so SRRC's first recommendation and expressed intentions would likely be insufficient evidence standing alone to impute discriminatory intent on the appointing body.[34] Thus, to the extent SRRC's second recommendation is incorporated into an amended version of the proposed ordinance, the language should be facially neutral and the ordinance should be neutrally applied (e.g., applicants should be considered and evaluated based on neutral, objective criteria[35]) to minimize any risk SRRC's first recommendation could be considered evidence of a discriminatory intent.

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[30] However, if the ordinance had express references to suspect classifications (e.g., requirements that vacancies be advertised in places predominantly patronized by people of color or members of a particular national origin), the ordinance would be facially discriminatory and subject to strict scrutiny. *See Alaska Civil Liberties Union*, 122 P.3d, at 788 n.33 (quoting *Cook v. Babbitt*, 819 F.Supp. 1, 14 (D.D.C. 1993) ("In cases where a law or regulation makes an explicit reference to a suspect characteristic, purposeful discrimination is self-evident, and the measure is subject to challenge on its face without any evidentiary inquiry into the motives of the relevant government actors.")).

[31] *See Alaska Civil Liberties Union*, 122 P.3d, at 788 n.33 (citing *Hamlyn v. Rock Island Cty. Metro. Mass Transit Dist.*, 986 F.Supp. 1126, 1133 (C.D. Ill. 1997) ("In cases where the particular law or policy is fair on its face, but is applied in a way that treats similarly situated individuals differently, the equal protection clause requires plaintiffs to allege and prove the presence of an unlawful intent to discriminate against the plaintiff for an invalid reason.")).

[32] *See Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) (regarding alleged ill intent).

[33] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 963 n.62 (Alaska 2005) (noting discrimination is usually perpetuated through subtle acts and "[g]overnment officials will almost never openly avow a discriminatory intent….").

[34] *See, e.g.*, *Welch v. N. Slope Borough*, 364 F.Supp.2d 1074, 1076 (D. Alaska 2005) (noting the plaintiff, a rejected job applicant bringing an action in light of an unconstitutional Native American hiring preference, failed to show the defendant mayor considered the plaintiff's race or national origin).

[35] In a 1978 Alaska Supreme Court case, *Alaska Gay Coalition v. Sullivan*, the Court held that the exclusion of an organization from a government publication (a public forum) due to the organization's beliefs violated the organization's constitutional rights *including equal protection*. *Alaska Gay Coal. v. Sullivan*, 578 P.2d 951, 960 (Alaska 1978). In a 2001 case, *DHSS v. Planned Parenthood of Alaska*, the Court, analogizing from *Alaska Gay Coalition*, noted the State was bound to apply neutral criteria in allocating health care. *Planned Parenthood of Alaska, Inc.*, 28 P.3d, at 910. As the Court stated, additionally referencing a case regarding workers' compensation and the constitutional right to travel, "under Alaska's equal protection provision the government may not allocate state benefits so as to deter citizens' exercise of constitutional rights." *Id.* at 910-11 (referencing *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 274 (Alaska 1984) and *Alaska Gay Coal.*, 578 P.2d, at 960). Based on the Court's subsequent analysis, it is likely rejecting a potential applicant from serving on an advisory committee based on a racial classification would constitute "invidious discrimination" denying that applicant equal protection of the laws. *See Planned Parenthood of Alaska, Inc.*, 28 P.3d, at 911 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969)). Similarly, it would violate

Legal Advice

Especially in Alaska, any government attempt to use a racial classification in legislation—regardless of the intent—risks affecting the constitutional guarantee of "equal rights, opportunities, and protection under the law."[36] If Ordinance 2022-64 were to contain an express reference to race, it would likely be subject to strict scrutiny, which it would not pass. Legislative goals, such as non-discrimination and diversity, may be legally pursued by increasing advertising and outreach efforts, not through quotas or race-conscious outreach efforts or criteria. Federal case law consistently reveals how rarely governments may use racial classifications, and Alaska case law is considerably more restrictive.

From
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AS 18.80.255(1) (stating, "It is unlawful… to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, religion, sex, color, or national origin."), CBJ Charter 15.2(a) (stating, "No person may be discriminated against in any municipal appointment, employment, or promotion because of race, sex, color, political or religious affiliation, or national origin."), and Resolution 2686. Further, as stated in the preamble to Resolution 2946, which reestablished JHRC, "the Assembly finds discrimination against an inhabitant of the municipality because of any characteristic unrelated to merit is a matter of public concern...."

[36] *See Planned Parenthood of Alaska, Inc.*, 28 P.3d, at 908-909 (quoting Alaska Const. art. I, § 1).