

Hi Representative and Jamie,

You asked whether [House Bill 4011](#), section 29, is unconstitutional under the Equal Protection Clause of the 14th Amendment to the United States Constitution because it requires the use of public moneys to recruit and retain behavioral health care providers who are people of color. Section 29 would be subject to a court's strict scrutiny analysis, and a court likely would find section 29 unconstitutional.

Section 29 directs the Oregon Health Authority to enter into an agreement with the Mental Health and Addiction Certification Board of Oregon, (MHACBO), a non-state agency, to increase the recruitment and retention of behavioral health care providers by providing incentives to the behavioral health care providers. Section 29 specifies the providers as those who:

1. Have "associate, bachelor's, master's or doctoral degrees or other credentials";
2. "Are people of color, tribal members or residents of rural areas in this state"; and
3. "Can provide culturally responsive behavioral health services to underserved communities in this state."

If section 29 were challenged, the court would apply strict scrutiny to determine whether section 29 meets constitutional muster. One of the factors MHACBO must consider regarding provider eligibility for incentives is whether the provider is a person of color. The phrase "person of color" is an express racial classification and thus section 29, if it were to be enacted, would be a race-conscious law. Race-conscious laws are subject to the strict scrutiny analysis. Strict scrutiny examines (1) whether the law serves a compelling government interest, and (2) whether the law is narrowly tailored to achieve that interest. As stated in the opinion you mentioned below, "[u]nder 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. The standard, however, is exacting." In order to meet this standard, "[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.'"

Whether the legislative record includes sufficient evidence of inequities is for a court to decide. OLIS offers [written testimony from MHACBO](#), and during the February 6, 2024, public hearing, MHACBO provided oral testimony regarding section 29. We cannot say whether that testimony and the rest of the legislative record provide sufficient evidence of inequities, or that section 29 remediates those inequities such that section 29 serves a compelling government interest. At a glance, MHACBO's testimony appears to be more than general statements about racial inequities in the behavioral health workforce, but even so, it is doubtful that the legislative record provides sufficient empirical evidence of significant racial disparities in the state's behavioral health workforce for a court to find a compelling government interest. Thus, section 29 is likely unconstitutional under the Equal Protection Clause and the court would not move to the second step -- whether or not the law is narrowly tailored to achieve the compelling government interest -- of the strict scrutiny analysis.

In sum, section 29 is likely unconstitutional under the Equal Protection Clause.

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BEHAVIORAL HEALTH PROVIDERS

SECTION 29. (1) The Oregon Health Authority shall enter into an agreement with the Mental Health and Addiction Certification Board of Oregon for the purpose of increasing the recruitment and retention of providers in the behavioral health care workforce with associate, bachelor's, master's or doctoral degrees or other credentials who are people of color, tribal members or residents of rural areas in this state and who can provide culturally responsive behavioral health services to underserved communities in this state.

(2) The agreement must require the:

(a) Authority to distribute moneys to the board; and

(b) Board to provide incentives for the purposes described in subsection (1) of this section, including for the reimbursement or payment of the board's certification or licensure fees on behalf of the providers described in subsection (1) of this section.

(3) The authority may request a report from the board on the use of moneys described in subsection (2) of this section.

SECTION 30. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Health Authority, for the biennium ending June 30, 2025, out of the General Fund, the amount of \$1,000,000 for the purpose of carrying out the provisions of section 29 of this 2024 Act.