Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 12, 2024

Representative Ed Diehl
900 Court Street NE H378
Salem OR 97301

Re: State action doctrine and the Economic Equity Investment Program

Dear Representative Diehl:

We recently delivered to you an opinion (LC 71 dated February 2, 2024) concluding that the Economic Equity Investment Program (EEIP) codified at ORS 285B.760 to 285B.763, if challenged under the Equal Protection Clause of the Fourteenth Amendment, would be subject to strict scrutiny and would likely fail the test. Now you ask what the implications are for the private organizations that receive grant awards under the EEIP and that deliver services based on the service recipients' race.

By its terms the Equal Protection Clause applies only to the states and state actors. It does not forbid private parties to discriminate on the basis of race in their personal affairs as an expression of their own personal predilections.[1] Under the "state action" doctrine, however, a court may deem that "conduct that is formally 'private' [is] so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[2] With respect to the Fourteenth Amendment in particular, "It is clear . . . that 'Individual invasion of individual rights is not the subject-matter of the amendment,' and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[3]

There is, however, a threshold for imputing state action to a private party. Thus, the United States Supreme Court

> has never held . . . that discrimination by an otherwise private entity would [violate] the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State,

[1] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169 (1970).
[2] *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 565 (1974) (internal quotations omitted). *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("[G]overnmental authority may dominate [private] activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.")
[3] *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). *See also Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed.").

> or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct.[4]

As for the test for state action, the United States Court of Appeals for the Tenth Circuit has stated, "The Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case."[5] The court then applied the four tests it singled out and came to the same conclusion under all of them. The United States Supreme Court itself had earlier held that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[6]

"Sifting facts and weighing circumstances" means that the details are determinative. In *Burton v. Wilmington Parking Authority*, for instance, the Eagle Coffee Shoppe rented premises in a Delaware state parking structure. The lease obligated the state parking authority to provide heat and gas and to make structural repairs at its own cost. The parking authority had the power to issue revenue bonds but entered into the lease in part because the bonds were not expected to be marketable if repayable solely out of anticipated parking revenue. The coffee shop affirmed that for it to serve Negroes would injure its business, meaning that the profits it earned by discrimination were indispensable to the financial success of the state's venture. On these facts, this was state action involving a private actor.[7]

By contrast, in *Moose Lodge No. 107 v. Irvis*, the lodge was a private social club housed in a building it owned. It refused service to the black guest of a white member. The mere fact that the lodge was regulated by the Pennsylvania Liquor Control Board, whose governing statutes did not overtly or covertly encourage discrimination, was insufficient to implicate the state in the lodge's discrimination.[8]

Norwood v. Harrison is the example closest to the fact pattern presented by the EEIP that we have found in the amount of time we have had to research the issue. In *Norwood*, the State of Mississippi provided free textbooks to all schools without discrimination by race. Some of the private schools, however, were all-white. Because textbooks are an important expense for schools, the state was found to be assisting the segregated private schools financially, in violation of the Equal Protection Clause.[9]

---

[4] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).
[5] *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). *See also Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016).
[6] *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). The facts-and-circumstances approach makes sense because, as the Court has stated, "This proscription on state action applies *de facto as well as de jure* because '(c)onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.'" *Gilmore*, 417 U.S. at 565 (emphasis added) (internal quotations omitted). Forty years after *Burton*, the Court listed a number of categories of fact patterns from prior state action decisions and summed them up thus: "Amidst such variety, examples may be the best teachers." *Brentwood*, 531 U.S. at 296.
[7] *Burton*, 365 U.S. 715 *passim*.
[8] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 *passim*.
[9] *Norwood v. Harrison*, 413 U.S. 455, 463-465.

Under the EEIP statutes, the Legislative Assembly appropriates moneys to the Oregon Business Development Department for the purpose of awarding grants to intermediary private organizations that qualify based on criteria set forth in the statutes. The private organizations in turn distribute the grant moneys to private recipients based on criteria set forth in the statutes.

The structural resemblance between *Norwood* and the EEIP lies in the fact that in both cases the state provides an asset to private organizations that then distribute the asset to individuals of their choosing. Indeed, unlike in *Norwood*, where Mississippi private schools' discrimination by race was an independent decision not involving the state, with the EEIP, the selection of recipients by private organizations is governed by state law.[10] Thus, because statutory criteria control the distribution of the grant moneys at all stages of the EEIP, if the private grantee organizations select recipients on the basis of race, a strong argument could be made that their conduct under the EEIP is state action.

We recognize that the Mississippi private schools' admissions policies in *Norwood* involved discrimination against individuals belonging to a racial minority. But, under Court doctrine, the race of the individual disfavored by racial discrimination is immaterial. As announced by the United States Supreme Court in *Students for Fair Admissions*: "'The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.' . . . 'If both are not accorded the same protection, then it is not equal.'"[11]

Intention is not a determinative factor in deciding whether state action can be imputed to a private actor.[12] Fifty years before *Students for Fair Admissions*, the Supreme Court stated in *Norwood*, "We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."[13] And 12 years before that: "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."[14]

In sum, if private organizations are discriminating by race or ethnicity in the distribution of the grant moneys awarded under the EEIP, a court might well impute state action to the private organizations, subjecting them to the restrictions of the Equal Protection Clause. And if

---

[10] The EEIP arguably shows a stronger connection to state action than the fact pattern discussed in *Reitman v. Mulkey*, 387 U.S. 369, 379 (1967): "[I]n *Nixon v. Condon*, . . . the Court was faced with a statute empowering the executive committee of a political party to prescribe the qualifications of its members for voting or for other participation, but *containing no directions with respect to the exercise of that power*. This was authority which the committee otherwise might not have had. . . . Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment." (Emphasis added.)

[11] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 190–91 (2023). This is current law, notwithstanding earlier individual Court decisions that might suggest otherwise. *See, e.g., Nixon v. Condon*, 286 U.S. 73, 89 (1932): "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." But special solicitude for the Negro race does not imply a total lack of solicitude for other races.

[12] *Students for Fair Admissions*, 600 U.S. at 271–72 (Thomas, J., concurring) ("Courts are not suited to the impossible task of determining which racially discriminatory programs are helping which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.").

[13] *Norwood*, 413 U.S. at 466–67 (internal citations omitted).

[14] *Burton*, 365 U.S. at 725.

brought under 42 U.S.C. 1983, a successful claim could also result in the payment by the private organizations of damages and, under 42 U.S.C. 1988, attorney fees.[15]

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Alan S. Dale
Senior Deputy Legislative Counsel

[15] *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) ("A § 1983 plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law. While generally not applicable to private parties, a § 1983 action can lie against a private party when 'he is a willful participant in joint action with the State or its agents.'") (internal citations omitted); *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); 42 U.S.C. 1988 ("In any action or proceeding to enforce a provision of . . . [section]1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").