

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
ASHEVILLE DIVISION**

JOHN P. MIALL, JR., ROBYN HITE,  
DAVID SHAW, DANIE JOHNSON, and  
WILLA GRANT,

Plaintiffs,

v.

CITY OF ASHEVILLE,  
DEBRA CAMPBELL, in her official  
capacity as City Manager of the City of  
Asheville, and  
ESTHER MANHEIMER, in her official  
capacity as Mayor of the City of Asheville,

Defendants.

Civil Action No. 1:23-cv-00259-MR-WCM

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFFS'  
EMERGENCY MOTION FOR A  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

**INTRODUCTION**

Residents of Asheville, North Carolina who want to serve on the Human Relations Commission of Asheville (HRCA) are required to compete for an appointment on unequal grounds. In addition to demonstrating an interest in local government, prospective appointees must also meet a requirement that treats them differently on the basis of their race. Section 2-185.25(b)(2) of the Asheville Code of Ordinances requires the City Council to prefer minority applicants for appointment to the HRCA. The City must specifically favor applicants who are Black or African American, Latino/a or Hispanic individuals, Native American and Indigenous people, and Asian Americans.

Defendants' race-based appointment preferences cannot survive constitutional scrutiny. Strict scrutiny demands that racial classification like these can only be upheld where they further a compelling interest and are narrowly tailored to that interest. Defendants cannot satisfy strict scrutiny. They have never asserted that the race-based appointment preferences remedy specific

instances of discrimination against the favored groups, nor have they demonstrated why race-neutral criteria are inadequate for selecting members to the HRCA.

Plaintiffs are applicants to the HRCA that do not identify as any of the races that the Asheville ordinance prefers. Yet each of them possesses unique backgrounds and a passion for making a difference in their community. The City of Asheville deprives Plaintiffs equal consideration for an appointment to the HRCA because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Since the Asheville City Council will appoint members to vacant positions on the HRCA on October 10, 2023, Plaintiffs require expedited preliminary relief to prevent Defendants from making appointments in a discriminatory manner before this Court can decide the merits of Plaintiffs' claims.

All four elements of the standard for obtaining preliminary relief are satisfied here: Plaintiffs are likely to succeed on the merits of their equal protection claim; they will suffer irreparable harm in the absence of preliminary relief; the balance of hardships tips in Plaintiffs' favor; and an injunction is in the public interest.

## **STATEMENT OF FACTS**

### **I. THE HUMAN RELATIONS COMMISSION OF ASHEVILLE**

#### **A. Formation of the HRCA**

The City of Asheville has a variety of boards and commissions to give residents a voice in their local government and a means of influencing decisions that shape their community.<sup>1</sup> The City

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<sup>1</sup> City of Asheville, City of Asheville Website, Boards and Commissions (2023), available at <https://www.ashevillenc.gov/department/city-clerk/boards-and-commissions/>.

Plaintiffs respectfully request that this Court take judicial notice of the ordinances cited in this motion as well as the content of government websites, as they are not subject to reasonable dispute. Fed. R. Evid. 201; *see also Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004) (taking judicial

Council appoints members to these boards and commissions following the recommendations of the Boards and Commissions Committee, a group composed of several members of the City Council that is responsible for reviewing citizens' applications for appointment.<sup>2</sup>

On May 23, 2017, the Boards & Commissions Committee recommended that the City create the Human Relations Commission of Asheville (HRCA). To that end, the City Council formed a Blue Ribbon Committee to determine and recommend the mission, scope, and duties of the HRCA.<sup>3</sup>

The Blue Ribbon Committee presented its recommendations to the City Council on February 13, 2018. Among its recommendations was the implementation of racial quotas for the membership of the HRCA. Specifically, the HRCA would have at least 6 African Americans and at least 2 "Latinx" members, along with 2 LGBTQ members, 3 "professionals with influence," at least 2 to 3 youth members, a representative from each of the city's geographical areas, 2 to 3 citizens living in public housing, and 2 individuals with a disability. The Blue Ribbon Committee stated as its reason for these quotas: "Always appoint 2 of any group of people so that someone is not 'the only one.'" (See Exhibit 1 at 19, to Declaration of Andrew R. Quinio ("Quinio Decl.")). It further explained to the City Council that these numbers were meant to "allow members to feel more comfortable working in a group like this."<sup>4</sup>

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notice of information publicly available on official government website).

<sup>2</sup> *Id.*, Boards and Commissions Committee (2023), available at <https://www.ashevollenc.gov/government/city-council-committees/boards-and-commissions-committee/>.

<sup>3</sup> *Id.*, City Council of Asheville, Minutes of Regular Meeting (May 23, 2017), available at: [https://drive.google.com/file/d/1Hz\\_05GQWpABsR6M0LGqd8vF0Sgg6pzm\\_/view](https://drive.google.com/file/d/1Hz_05GQWpABsR6M0LGqd8vF0Sgg6pzm_/view) (last visited September 25, 2023).

<sup>4</sup> *Id.*, City Council of Asheville Meeting Video, YouTube (February 13, 2018), available at <https://www.youtube.com/watch?v=RtPbOedndZ4> (starting at 45:30) (last visited September 25, 2023).

On April 10, 2018, pursuant to the Blue Ribbon Committee's recommendations, the City Council unanimously passed Ordinance No. 4663, codified in the Asheville Code of Ordinances as Section 2-185.23 et seq., establishing the HRCA.<sup>5</sup>

Section 2-185.25(b) set forth the criteria for membership and appointment to the Commission, providing for a 15-member commission appointed by the City Council to serve staggered two-year terms. The section further implemented a membership quota for various categories, including race. Specifically, the section provided that "In appointing members to the HRCA, the Council should endeavor to use the following criteria:"

...

- b. Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. With the recognition that there will have to be members who meet more than one of the following, the City Council should endeavor to appoint individuals meeting the following criteria:
- 6 African Americans;
  - 2 Latinx individuals;
  - 2 members of the LGBTQ+ community;
  - 2 Youth members between the ages of 18 and 25;
  - 2 to 3 individuals who live in public housing;
  - 2 individuals with a disability;
  - 3 individuals who are recognized as community leaders.

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<sup>5</sup> *Id.*, City Council of Asheville, Minutes of Regular Meeting (April 10, 2018), available at [https://drive.google.com/file/d/14Vmvu13JNSHGnm\\_VjfHYdjfZJ3XNxJ5/view](https://drive.google.com/file/d/14Vmvu13JNSHGnm_VjfHYdjfZJ3XNxJ5/view) (last visited September 25, 2023).

The City Council appointed the HRCA's first members on May 22, 2018.<sup>6</sup> Its appointments largely adhered to the ordinance's quotas.<sup>7</sup> The City Council strived to adhere to these quotas in its subsequent appointments to vacant positions on the HRCA, including confirming with the Boards and Commissions Committee that newly appointed members satisfied the requisite numbers. For instance, when new appointments were made to the HRCA on March 12, 2019, Councilwoman Julie Mayfield asked the Committee if "you guys have done the math on the balances."<sup>8</sup> At the January 14, 2020, meeting, Councilwoman Mayfield asked if "the numbers are still generally ok?" as a result of appointments being postponed.<sup>9</sup>

### **B. Persistence of Racial Preferences for HRCA Membership**

In a June 16, 2022, HRCA meeting, Alayna Schmidt, the City Equity & Inclusion Consultant, and Aarin Miles, City Attorney, presented amendments to the HRCA's membership criteria that would revise the numerical racial quotas. Ms. Miles explained that state and federal law prohibit racial quotas. Tanya Rodriguez, the HRCA Chairperson, inquired about alternatives to the numerical quota, such as implementing specific percentages of members based on race instead so that "our color isn't diluted out of the Commission."<sup>10</sup>

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<sup>6</sup> *Id.*, City Council of Asheville, Minutes of Regular Meeting (May 22, 2018), available at <https://drive.google.com/file/d/15xYncOdmvprtk0gQgSTS4DrBZiUd3wF-/view> (last visited September 25, 2023).

<sup>7</sup> *Id.*, City Council of Asheville, Meeting Materials for March 12, 2019, available at [https://drive.google.com/file/d/15bJ7UX\\_6m3sMzGXYrTLkfogKwOFfouwo/view](https://drive.google.com/file/d/15bJ7UX_6m3sMzGXYrTLkfogKwOFfouwo/view) (last visited September 21, 2023); *see also* Walton, Daniel, "Human Relations Commission holds first meeting on Thursday," Mountain Xpress, June 12, 2018, available at <https://mountainx.com/news/human-relations-commission-takes-up-task-of-advancing-equity/>.

<sup>8</sup> *Id.*, City Council of Asheville Meeting Video, YouTube (March 12, 2019), available at <https://www.youtube.com/watch?v=GCDpL911xLw> (starting at 3:59:20).

<sup>9</sup> *Id.*, City Council of Asheville Meeting Video, YouTube (January 14, 2020), available at <https://www.youtube.com/watch?v=1VKrdJGllvg> (starting at 1:37:30).

<sup>10</sup> *Id.*, HRCA Meeting Video, YouTube (June 16, 2022), available at <https://www.youtube.com/watch?v=Ew4aAIBUdmw> (starting at 14:20).

The City Council then adopted Ordinance No. 4967 on September 13, 2022, amending the membership criteria to remove the quotas.<sup>11</sup> As such, Section 2-185.25(b)(2) was revised to state:

“In appointing members to the HRCA, the Council should endeavor to use the following criteria:”

- a. Members should have demonstrated an interest and experience in human relations;
- b. Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. Commission representation shall take into consideration the diverse nature of the Asheville community. Membership on the Commission shall include, but not be limited to, the following:
  - Black or African Americans;
  - Latino/a or Hispanic individuals;
  - Native Americans and Indigenous People;
  - Asian Americans;
  - members of the LGBTQ+ community;
  - Youth members between the ages of 18 and 25;
  - Individuals who live in public housing;
  - Individuals with a disability or disabled individuals;
  - Individuals who are recognized as community leaders.

On January 10, 2023, the City Council reduced the number of members on the HRCA from 15 to 9 members. It also allowed up to 3 members to be non-city residents of Buncombe County.<sup>12</sup>

Following the revisions, the HRCA’s racial preferences persisted. City Council meeting materials conveyed these racial preferences to council members. At the October 11, 2022, meeting, spreadsheets displaying the racial demographics of the HRCA members were included in meeting materials with reminders stating, “Endeavor to appoint ...” following a list that included African

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<sup>11</sup> *Id.*, City Council of Asheville, Minutes of Regular Meeting (September 13, 2022), available at <https://drive.google.com/file/d/1t1nMMif6epZEU0rxMDmxCtiPSdziE2L/view> (last visited September 25, 2023).

<sup>12</sup> *Id.*, City Council of Asheville, Minutes of Regular Meeting (January 10, 2023), available at [https://drive.google.com/file/d/1\\_i0gkknax5HHwrUVoHgEx6ulHCPEXjol/view](https://drive.google.com/file/d/1_i0gkknax5HHwrUVoHgEx6ulHCPEXjol/view) (last visited September 26, 2023).

Americans and “Latinx” individuals. Neither Asian Americans nor Native Americans were listed despite the City Council adding them to the ordinance’s preferred racial categories. (Exhibit 2 to Quinio Decl.). The same note appeared in a spreadsheet provided for the June 13, 2023, City Council meeting. (Exhibit 3 to Quinio Decl.).

Updates to the City’s website for the HRCA around January 17, 2023, reflected the Commission’s enduring racial preferences, stating, “City Council will endeavor to appoint city residents (with up to three members residing in Buncombe County), meeting the following criteria ...” followed by a list that included the racial categories of Black or African American, Latino/a or Hispanic, Native American, and Asian American. The website also asked applicants to indicate on the separate Human Relations Commission Form whether they satisfy these qualifications. The website provided a link to the Human Relations Commission Form. (Exhibit 4 to Quinio Decl.). An update to the HRCA website on September 14, 2023, continues to display these same racial preferences. (Exhibit 5 to Quinio Decl.).

The Human Relations Commission Form that applicants were required to complete likewise stated, “Because the City Council will endeavor to appoint city residents meeting the following criteria, please list and further describe, as desired, any that may apply to you...” This was again followed by a list that included the racial categories of Black or African American, Latino/a or Hispanic, Native American, and Asian American. (Exhibit 6 to Quinio Decl.).

At the September 21, 2023, HRCA Meeting, City Attorney Brad Branham presented another proposed revision to the language of the ordinance setting the Commission’s membership. Section 2-185.25(b)(2) would be potentially revised to state:

Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. Commission representation shall take into consideration the diverse

nature of the Asheville community. The Consideration of appointment of members shall provide equal access and opportunity to serve upon the Commission to all historically disadvantaged groups, including but not limited to the following ...

The specific racial categories of Black or African Americans, Latino/a or Hispanic individuals, Native Americans and Indigenous People, and Asian Americans were not revised and followed that section.<sup>13</sup>

Mr. Branham explained the effect of the proposed revisions, stating, “It mandates that the city council shall consider in all of their appointments the ability for all of those particular named groups to offer the opportunity to serve. ... The only thing that we have done to alter that a little bit it is to call out that everyone has the opportunity to serve, but those groups particularly must be protected in their opportunity to be part of this group.”<sup>14</sup>

Mr. Branham went on to remind the HRCA that interviews are a part of the interview process which would allow applicants to convey to the City Council members whether they identify in one of the preferred groups. He additionally elaborated on the language specifying preferred categories of members, stating, “[W]e left that language in there purposefully because we felt that part of the reason this board in particular was formed was to provide that voice to those particular groups of people who are some of the most affected by human relations issues in the city ...” Mr. Branham then commented that he believed the HRCA was the only board that “calls out a requirement to guarantee access to those individuals.”<sup>15</sup>

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<sup>13</sup> *Id.*, HRCA, Regular Meeting Staff Report on Amendment to City’s Human Relations Commission of Asheville Ordinances (September 21, 2023), available at <https://drive.google.com/file/d/1ym1mPzc0ShS7NT1O6isOLpZmEhbtb62j/view> (last visited September 25, 2023). Please note the minutes are dated September 21, 2022, but the meeting took place on September 21, 2023. *See* HRCA Meeting Video, YouTube (September 21, 2023), available at <https://www.youtube.com/watch?v=YvasgnHxq1E>.

<sup>14</sup> *Id.*, HRCA Meeting Video, YouTube (September 21, 2023), available at <https://www.youtube.com/watch?v=YvasgnHxq1E> (starting at 9:40; quoted remarks start around 16:50).

<sup>15</sup> *Id.* (starting around 20:15).

The City Council will decide on the proposed revision at its meeting on October 10, 2023.<sup>16</sup>

## **II. THE CITY DECLINES TO APPOINT PLAINTIFFS TO THE HRCA**

Around March 2023, the City advertised that it was accepting applications to the HRCA. To apply, the City required applicants to complete and submit the Boards & Commissions Application Form, which asks applicants to identify their race. Applications were due on April 30, 2023. Plaintiffs timely submitted their applications for appointment and noted on their applications their backgrounds, areas of expertise, education, and other factors that demonstrate their interest and experience in human relations.

David Shaw submitted his application for appointment to the HRCA on March 17, 2023. He indicated on his application that he was completing a master's degree in social work and interning at a hospital. He stated that he cared about the health of the city and its residents. He indicated his race as white. (Exhibit 7 to Quinio Decl.).

John P. Miall, Jr., submitted his application around March 21, 2023. He attached his resume to his application, which listed his nearly 30-year career with the City of Asheville, including his role as the city's risk manager for several of those years, and his extensive experience as a speaker on behalf of pharmaceutical companies. He indicated his race as white. (Exhibit 1 to Declaration of John Miall, Jr. (Miall Decl.)).

Robyn Hite submitted her application on March 27, 2023. Her application mentioned her time on the North Buncombe Elementary PTO, her presidency of the North Windy Ridge PTO, and her experience organizing fundraisers, facilitating meetings with parents and staff, and writing newsletters. She indicated her race as white. (Exhibit 7 to Quinio Decl.).

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<sup>16</sup> *Id.* (starting around 15:35)

Danie Johnson submitted his completed Human Relation Commission Form on April 21, 2023. He stated on the form that while he does not meet any of the criteria for residents that the City Council would endeavor to appoint, he was concerned with the human rights of all individuals, and that “I feel I could contribute diverse viewpoints to the Commission’s discussions.” (*Id.*).

Willa Grant submitted her application around April 24, 2023. She mentioned on her application that she was serving at the WNC Rescue Mission and assisted homeless persons regain housing and stability. She had also completed around nine years of social work. She indicated her race as white. (*Id.*).

None of these applicants indicated on their applications that they were Black or African American, Latino or Hispanic individuals, native American or Indigenous persons, nor Asian Americans. They also did not indicate that they were members of the LGBTQ+ community, youth, living in public housing, nor had disabilities. (*Id.*; Exhibit 2 to Miall Decl.).

On June 13, 2023, the Boards & Commission Committee made its recommendations for the appointment of applicants to six positions on the HRCA. The committee recommended that two other applicants, Candace Blanchard and Susan Ann Sacco, be appointed to the HRCA, and that the other four remaining positions be readvertised to the public. The occupants of those four positions are current members of the HRCA, who would continue to serve until they are reappointed or replaced.<sup>17</sup> The City Council subsequently adopted the Committee’s appointment

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<sup>17</sup> *Id.*, Boards & Commissions Committee of Asheville, Minutes of Regular Meeting (June 13, 2023), available at <https://docs.google.com/document/d/1weQimfW05S52nHuUnK1GWvZXJd-wUgLkriDIYmnyLUs/edit> (last viewed September 26, 2023).

recommendations on June 13, 2023, appointing Ms. Blanchard and Ms. Sacco to the HRCA.<sup>18</sup> Consequently, Mr. Miall, Mr. Shaw, Ms. Hite, Ms. Johnson, and Ms. Grant were not appointed to the Commission. At the time the City Council made these appointments it had information and materials that identified applicants' races, including copies of applications and spreadsheets listing applicant racial data. (Exhibit 3 to Quinio Decl.).

Thereafter, the City advertised vacancies on the HRCA, with applications for appointments due on August 27, 2023. (Exhibit 8 to Quinio Decl.). The City Council is scheduled to make appointments at its October 10, 2023, meeting. (Exhibit 9 to Quinio Decl.). It is also scheduled to make board and commission appointments in January 2024 and April 2024. (*Id.*).

If the City Council appoints members to four of the HRCA positions at its October 10, 2023, meeting, the next vacancies will not appear until June 1, 2024, when four of the current members' terms will expire. (Exhibit 3 to Quinio Decl.). The City maintains applications on file for consideration for one year. If an applicant is not appointed within the year he or she submits an application, he or she must resubmit their application to be considered for appointment. (Exhibit 9 to Quinio Decl.). As such, Plaintiffs' applications will expire around April 2024.

### **LEGAL STANDARD**

To obtain a preliminary injunction, Plaintiffs must show: (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 236 (4th Cir. 2014). In evaluating a request for a temporary restraining order, the court considers the same factors applied for a preliminary injunction, except

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<sup>18</sup> *Id.*, City Council of Asheville, Action Agenda (June 13, 2023), available at <https://drive.google.com/file/d/1iJ4lY6mXhjhPGXeUwezRUk9lFAT2XJ-c/view> (last visited September 26, 2023)

that the Court takes into account the ex parte and emergency nature of the request. *Fender v. Biltmore Forest Country Club, Inc.*, No. 1:18-CV-00043-MR-DLH, 2018 WL 2304045, at \*1 (W.D.N.C. May 21, 2018).

At the temporary restraining order and preliminary injunction stage, Plaintiffs do not need to show “a certainty of success,” but rather a “grave or serious question for litigation.” *Schumacher Homes of N. Carolina, Inc. v. Buchanan*, No. 121CV00260MOCWCM, 2021 WL 5566771, at \*2 (W.D.N.C. Nov. 29, 2021); *see also Variable Annuity Life Ins. Co. v. Coreth*, 535 F. Supp. 3d 488, 504 (E.D. Va. 2021). While the plaintiffs have the burden of establishing that the four factors for issuing an injunction weigh in their favor, “the burdens at the preliminary injunction stage track the burdens at trial.” *Hebb v. City of Asheville*, No. 1:22-CV-00222-MR-WCM, 2023 WL 1825081, at \*1 (W.D.N.C. Feb. 8, 2023) (citation omitted). Accordingly, as the proponents of the ordinance being challenged, Defendants must make a sufficient showing that the ordinance is constitutional. *Id.* If Defendants do not make this showing, the movants will have shown a substantial likelihood that they will prevail on the merits of their claim challenging the validity of the ordinance. *Id.* (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666, (2004) (“As the Government bears the burden of proof on the ultimate question of [the challenged law's] constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents’ proposed less restrictive alternatives are less effective than [the challenged law].”)). Plaintiffs meet their burden here.

## ARGUMENT

### I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

Plaintiffs are likely to succeed in proving that Defendants’ race-based appointment preferences for the HRCA violate the Equal Protection Clause. Section 2-185.25 of the City’s Code

of Ordinances plainly requires the City Council to appoint members to the HRCA based on race. As such, it must survive strict scrutiny because “[a]ny racial classification ... must survive strict scrutiny review.” *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Pub. Sch.*, 197 F.3d 123, 129 (4th Cir. 1999).

Strict scrutiny is a “daunting two-step examination,” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023), in which the government has the burden of proving that racial classifications both (1) further a compelling governmental interest, and (2) are narrowly tailored to further that interest, *Johnson v. California*, 543 U.S. 499, 505 (2005) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

The Court applies the rigid standard of strict scrutiny to policies that use racial classifications because such classifications are presumptively invalid. *Eisenberg*, 197 F.3d at 129. The constitutional premise is that “‘race is an impermissible arbiter of human fortunes,’ even when using race as a ‘reparational device,’ or as a ‘remedial measure’ for past discrimination.” *Id.* (quoting *Podberesky v. Kirwan*, 38 F.3d 147, 152 (4th Cir. 1994)). Moreover, “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (cleaned up). And because racial classifications “carry a danger of stigmatic harm,” they must be “strictly reserved for remedial settings,” lest they “promote notions of racial inferiority and lead to a politics of racial hostility.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

The City’s ordinance explicitly advantages minority applicants because it requires the City Council to appoint applicants from certain racial categories to the HRCA. The ordinance specifically names African Americans, Latinos or Hispanics, Native Americans and Indigenous people, and Asian Americans as the races that the City Council must endeavor to appoint.

Applicants who have racial identities different than the ones the ordinance lists will only be favored for appointment if they also identify as one of the other categories, such as being a member of the LGBTQ+ community or a youth member. Since Plaintiffs, who are white, do not identify as any of the other categories, the City Council disfavors their appointment compared to minority applicants. The City automatically favors minority applicants without needing them to satisfy any other category. For instance, an Asian-American applicant to the HRCA would not need to also be a youth member in order for the City to favor him or her for appointment. The City thus “distributes burdens or benefits on the basis of individual racial classifications” through its express prioritization of minority applicants. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

Defendants cannot deny the ubiquity of racial preferences in the City Council’s appointments to the HRCA. Applicants are required to identify their race in various applications and forms, which have reminders of the City’s efforts to appoint minority applicants. Materials given to the City Council are replete with spreadsheets identifying applicant races and exhortations to attempt to appoint certain minority members. The City Council can also acquire information about applicants’ races through interviews. Meanwhile, proposed revisions to the ordinance nevertheless maintain the purpose of “call[ing] out a requirement to guarantee access” to individuals of specific races.<sup>19</sup>

The City’s racial preferences are therefore subject to strict scrutiny, requiring Defendants to show that these preferences both further a compelling government interest and are narrowly

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<sup>19</sup> City of Asheville, HRCA Meeting Video, YouTube (September 21, 2023), available at <https://www.youtube.com/watch?v=YvasgnHxq1E> (starting at 9:40)

tailored to further that interest. Plaintiffs are likely to succeed in proving that the preferences fail both requirements.

**A. Defendants Do Not Have a Compelling Interest to Justify Their Racial Preferences in HRCA Appointments**

The “core purpose” of the Equal Protection Clause is “do[ing] away with all governmentally imposed discrimination based on race.” *Students for Fair Admissions*, 143 S. Ct. at 2161 (*quoting Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). For that reason, “Eliminating racial discrimination means eliminating all of it.” *Id.* The Supreme Court has thus recognized only two interests as compelling enough to justify racial classifications: 1) remediating specific, identified instances of past discrimination, and 2) avoiding imminent and serious risks to human safety in prisons. *Id.* at 2162. The latter interest is inapplicable here and Defendants cannot demonstrate an interest in the former.

A government seeking to use race-conscious remedies must justify its discriminatory action by showing its past discriminatory conduct. *Croson*, 488 U.S. at 495–97 (1989). It must have a “strong basis in evidence” to warrant a race-conscious remedy in the first place. *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

Defendants cannot assert any interest in using the HRCA’s racial preferences to remedy specific instances of past discrimination by the City of Asheville. None of the City entities that recommended or implemented the HRCA, including the Blue Ribbon Committee and City Council, suggested that racial appointment preferences are meant to remedy prior discriminatory government conduct. This compelling justification is likewise lacking in subsequent revisions to the ordinance. Ultimately, Defendants can provide no evidence of the City previously disfavoring applicants of the currently preferred races appointments to city boards and commissions.

Instead, the initial interest in appointing members on the basis of race was to allow members to “feel more comfortable” and not feel they are “the only one,” which are plainly not interests that can uphold racial discrimination. The twin commands of the Equal Protection Clause do not permit the government to use race as a “negative” or to operate as a stereotype. *Students for Fair Admissions*, 143 S. Ct. at 2168. The City’s interest in using race as a means of comfort to its members violates both commands, as it assumes that applicants will be at ease with one another on the HRCA simply because they are the same race, while applicants of other races are presumed to cause discomfort and are disfavored. Explanations for ensuing revisions to the HRCA ordinance fare no better and further devolve into stereotyping individuals of certain races as uniformly deprived, as the interest is to “provide that voice to those particular groups of people who are some of the most affected by human relations issues in the city.” As the Supreme Court asserted, “We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those ‘who may have little in common with one another but the color of their skin.’” *Id.* at 2170 (*quoting Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

The ordinance itself does not suggest any remedial interest either, as it states that “membership should reflect the groups of individuals that the human relations program is intended to assist and protect ...” or providing access to “historically disadvantaged groups,” as the recently proposed revision to the ordinance sets forth. Defendants persist with the impermissible presumption that minority applicants are disadvantaged in appointments to boards and commissions based on Defendants’ perception of their broader societal disadvantage. Defendants cannot make this presumption using evidence of broad social disparities outside of board and commission appointments. *See Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (finding no compelling interest in a government grant program that provided preference to certain minority

businesses based on evidence of broad statistical disparities). “Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest.” *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

### **B. HRCA Appointment Preferences Are Not Narrowly Tailored**

Even if Defendants were able to conceive a compelling interest in remedying past discrimination that the statute is designed to remedy, the discriminatory appointment preferences are not narrowly tailored to serve that interest.

Narrow tailoring of race-based measures requires Defendants to give “serious, good faith consideration of workable race-neutral alternatives” that it can use to achieve its goals. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). A court cannot uphold a race-conscious policy unless it is “satisfied that no workable race-neutral alternative” would achieve that compelling interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). Asheville had several race-neutral alternatives available that it did not consider. For instance, if the HRCA seeks to advantage applicants who were previously denied membership to boards or commissions because of their race, the City could prioritize those applicants for appointment. The City could also exclude from consideration those who are already serving on a board or commission or who have previously served. And to the extent that membership was intended for “individuals that the human relations program is intended to assist and protect,” Defendants could require applicants to discuss how the City has failed to assist and protect them and appoint such applicants accordingly, rather than resort to presuming applicants had those experiences based on their race. Similarly, insofar as Defendants intend the HRCA for “historically disadvantaged” individuals, they could inquire about specific disadvantages that applicants faced. In other words, applicants “must be treated based on his or

her experiences as an individual—not on the basis of race.” *Students for Fair Admissions*, 143 S. Ct. at 2176.

Additionally, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications. *Croson*, 488 U.S. at 507–08. Since the City gives applicants of several racial backgrounds preference without regard for whether they actually experienced discrimination, those who have not experienced prior discrimination whatsoever are still favored for appointment. This overbroad preference is the opposite of a narrowly tailored policy. *Id.* at 506. As the Court in *Croson* illustrated, if the law was narrowly tailored “to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this remedial relief with an Aleut citizen who moves to Richmond tomorrow?” *Id.* In this case, it is unclear how a preference for several categories of minority applicants, along with other specified categories that include “Individuals who are recognized as community leaders,” compensates an individual applicant for specific discrimination he or she may have faced, and why the remedy for his or her unique harm must be shared and distributed to all minorities.

Finally, racially conscious government programs must have a “‘logical end point.’” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (quoting *Grutter*, 539 U.S. at 342). Defendants’ race-based appointment preferences may last in perpetuity, as the ordinance establishing them does not state an expiration. Defendants cannot point to any other policy that suggests that HRCA’s racial preferences are temporary. This requirement is “critical” because “‘deviation from the norm of equal treatment’ must be ‘a temporary matter.’” *Students for Fair Admissions*, 143 S. Ct. at 2165 (quoting *Grutter*, 539 U.S. at 342).

Since the Defendants cannot demonstrate a compelling government interest, nor precisely tailor their race-based appointment preferences, Plaintiffs are likely to prevail on their equal protection claim.

## **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION**

The City's race-based appointment preferences inflict irreparable harm on Plaintiffs by violating their fundamental rights under the Equal Protection Clause. The deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). See also *Container Corp. of Carolina v. Mecklenburg Cnty.*, No. 3:92CV-154-MU, 1995 WL 360185, at \*6 (W.D.N.C. June 22, 1992) ("[A]llegations ... that constitutional rights will be violated does serve to satisfy the Plaintiffs' burden of showing irreparable harm."); and *Grimmett v. Freeman*, No. 22-1844, 2022 WL 3696689, at \*2 (4th Cir. Aug. 25, 2022) ("Infringing constitutional rights generally constitutes irreparable harm."). Notably, the showing necessary to demonstrate irreparable harm is less strict in cases involving constitutional challenges than in cases in which there is a possibility of future monetary damages. *Manning v. Hunt*, 119 F.3d 254, 264 (4th Cir. 1997).

Plaintiffs will be irreparably harmed because Defendants plan to make appointments to the four vacant HRCA positions in its October 10, 2023, meeting. Without an injunction, the City Council will proceed to make these appointments under the mandatory race-based preferences of the City ordinance, further depriving Plaintiffs of equal consideration. While the City is scheduled to make board and commission appointments again in January 2024, it is unlikely that those appointments will be to the HRCA, since the next round of vacancies will not be until around June 2024, when several current HRCA members' terms expire. By that time, Plaintiffs' applications

will have expired, since they are only kept on file for one year. Absent preliminary relief in time for the forthcoming City Council meeting, Plaintiffs will be deprived of the opportunity to compete on equal footing for seats on the HRCA. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that the injury-in-fact in a case involving racial discrimination is “the inability to compete on an equal footing.”).

### **III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF PLAINTIFFS AND THE PUBLIC INTEREST WOULD BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION**

The final two preliminary injunction factors merge when the government is the opposing party. *Roe v. Dep’t of Def.*, 947 F.3d 207, 230 (4th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Plaintiffs will suffer irreparable harm absent a preliminary injunction because they will be deprived of their constitutional rights. In stark contrast, no harm would befall Defendants from merely having to make appointments to the HRCA without regard for race. Indeed, Plaintiffs are not asking the Court to enjoin Defendants from making any appointments whatsoever. Nor do Plaintiffs ask the Court to appoint them to the HRCA. They are simply asking the City Council to make appointments on a race-neutral basis. Doing so in conformity with the Equal Protection Clause is in the public interest, as “upholding constitutional rights is in the public interest.” *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011); *see also Bernstein v. Sims*, 643 F. Supp. 3d 578, 588 (E.D.N.C. 2022) (“The public interest always lies with the vindication of constitutional rights.”).

Even if Defendants are enjoined from making appointments to the HRCA entirely, they are still not harmed because the four current members whose seats would have been filled at the October 10 City Council meeting will continue serving if the City does not replace them. The HRCA would therefore not be deprived of a quorum and could continue to conduct regular

business. Overall, enjoining Defendants from making appointments altogether or under race-based preferences, “would cost little when compared to the damage otherwise risked by plaintiffs and all those similarly situated in being deprived of their Constitutional rights.” *Cannon v. N. Carolina State Bd. of Educ.*, 917 F. Supp. 387, 391 (E.D.N.C. 1996).

#### **IV. NO SECURITY SHOULD BE REQUIRED**

Plaintiffs ask the Court to waive any requirement that a security bond be posted since Defendants will not be harmed by an improvidently issued injunction. The Court has wide discretion in determining the amount of an injunction bond and should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers from an improperly issued injunction. *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 521 (W.D.N.C. 1999). A security bond may be waived entirely when the Defendant would not suffer any harm from the injunction. *Bartell v. Grifols Shared Servs. NA, Inc.*, 618 F. Supp. 3d 275, 292 (M.D.N.C. 2022).

Enjoining Defendants from implementing race-based preferences will not harm the HRCA’s ability to conduct regular business, nor will it harm the City from carrying out any of its human relations goals. Given the absence of harm to Defendants, the Court should not require Plaintiffs to post a security bond.

Moreover, since Plaintiffs seek vindication of the right to equal protection under the Fourteenth Amendment, the Court should waive the bond requirement. *Taliaferro v. N. Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 440 (E.D.N.C. 2020) (security bond waived in light of important federal rights at issue).

**CONCLUSION**

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

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