From the Desk of
Senator
Tim Knopp

Senator Knopp,

You asked whether Senate Bill 1579 (2022) violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution or any other aspect of the federal or Oregon Constitutions. We believe that the awarding of grant moneys under section 2 (3) could give rise to a challenge under both the Equal Protection Clause and Article I, section 20, of the Oregon Constitution. (In the interest of time, all case citations have been omitted from this opinion, but are available upon request.)

In relevant part, section 2 (1) of SB 1579 would make cash grants to organizations that provide culturally responsive services to support economic stability, self-sufficiency, wealth building and economic equity among disadvantaged individuals, families, businesses and communities in Oregon. Under section 2 (3), to improve economic equity, grant moneys must be used to provide outreach, support and resources to individuals, families, businesses or communities whose future is at risk because of any combination of two or more economic equity risk factors. Under section 1 (2), "economic equity risk factor" is defined to mean (a) experience of discrimination because of race or ethnicity; (b) English language proficiency; (c) citizenship status; (d) socioeconomic status; or (e) residence or operation in a rural location.

SB 1579 attempts to address the constitutional concern under the Equal Protection Clause in a few ways. In section 1 (1), the definition of "culturally responsive services" does not require the organization providing the services to be owned or operated by any specific racial or ethnic minority. Rather, the organization's goals must be aligned with the culture of the recipients, and the organization must demonstrate intimate *knowledge* of the lived experience of the recipients, rather than direct experience in common with the recipients. Under section 1 (2)(a), the economic equity risk factors include the "experience of discrimination because of race or ethnicity." So, unlike race or ethnicity in themselves, the *experience* of discrimination is more individualized, which is a positive attribute under the U.S. Supreme Court's approach to the narrow tailoring step (described below) in affirmative action decisions.

Of course, under contemporary ideas about systemic racism, the experience of discrimination among black Americans because of race would probably be considered universal. And this economic equity risk factor is not limited to experience of *economic* discrimination because of race or ethnicity, which might better tie it to the remedial goals of the bill. Thus, there remains this problem under SB 1579: Two people, one black and one white, each operating a business in a rural location (economic equity risk factor (e)), do not qualify for state resources channeled through the grant-recipient organizations under any of the other economic equity risk factors. Nevertheless, the black person, having the requisite two economic equity risk factors of (a) and (e), will qualify to receive the resources while the white person, having only economic equity risk factor (e), will not, and the difference is entirely due to the race of the otherwise similarly situated applicants.

Under the U.S. Supreme Court's affirmative action decisions, the Equal Protection Clause mandates that state governments treat similarly situated persons equally under the law. (Please note that the U.S. Supreme Court subjects a state's policy to the same analysis whether the policy is based on race or ethnicity.) The Court has concluded that all race-conscious state laws are so

inherently suspect that they are unconstitutional under Equal Protection analysis unless they pass strict scrutiny, which is a two-step test: (1) whether the law serves a compelling government interest; and (2) whether the law is narrowly tailored to achieve that interest. Under step one, remedying the present effects of past discrimination has long been recognized as a compelling government interest in affirmative action cases. However, a state must demonstrate that, under the facts and circumstances particular to the relevant market or industry and the geographic area subject to the policy, the identification of present effects of past discrimination is supported by a "strong basis in evidence." Mere speculation, or legislative pronouncements, of past discrimination or generalized societal discrimination are insufficient. Where a significant statistical disparity can be demonstrated—e.g., between the availability of qualified minority businesses in an industry and geographic area and the utilization of those minority businesses—that disparity may be sufficient to raise an inference of discrimination. However, the use of racial balancing—i.e., the assumption that minorities will participate in a particular industry or trade in numeric proportion to their representation in a particular population—is constitutionally invalid.

Under step two, to determine whether a race-conscious public policy is narrowly tailored to remedy the present effects of past discrimination that has first been substantiated under step one, courts consider a series of factors, including: (1) the necessity for the relief; (2) the efficacy of race-neutral alternative remedies; (3) the flexibility of the relief, including the availability of waiver provisions; (4) the duration of the relief; (5) the relationship of the numeric goals to the relevant labor market, including over- and under-inclusion of minority groups; and (6) the impact of the relief on the rights of third parties. While narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of workable, less restrictive, race-neutral alternatives that do not unduly burden members of unfavored racial groups.

This office can't say whether the racial preference in SB 1579 would be challenged under the Equal Protection Clause in the first place, or whether, if challenged, it would be upheld. We strongly believe, however, that courts would consider that the economic equity risk factor based on race makes SB 1579 a race-conscious law subject to strict scrutiny. Our office would not be competent to analyze the legal sufficiency of any statistical evidence relied on to demonstrate the state's compelling government interest in the policy of SB 1579, even if we had the evidence before us. But the law is more likely to be upheld if the preferences are justified by a strong basis in evidence that meets the U.S. Supreme Court's requirements and is presented to the legislature before enactment of the law.

Please note that, in *Collins v. Meyers*, a decision from October 2021, the U.S. District Court for the District of Colorado issued a temporary restraining order against a law that gave preferences for minority-owned businesses in the distribution of COVID-19 relief funds. (According to the plaintiffs, "[A] minority-owned business, unlike a non-minority-owned business, automatically qualifies as a disproportionately impacted business regardless of whether it meets any of the other criteria.") When determining the substantial likelihood of the plaintiffs' success on the merits, the court admitted that the record was limited. Nevertheless, the court's description of how strict scrutiny applies in such circumstances sketches a likely model for analyzing SB 1579 under the Fourteenth Amendment.

Finally, the racial preference under SB 1579 could also be challenged under Article I, section 20, of the Oregon Constitution, which prohibits the state from providing to a class of citizens privileges or immunities that do not apply on the same terms to all citizens. The test under the Privileges or Immunities Clause has been established by case law, but we are not aware of any cases applying it to an affirmative action program. A response to such a challenge would likely require some evidentiary showing of actual discrimination, as is required under strict scrutiny. Without relevant case law, however, we cannot predict the type and strength of evidence an Oregon court would require, though we think it likely that evidence that satisfies the requirements of the Equal Protection Clause would also satisfy the requirements of the Privileges and Immunities Clause.

Let me know if you have any other questions.

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