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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 2, 2024

Representative Ed Diehl
900 Court Street NE H378
Salem OR 97301

Re: Equal Protection analysis of the Economic Equity Investment Program

Dear Representative Diehl:

Question.

You asked for an opinion about the constitutionality of the Economic Equity Investment Program (EEIP) codified at ORS 285B.760 to 285B.763 under the Equal Protection Clause of the Fourteenth Amendment in light of the recent decision by the United States Supreme Court in *Students for Fair Admissions v. Harvard* (*SFFA*).

Short Answer.

While we cannot say whether the EEIP would be challenged in the first place, we believe that the program would be subject to strict scrutiny and would not survive the test.

Analysis.

A. Equal Protection analysis after *Students for Fair Admissions v. Harvard*.

The question addressed by the Court in *SFFA* was "whether the admissions systems used by Harvard College and the University of North Carolina . . . are lawful under the Equal Protection Clause of the Fourteenth Amendment."[1] This means that the decision is not directly on point for your question about the EEIP. That said, the Court's holding in *SFFA* is very broad:

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." . . . For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a

[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 190–91 (2023). The Court invalidated the admissions systems of both Harvard College and the University of North Carolina for impermissible consideration of race.

> person of another color." . . . "If both are not accorded the same protection, then it is not equal."[2]

And numerous cases cited by the Court in the decision did not involve college admissions. Thus, we lay out the analysis the Court has applied to affirmative action laws in general, in light of the *SFFA* decision.

The Court's decisions have established that all laws that classify citizens on the basis of race are so inherently suspect that they are unconstitutional under Equal Protection analysis unless they pass strict scrutiny,[3] 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.[4] A claim that the racial classification is intended to help one race and not to harm another does not prevent application of strict scrutiny,[5] because, "[a]bsent searching judicial inquiry into the justification for such race-based measures, we have no way to determine 'what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[6]

Under step one of strict scrutiny, remedying the present effects of past discrimination has long been recognized as a compelling government interest in affirmative action cases.[7] The standard, however, is exacting. "[A]meliorating *societal* discrimination does not constitute a compelling interest that justifies race-based state action" (emphasis added).[8] "[M]ere speculation, or legislative pronouncements, of past discrimination" is insufficient; a state must present a "'strong basis in evidence for its conclusion that remedial action was necessary' by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices."[9] A state must develop evidence of inequities caused by racial discrimination and demonstrate that its race-conscious law is designed to remediate those inequities in a way that is "limited to those minority groups that have actually suffered discrimination."[10] And courts closely scrutinize the evidence presented in support of race-conscious programs: "Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review."[11] Although a split among the United States Courts of Appeals exists as to

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[2] *Id.* at 206, *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) *and Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 289-290 (1978) (citations omitted).
[3] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("[A]ll racial classifications imposed by government . . . are constitutional only if they are narrowly tailored to further compelling governmental interests."); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[4] *SFFA*, 600 U.S. at 206-207; *Grutter*, 539 U.S. at 326; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 484-485 (1986) (Powell, J., concurring).
[5] *SFFA*, 600 U.S. at 218-19.
[6] *Grutter*, 539 U.S. at 326 (citation omitted), *quoting J.A. Croson Co.*, 488 U.S. 469, 493. *See also SFFA*, 600 U.S. at 257 (Thomas, J., concurring).
[7] *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-477 (1989).
[8] *SFFA*, 600 U.S. at 226.
[9] *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000), *quoting J. A. Croson Co.*, 488 U.S. at 486-92; *cert. denied*, *Johnson v. Associated Gen. Contractors of Ohio, Inc.*, 531 U.S. 1148 (2001). *See also W. States Paving Co. v. Washington State Dep't of Transp.*, 407 F.3d 983, 991 (9th Cir. 2005), *cert. denied, City of Vancouver, Wash. v. W. States Paving Co.*, 546 U.S. 1170 (2006) ("Congress may not merely intone the mantra of discrimination to satisfy the searching examination mandated by equal protection.") (internal quotations and citations omitted); *J.A. Croson Co.*, 488 U.S. at 505-506; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–278 (1986).
[10] *Associated Gen. Contractors of Amer., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1191 (9th Cir. 2013), *quoting W. States Paving Co.*, 407 F.3d at 997-998.
[11] *SFFA*, 600 U.S. at 217.

whether courts may consider post-enactment evidence,[12] the Court's own precedents have rejected such evidence.[13]

If the present effects of past discrimination that the race-conscious law is intended to remediate have been adequately substantiated under step one of strict scrutiny, under step two courts determine whether the law is narrowly tailored by considering a number 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.[14]

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.[15] Put simply, the precise fit between the ends sought (remedying the present effects of the identified past government discrimination, as opposed to societal discrimination) and the means chosen (the race-conscious policy) must be demonstrably and logically justified by the evidentiary record established under step one.[16] Finally, a race-conscious public policy that, to the greatest extent possible, makes an individualized determination as to eligibility, as opposed to relying on racial status alone, is more likely to survive strict scrutiny.[17]

B. Equal Protection analysis of the EEIP.

Under the EEIP, grant moneys are awarded to organizations to provide culturally responsive services "to individuals, families, businesses or communities whose future is at risk because of any combination of two or more economic equity risk factors."[18] One risk factor is

[12] *Compare Coral Construction Co. v. King County*, 941 F.2d 910, 919-921 (9th Cir. 1991) (holding post-enactment evidence admissible) *with Rothe Development Corp v. United States Department of Defense*, 262 F.3d 1306, 1326-1328 (Fed. Cir. 2001) (holding post-enactment evidence inadmissible).
[13] *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) ("Second, the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative-action program") (internal quotation and citation omitted); *W. States Paving Co.*, 407 F.3d at 991 ("Rather, we must evaluate the evidence that Congress considered in enacting TEA-21 to ensure that it had a strong basis in evidence for its conclusion that remedial action was necessary."); *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002) (*relying on J.A. Croson Co.,* 488 U.S. at 504, as cited in *Associated Gen. Contractors of Ohio, Inc.*, 214 F.3d at 350-351); Mark L. Johnson, "Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation," 2002 University of Chicago Legal Forum 12.
[14] *U.S. v. Paradise*, 480 U.S. 149, 171. *See also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178 (10th Cir. 2000).
[15] *Grutter*, 539 U.S. at 339-340; *J.A. Croson Co.*, 488 U.S. at 507.
[16] *Grutter*, 539 U.S. at 333; *W. States Paving Co.*, 407 F.3d at 994-995 ("To be narrowly tailored, a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market."); *J.A. Croson Co.*, 488 U.S. at 493.
[17] *J.A. Croson Co.*, 488 U.S. at 508 ("[S]uch programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration."); *Adarand Constructors, Inc.*, 228 F.3d at 1184-1185 ("In short, by inquiring into economic disadvantage on an individual basis, the program could avoid improperly increasing the contracting opportunities of those minority entrepreneurs whose access to credit, suppliers, and industry networks is already sufficient to obviate the effects of discrimination, past and present.").
[18] ORS 285B.761 (3). Under ORS 285B.760 (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.

"[e]xperience of discrimination because of race or ethnicity."[19] We believe it highly likely that this would be considered a racial classification and would subject the EEIP to strict scrutiny.

We acknowledge the possibility that a court might find that "experience of discrimination because of race or ethnicity" classifies individuals based on their experience as a member of a race, not on the individual's race in and of itself. The phrase inarguably does not specify any particular race that would be able to claim this as one of the two required economic equity risk factors.

At trial, however, the court would likely have before it both the legislative history of enrolled Senate Bill 1579 (2022) (SB 1579), which enacted the EEIP, and the Oregon Business Development Department's public Request for Grant Applications (RFGA) implementing the EEIP.[20] The legislative history includes a memorandum from Senator Manning, a co-chief sponsor of SB 1579, submitted for the February 8, 2022, public hearing on the bill before the Senate Committee on Labor and Business, which reads in part:

> The creation of the Equity Investment Fund will help close the wealth gap that exists for Black, Indigenous, and Latinx communities across Oregon that exists because of systemic and historical racism and has been exacerbated by the COVID-19 pandemic. As an example, Black and brown business owners do not have the same levels of capital as their white peers, and more vulnerable to economic shocks than non-minority owned businesses. During the Covid-19 pandemic, this resulted in a 41% decline in Black-owned businesses and 32% drop in Latinx business owners. White entrepreneurs experienced only a 17% decline.[21]

In turn, the program overview of the RFGA reads in part:

> The Economic Equity Investment Program is intended to provide assistance to help address vast and persistent economic disparities among Oregonians and aims to advance economic equity for people historically excluded from or encumbered by barriers to accessing wealth building opportunities. It acknowledges the legacies of discrimination and disenfranchisement of certain populations and seeks to close historic economic inequities by investing in wealth building opportunities for underrepresented individuals, families, businesses, and communities.

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[19] ORS 285B.760 (2)(a).

[20] Oregon Business Development Department, *Request for Grant Applications: Economic Equity Investment Program*, https://www.oregon.gov/biz/Publications/EEIP/C2022803_RFGA_EEIP.pdf.

[21] Written testimony of Senator James I. Manning, Jr. to Senate Committee on Labor and Business, RE: SB 1579, February 8, 2022. *See also* written testimony submitted for the same public hearing by Jenny Lee, Deputy Director, Coalition of Communities of Color; Alison McIntosh, Oregon Housing Alliance; Mariana Garcia Medina, Senior Policy Associate, ACLU of Oregon; Loren Naldoza, Oregon Economic Justice Roundtable; Peggy Samolinski, Director, Youth and Family Services Division, Multnomah County Department of County Human Services; Gloria Sandoval, Unite Oregon; Ted Wheeler, Mayor, City of Portland, et al.; Jennifer Parrish Taylor, Director of Advocacy and Public Policy, Urban League of Portland and Shannon M. Vilhauer, Executive Director, Habitat for Humanity of Oregon.

> Inequity has deep roots in Oregon and is manifest in a multitude of ways. People of color earn less than their white counterparts, are twice as likely to meet the federal definition of poverty and lack equal access to traditional wealth building opportunities like credit, business capital, and homeownership. Cumulatively, these disparities and others have resulted in self-perpetuating wealth gaps that limit intergenerational economic mobility. As of 2019, the difference in median wealth between White and Black families was over $160,000 and between White and Latinx families was more than $150,000 nationally. Similarly, immigration status, socioeconomic status, and residence in rural areas of the state correlate with lower incomes and less wealth accumulation. While none of this is new, neither is it acceptable and Business Oregon is eager to support the work of those on the vanguard of combatting inequity in the state.[22]

The legislative history of SB 1579 thus manifests an intent for the EEIP to provide assistance to "Black, Indigenous, and Latinx communities" in order to close economic gaps between these communities and their "white peers," "non-minority owned businesses" and "[w]hite entrepreneurs." Similarly, the overview of the implementation of the EEIP per the RFGA shows a determination to counter the effects of discrimination against "certain populations" by closing historic economic inequities suffered by "underrepresented individuals, families, businesses, and communities." Those underrepresented populations include "[p]eople of color" as opposed to their "white counterparts" and Black and Latinx families as opposed to White families.[23]

Thus, while the EEIP's economic equity risk factor "experience of discrimination because of race or ethnicity" may be race neutral in a literal sense, the legislative intent and program implementation show that "discrimination" is used to mean discrimination against people of color, not against white people. Indeed, providing resources to improve the economic circumstances of white people would not further the stated intent of the EEIP to close economic gaps between people of color and white people. And even if the phrase is race neutral in a literal sense, the *SFFA* Court warned, "[U]niversities may not simply establish through application essays or other means the regime we hold unlawful today. . . . 'What cannot be done directly cannot be done indirectly.' The Constitution deals with 'substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'"[24]

In sum, we believe it likely that a court would find that in both intent and application, the EEIP's phrase "experience of discrimination because of race or ethnicity" is not race neutral, and if the EEIP has been implemented in accordance with the RFGA's program overview, this issue arises: Two individuals, one black and one white, each operating a business in a rural location (economic equity risk factor (e)), do not qualify for services provided by organizations awarded state-funded grants under any of the other economic equity risk factors. Nevertheless, the black individual, having the requisite two economic equity risk factors of (a) and (e), will

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[22] Oregon Business Development Department at 1.2 (citations omitted).
[23] *See also Herrera v. NYC Dep't of Educ.,* No. 1:21-cv-7555-MKV, 2024 WL 245960 (S.D.N.Y. Jan. 23, 2024) (statements by mayor, chancellor and chief operating officer of New York City Department of Education supported denial of defendants' motion for summary judgment in challenge under Equal Protection clause of alleged race-based employment policy).
[24] *SFFA*, 600 U.S. at 230, *quoting Cummings v. Missouri*, 71 U.S. 277, 325 (1857) (citation omitted).

qualify to receive the services, while the white individual, having only economic equity risk factor (e), will not, and the difference is entirely due to the race of the otherwise similarly situated applicants.[25] Thus, we believe that the EEIP would be subject to strict scrutiny.

Under the first step of strict scrutiny, the court would determine whether the EEIP serves a compelling government interest.[26] As noted above, the *SFFA* Court rejected the notion that general societal discrimination constitutes a compelling government interest justifying racial preferences. Thus, counteracting the experience of discrimination because of race would not be considered a compelling government interest unless it were supported by a strong basis in evidence of the government's active or passive participation in a specific form of discrimination redressed by the EEIP, evidence that is measurable and concrete enough to permit judicial review.

We are not aware of such basis in evidence being presented to the Legislative Assembly when the EEIP was enacted. Rather, the legislative history, as reflected in the written testimony discussed above, shows what a court would probably consider general statements of societal discrimination and insufficient statistical evidence. For instance, in addition to making minority racial and ethnic preferences central to the EEIP, the testimony presents these difficulties under strict scrutiny: 1) It refers to societal discrimination—i.e., "systemic and historical racism"—rather than specific active or passive governmental discrimination, and 2) the statistics offered are cursory and neither the methodology nor even the source of the statistics is set forth.[27] Moreover, economic equity risk factor (a) is not limited to experience of *economic* discrimination because of race or ethnicity, which might better tie it to the remedial goals of the EEIP.[28] It may be uncertain whether a court would find post-enactment evidence admissible to defend the EEIP, but if it did, the evidence would have to be more specific and robust than any statistics that we are aware of that have been put forth in support of the EEIP, including evidence of the state government's active or passive participation in the specific harm redressed.

If a court nevertheless found that the EEIP served a compelling government interest, the analysis would proceed to the second step, i.e., narrow tailoring. Unlike race or ethnicity in themselves, the *experience* of discrimination might be considered more individualized, which is

[25] For purposes of deciding whether to issue a temporary restraining order against a (since repealed) Colorado state law giving preferences for minority-owned businesses in the distribution of COVID-19 relief funds, the District Court of Colorado found a substantial likelihood of success on the merits of the plaintiffs' Equal Protection challenge where they had claimed, "[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." *Collins v. Meyers*, No. 21-CV-2713-WJM-NYW, 2021 WL 4739513, at 2 (D. Colo. Oct. 12, 2021); *order clarified*, 2021 WL 4890584 (D. Colo. Oct. 15, 2021). The case was dismissed for lack of standing because the challenged award program had been undersubscribed and so the preferences did not play a part in making awards. No. 21-CV-2713-WJM-NYW (D. Colo. Oct. 28, 2021).

[26] Outside cases addressing college admissions, Supreme Court "precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot." *SFFA*, 600 U.S. at 207 (citation omitted).

[27] One instance of statistical analysis that caused a court to uphold a race-conscious law: Before resuming its race- and gender-conscious affirmative action program for awarding contracts, Caltrans commissioned a disparity study which involved, in part, examining over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006. *Associated Gen. Contractors of Amer.,* 713 F.3d at 1191-1192.

[28] See ORS 285B.761 (3): "Grant moneys shall be awarded to organizations only for proposals 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 in order to improve economic equity as measured by: (a) Ownership of land, principal residences and other real property; (b) Entrepreneurship; (c) Business development; (d) Workforce development; and (e) Intergenerational wealth building, such as savings, investments and real property equity."

a plus. On the other hand, under contemporary ideas about systemic racism, the experience of discrimination because of race would probably be considered universal for people of color. And because no statistical foundation in a specific act of government discrimination was presented in support of the enactment of the EEIP, it would be difficult for a court to find that the program was narrowly tailored to achieve any specific form of remediation.

In sum, then, while we cannot say whether the EEIP would be challenged in the first place, we believe that the program would be subject to strict scrutiny and would not survive the test.

Please let us know if you have any other questions on the subject.

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Very truly yours,

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