



May 2023

## Policy Primer: Incorporating Racial Equity into Housing Policy

### Introduction

Communities across the United States face a variety of pressing challenges related to the safety, stability, and affordability of housing. For the past year, ChangeLab Solutions has been working with local governments and housing advocates in eight communities across the country as part of the [Housing Solutions Collaborative](#), a peer-learning cohort focused on building capacity and partnerships to advance housing equity. Although no two communities are the same, the technical assistance provided to our partners revealed common needs and areas of interest. This memo is one of five in a series that provides a high-level overview of strategies and policies that the cohort explored together: using tax incentives to spur affordable housing, developing best practices for establishing and expanding local emergency rental assistance, adopting anti-displacement policies to protect tenants, supporting affordable housing production, and adopting strategies to address housing-specific racial inequities. The memos highlight equitable solutions to housing challenges that local jurisdictions and communities face throughout the United States.

### Housing Challenge: Racial Disparities in Housing

Centuries of systemic racism have perpetuated compounding inequities for people of color, resulting in significant health disparities, particularly in housing.<sup>1</sup> Addressing these housing disparities will require such efforts as producing more affordable housing, preserving existing affordable housing, and preventing displacement.<sup>2</sup> While there is a demonstrated need to prioritize racial equity within government programs and policies,<sup>3</sup> federal law, and in some instances state law, restricts localities' ability to factor race<sup>4</sup> expressly into their decision making, thereby limiting the ability of local governments to create policy solutions that remedy historical harms rooted in racism and necessitating the use of equitable, race-neutral metrics.

### Designing Equitable Housing Policies

Designing equity promoting housing policies requires navigating both complex federal and state legal considerations. Nevertheless, there are a variety of strategies localities can use to navigate legal barriers to designing equity promoting housing policies.

### Legal Considerations

The following sections identify the general federal and state limitations on the use of race in governmental decision making.

## Federal law

Under the US Constitution, the equal protection clause (as applied to states and localities) and the due process clause (as applied to the federal government) limit “governments’ abilities to confer benefits or impose burdens based on race.”<sup>5</sup> Federal statutes prohibiting discrimination on the basis of race, such as the Fair Housing Act, may also restrict the use of racial classifications. This means that federal, state, and local government entities generally cannot use race as a classification when choosing target populations in the design of equitable programs or policies. For more detail on the implications of federal law, consult the Housing Solutions Lab brief [Legal Frameworks for Addressing Racial Disparities in Housing](#).

## State law

In addition to federal law, nine states have further limited the use of racial and other classifications: five states by state constitutional amendment,<sup>6</sup> three by legislation,<sup>7</sup> and one by executive order.<sup>8</sup> These restrictions may be found in different places in the law, and local advocates must review carefully to ensure they understand the full legal landscape in their state.

To use Oklahoma’s wording as an example, these bans often prohibit state and local governments from “grant[ing] preferential treatment to, or discriminat[ing] against, any individual or group on the basis of race, color, sex, ethnicity, or national origin in the operation of public employment, public education or public contracting.”<sup>9</sup> Importantly, these laws apply not only to discrimination against populations on the basis of these categories, but also to discrimination in favor of populations on the basis of these categories. Sometimes referred to as affirmative action bans, these state laws largely overlap with the prohibitions under federal law and also prohibit the narrow uses permitted by federal law. For example, while the use of race as one factor in a holistic college admissions assessment has historically survived legal challenges under federal law,<sup>10</sup> a state affirmative action ban would prohibit this use.

While the language of these bans sounds incredibly broad, courts that have considered them have been clear that not all uses of race or other enumerated classifications are prohibited under these laws, and permitted uses have been refined on a case-by-case basis. Note that much of this litigation establishing permissible uses of race even in the presence of these bans has taken place in California, and interpretation by other state courts of their own laws could differ.

### **Compelled Affirmative Action**

In extremely narrow circumstances, federal law may preempt state bans and require affirmative action. Although cases have not directly decided this issue, courts in California and Washington have suggested that the federal equal protection clause may compel the use of race-based classifications to correct specific instances of intentional discrimination by the government itself, preempting state affirmative action bans.<sup>11</sup> An example of compelled (rather than simply permissible) affirmative action is school integration.<sup>12</sup>

Similar to the interplay between the federal equal protection clause and federal anti-discrimination statutes like the Fair Housing Act, state anti-discrimination statutes may also limit race distinctions that would otherwise be permissible under a state’s constitution.

## Policy Considerations

Against this legal backdrop, there are still several ways to design legally defensible, equitable programs.

### Use race-neutral categories

Case law establishes two distinct levels of judicial review for race-conscious policies that confer benefits or impose burdens based on race and race-neutral policies that do not. While race-conscious policies are subject to strict scrutiny, the highest form of judicial review, race-neutral policies are subject to the more lenient rational basis standard.<sup>13</sup> As a result, while the courts have determined that the use of set-asides, quotas, or percentages based on race in government policies is impermissible,<sup>14</sup> governments can generally use race-neutral metrics to indirectly address racial disparities. (For more information on federal constitutional scrutiny, see the Housing Solutions Lab brief [Legal Frameworks for Addressing Racial Disparities in Housing](#).)

Race-neutral metrics can still promote racial equity in the housing context, as systemic discrimination in the form of government policies like segregation, redlining, and restrictive covenants has resulted in significant inequality identifiable in the geographic location and socioeconomic status of Black, Indigenous, and people of color (BIPOC).<sup>15</sup> However, race-neutral metrics may be less precise than race-conscious measures for closing the gap on racial disparities.<sup>16</sup> Selecting effective race-neutral metrics requires intimate knowledge of the specific local context and existing data to ensure that government actions or programs are targeted appropriately. In other words, the degree to which race-neutral metrics can be used to promote race equity depends on how closely the metrics chosen correlate with the populations the policy is intended to help. It may be helpful to partner with local universities or other research institutions that have access to existing data, as well as grassroots advocates, community-based organizations (CBOs), and the community itself to inform the selection of appropriate metrics; such partners may also be interested in evaluating the impact of the government programs once they are adopted. Suitable race-neutral metrics might include these:

Categories	Example Metrics	Notes
Geographic locations (e.g., zip codes, neighborhood boundaries, US Census geographies such as Census tracts or block groups)	Neighborhoods with: Higher numbers of renters than citywide average Higher rates of housing-related health conditions compared to citywide average, such as asthma Emergency Department utilization rates or elevated blood-lead levels Higher unemployment rates	
Socioeconomic status	Federal poverty line based on household income Percentages of area median income	

Categories	Example Metrics	Notes
Language	Primary or preferred language or language ability <sup>17</sup> Linguistic isolation	Courts have held that language preferences do not violate affirmative action bans because they do not discriminate on race, but rather based on a person’s ability to speak a certain language. Not every member of a race may speak a specific language, and people of any race are free to learn any new language.
Small businesses/businesses previously not awarded contracts	Businesses based on number of employees or amount of annual revenue	As opposed to the more typical minority-owned business enterprise (MBE) classification, which is often based on race, race-neutral metrics based on smaller size and revenue of businesses may more equitably allow such businesses to secure contracts when they would otherwise be excluded in traditional bidding processes.
Banding <sup>18</sup>	Applicant scores	<p>“Banding” involves grouping bands of similarly qualified applicants and treating them as equivalent. For example, if a city hires in part based on applicants’ exam scores, under banding, applicants’ scores would be grouped (e.g., 76–100, 51–75, 26–50, 0–25) rather than ranked sequentially (e.g., 100, 97, 93, 88, 76). This may allow for more equitable hiring, as applicants who are scoring lower because of a lack of opportunity or education due to systemic discrimination will be competitive with higher-scoring applicants within the same range.</p> <p>In the housing context, localities could choose to band developers’ scores when they bid for affordable housing development contracts in order to potentially increase diversity in developer participation. Localities might also consider using banding when establishing housing program eligibility criteria.</p>

Categories	Example Metrics	Notes
Other examples; creating a race-neutral metric related to the purposes of specific legislation	Census tracts disproportionately harmed by environmental pollution and other social inequities	The California Global Warming Solutions Act (SB 535) requires that a certain percentage of the proceeds from the state’s cap-and-trade program be used to benefit “priority populations,” including “disadvantaged communities,” low-income communities, and low-income households. “Disadvantaged communities” are designated by the California Environmental Protection Agency using a screening tool to identify places that are disproportionately burdened by pollution. <sup>19</sup>

Governments must be able to articulate a nondiscriminatory reason for the race-neutral category of choice. For example, there are clear arguments that income-based eligibility for programs that provide financial assistance (e.g., down payment assistance or emergency rental assistance) has a nondiscriminatory basis: they target financial assistance at individuals most likely to need it—those with the least financial resources.

**Avoid disparate Impact**

In addition to intentional discrimination, many federal laws prohibit disparate impact — unintentional discrimination that nevertheless has a disproportionately negative effect on a protected class.<sup>20</sup> Some courts have suggested that seeking to avoid disparate impact under federal or state law may serve as a defense for the use of race-neutral metrics to benefit BIPOC communities.<sup>21</sup> However, if a government uses disparate impact as a justification to design a program that benefits communities of color, this may suggest that the government is impermissibly using race as the basis of its decision making, even if the chosen metric is race neutral. Providing a strong, nondiscriminatory justification for the choice of classification, and not relying on disparate impact, may be more defensible.

**Take advantage of permissible uses of racial categories**

Even under affirmative action bans, race-neutral programs may still be able to make express use of racial categories in some ways as long as race is not used as a decision-making factor to determine when or where to take government action, or who should receive services or benefits under a government program)—for example:

**Aspirational goals.**<sup>22</sup> While set-asides, quotas, or percentages are clearly impermissible and governments cannot use race as a decisive factor, they may still be able to articulate racial equity as an aspirational goal. For example, the Tulsa Public School purchasing and procurement policy states, “Minority, female-owned businesses and labor surplus firms are encouraged to participate.”<sup>23</sup>

**Strategic planning.** When crafting policy, governments remain free to “recognize that our society is composed of multiple races with different histories, to gather information concerning geographic distribution of the races, and to adopt race-neutral policies in an effort to achieve a fair allocation of resources.”<sup>24</sup>

Jurisdictions may be able to use racial equity analysis tools to understand a jurisdiction’s history of discriminatory policies and their present-day harms or to assess the impacts of proposed or adopted policies;<sup>25</sup> however, this may verge on using race as a decision-making factor to determine the allocation of government actions or programs. Even if a government collects or uses race and ethnicity data for strategic planning, its position may be more legally defensible if it adheres to race-neutral metrics and decision-making processes.

**Outreach.** It may be permissible to target outreach on the basis of race or other protected classes (e.g., age, gender, disability) as long as outreach is not exclusively directed toward the protected class. However, it may be more defensible to target outreach on the basis of a race-neutral category, which has already been designed to reach target populations equitably.<sup>26</sup>

**Data collection.** It may be permissible for governments to collect race, ethnicity, and other data to determine whether public contracts or public benefits are awarded in an inclusive, nondiscriminatory manner.<sup>27</sup> For example, prior to 2019, King County and the City of Seattle, Washington, prioritized Coordinated Entry for All, a housing referral program for people experiencing homelessness, based on a “vulnerability index” screening tool. After collecting data and evaluating the program’s performance, they found that the screening tool resulted in significant racial disparities in who received services: families with a White head of household were significantly more likely to be referred for housing than households of other races. Realizing the tool was not capturing the reality of need, Seattle and King County formed a work group to choose new criteria to distribute services more equitably. The group used race-neutral criteria, including the fact that BIPOC and White respondents answered questions differently, to reduce the weight of the vulnerability index score and increase the weight of homelessness chronicity, history of foster care, and the presence of children or pregnant people in the household as criteria for the program.<sup>28</sup>

### Grant funds to CBOs that are subject to fewer restrictions

Local governments could potentially grant funds to CBOs that have more flexibility to ensure services and benefits reach targeted groups, because private actors are not usually subject to constitutional limitations. For example, the Mayor’s Office of Lansing, Michigan, has established the Racial Justice & Equity initiative<sup>29</sup> and through the initiative has put out a request for information from community organizations seeking to “address systemic racism and racial inequity” to develop a new grant program.<sup>30</sup>

However, keep in mind that local governments must still use race-neutral criteria when selecting which CBOs should receive grant funds because a government’s choice of contractors or grantees falls within the scope of government action. Also note that in the housing context, private organizations may still be prohibited from implementing race-conscious programs under the federal Fair Housing Act and/or state fair housing laws. There may be more flexibility in the economic development context, which does not generally receive the same nondiscrimination protections as rights like housing and employment.

## Additional Legal Considerations for Geographic- or Location-Based Classifications

When geographic- or other location-based strategies specifically are used to develop more equitable policies, they can trigger additional constitutional protections and should be designed accordingly so that programs will be upheld. Local hiring and local procurement preferences in particular may trigger either the Privileges & Immunities Clause<sup>31</sup> or the “Dormant” Commerce Clause.<sup>32</sup> Such policies are more legally defensible when the locality exempts out-of-state residents or businesses from preference calculations<sup>33</sup> or uses its own funds as a market participant,<sup>34</sup> respectively.

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## References

- <sup>1</sup> ChangeLab Solutions. *A Blueprint for Changemakers: Achieving Health Equity Through Law and Policy*. 2019. [www.changelabsolutions.org/product/blueprint-changemakers](http://www.changelabsolutions.org/product/blueprint-changemakers); Bailey ZD, Feldman JM, Bassett MT. How structural racism works: Racist policies as a root cause of US racial health inequities. *N Engl J Med* 2021;384:768–773. doi:10.1056/NEJMms2025396; Braveman PA, Arkin E, Proctor D, Kauh T, Holm N. Systemic and structural racism: Definitions, examples, health damages, and approaches to dismantling. *Health Aff* 2022;41(2). doi:10.1377/hlthaff.2021.01394.
- <sup>2</sup> Solomon D, Maxwell C, Castro A. *Systemic Inequality: Displacement, Exclusion, and Segregation: How America’s Housing System Undermines Wealth Building in Communities of Color*. Washington, DC: Center for American Progress; 2019. [www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/](http://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/); Butler A, Carter K, Lowery L. *Embedding Racial Equity in Housing*. National League of Cities. [www.nlc.org/article/2020/07/09/embedding-racial-equity-in-housing/](http://www.nlc.org/article/2020/07/09/embedding-racial-equity-in-housing/). Accessed August 19, 2022; Velasco G, Fedorowicz M. *Applying a Racial Equity Lens to Housing Policy Analysis*. Urban Institute. <https://housingmatters.urban.org/articles/applying-racial-equity-lens-housing-policy-analysis>. August 5, 2020. Accessed August 19, 2022.
- <sup>3</sup> Why government? Local and Regional Government Alliance on Race & Equity. [www.racialequityalliance.org/about/our-approach/government/](http://www.racialequityalliance.org/about/our-approach/government/). Accessed August 19, 2022.
- <sup>4</sup> While the term *race* and its derivations are used throughout this primer, the same considerations apply to similar concepts such as ethnicity and national origin.
- <sup>5</sup> House S. *Legal Frameworks for Addressing Racial Disparities in Housing*. New York: Housing Solutions Lab, NYU Furman Center; 2022. [https://localhousingsolutions.org/wp-content/uploads/2022/04/Legal-Frameworks-to-Address-Racial-Disparities\\_Final.pdf](https://localhousingsolutions.org/wp-content/uploads/2022/04/Legal-Frameworks-to-Address-Racial-Disparities_Final.pdf).
- <sup>6</sup> Although they have small differences in wording, constitutional amendments in Arizona, California, Michigan, and Nebraska, and Oklahoma are essentially the same. ARIZ. CONST. art. II, § 36.; CAL. CONST. art. I, § 31.; MICH. CONST. art. I, § 26.; NEB. CONST. art. I, § 30.; OKLA. CONST. art. II, § 36A.
- <sup>7</sup> Idaho’s statutory ban is essentially the same as the above constitutional amendments, while New Hampshire’s and Washington’s are different. IDAHO CODE §§ 67-5909A [public employment and education], 67-9210

[state contracting], 67-2802, and 67-2809 [local contracting]; New Hampshire includes sexual orientation and religion or religious beliefs in the categories of prohibited classifications and applies the ban only to public employment and public secondary education, not to primary education or public contracting. N.H. REV. STAT. §§ 21-I:52 [public employment], 188-F:3-a [public secondary education]; WASH. REV. CODE § 49.60.400; see *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 72 P.3d 151 (Wash. 2003) (only prohibiting the use of race and gender to choose a less qualified candidate over a more qualified candidate), see also *Parents v. Seattle*, 551 U.S. 701 (2007) (invalidating the Seattle school district program under federal law, even though it was upheld under the state constitutional ban on affirmative action).

<sup>8</sup> Florida Governor, Executive Order 99-281. November 9, 1999. As a matter of legislative interpretation, constitutional amendments may have more weight than statutes and statutes more weight than executive orders. Procedurally, constitutional amendments are also more difficult to enact or change than statutes or executive orders.

<sup>9</sup> OKLA. CONST. art. II, s. 36A.

<sup>10</sup> Affirmative action in higher education is again being challenged in the Supreme Court. *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199, 142 S.Ct. 895 (2022) (granting cert.).

<sup>11</sup> See *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947 (Cal. 2010), *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), and *Parents Involved*, 72 P.3d 151.

<sup>12</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971).

<sup>13</sup> House S. *Legal Frameworks for Addressing Racial Disparities in Housing*. New York: Housing Solutions Lab, NYU Furman Center; 2022. [https://localhousingsolutions.org/wp-content/uploads/2022/04/Legal-Frameworks-to-Address-Racial-Disparities\\_Final.pdf](https://localhousingsolutions.org/wp-content/uploads/2022/04/Legal-Frameworks-to-Address-Racial-Disparities_Final.pdf).

<sup>14</sup> See *Hi-Voltage Wire Works*, 12 P.3d 1068.

<sup>15</sup> See, e.g., Blower B, Silver J, Richardson J, Schlactus G, Markano-Stark S. *Adding Robust Consideration of Race to Community Reinvestment Act Regulations: An Essential and Constitutional Proposal*. Washington, DC: National Community Reinvestment Coalition; 2021. <https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/>.

<sup>16</sup> *Id.*

<sup>17</sup> See *Pierce v. Regents of University of California*, 2016 WL 892015 (unpublished); see also *Hernandez v. New York*, 500 U.S. 352 (1991) (upholding prosecutor striking Spanish-speaking jurors as race neutral).

<sup>18</sup> See *Hofmann v. City & County of San Francisco*, 2013 WL 6734091 (N.D. Cal. 2013).

<sup>19</sup> California Climate Investments priority populations 2022 CES 4.0. California Air Resources Board. <https://webmaps.arb.ca.gov/PriorityPopulations/>. Accessed August 19, 2022; SB 535 disadvantaged communities. California Office of Environmental Health Hazard Assessment. <https://oehha.ca.gov/calenviroscreen/sb535>. Accessed 19, 2022.

<sup>20</sup> See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)(i) [Title VII], 24 C.F.R. § 100.500 [Fair Housing], and 28 C.F.R. § 42.104 [Title VI].

<sup>21</sup> See *Hofmann*, 2013 WL 6734091; see also *Ricci v. DeStefano*, 557 U.S. 557 (2009).



- <sup>22</sup> See *Spokojny and American Civil Rights Foundation v. Berkeley Unified School Dist.*, 172 Cal.App. 4th 207 (Cal. App. 2009).
- <sup>23</sup> Purchasing and procurement. Tulsa Public Schools. [www.tulsaschools.org/about/teams/finance/purchasing](http://www.tulsaschools.org/about/teams/finance/purchasing). Accessed August 19, 2022.
- <sup>24</sup> *American Civil Rights Foundation*, 172 Cal.App. 4th 207.
- <sup>25</sup> E.g., Nelson J, Brooks L. *Racial Equity Toolkit: An Opportunity to Operationalize Equity*. Local and Regional Government Alliance on Race & Equity; 2015. [www.racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial\\_Equity\\_Toolkit.pdf](http://www.racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial_Equity_Toolkit.pdf).
- <sup>26</sup> See *Connerly v. State Bd. of Personnel*, 92 Cal.App. 4th 16 (Cal. App. 2001); see also *Coral Construction*, 235 P.3d 947 .
- <sup>27</sup> See *Connerly*, 92 Cal.App. 4th 16.
- <sup>28</sup> *COVID-19 Homeless System Response: Advancing Racial Equity Through Assessments and Prioritization*. Washington, DC: HUD Exchange, US Department of Housing and Urban Development; 2020. <https://files.hudexchange.info/resources/documents/COVID-19-Homeless-System-Response-Advancing-Racial-Equity-through-Assessments-and-Prioritization.pdf>.
- <sup>29</sup> Racial justice & equity. City of Lansing, Michigan. [www.lansingmi.gov/360/Racial-Justice-Equity](http://www.lansingmi.gov/360/Racial-Justice-Equity). Accessed August 19, 2022.
- <sup>30</sup> City of Lansing Purchasing Office. Request for information RFI/21/096 Racial Equity Grant Program. City of Lansing, Michigan. <https://content.civicplus.com/api/assets/3f08dd39-f004-4224-8206-2172d8ed652d>. June 8, 2021.
- <sup>31</sup> If a municipality discriminates against out-of-state residents on a matter of “fundamental concern,” such as the pursuit of private employment, there must be a “substantial reason” for the differential treatment that is “substantially related” to the government’s objectives. See, e.g., *United Bldg. & Construction Trades Council of Camden v. Mayor of Camden*, 465, U.S. 208 (1984).
- <sup>32</sup> The Supreme Court has interpreted the Commerce Clause to prohibit state or local governments from taking actions that burden interstate commerce. *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).
- <sup>33</sup> As demonstrated by case law, local hiring preferences are more defensible when “local evils,” such as unemployment or poverty rates, are higher in the jurisdiction where the policy applies than in other areas and are caused by out-of-state workers. Another approach to avoid liability, used in Cleveland, is to exempt out-of-state workers from preference calculations. See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984); *City of Cleveland v. Ohio Dept. of Transport.*, 508 F.3d 827 (6th Cir. 2007); *Hudson County Bldg. & Constr. Trades Council v. Jersey City*, 960 F. Supp. 823, (D.N.J. 1996).
- <sup>34</sup> When a local government is acting as a “market participant” (by using its own funds like a business or customer) rather than acting as a regulator, in-state preferences are permissible and do not need additional justification. See, e.g., *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).