Representative Yunker,

You requested a legal opinion analyzing the constitutionality of House Bill 3030 with respect to the definition of "diverse" in ORS 342.433. Due to time constraints, I am not able to prepare a formal opinion before the public hearing tomorrow morning (3/27). Be that as it may, I am providing this email response in lieu of a formal opinion in hopes that it supports your ability to testify at tomorrow's public hearing. Note that I omit case citations in this response as a time-saving measure, but that extensive case law supports the conclusions. I apologize in advance for any typographical errors.

In short, the scholarship program in HB 3030 employs racial, ethnic and national origin classifications. Courts apply the most stringent form of judicial scrutiny to such classifications, requiring a state to demonstrate the classifications are narrowly tailored to achieve a compelling governmental interest. For the following reasons, a court would almost certainly conclude that the scholarship program, if enacted, fails strict scrutiny and therefore violates the Equal Protection Clause. Additionally, for your consideration, accompanying this response please find attached a Complaint for Declaratory and Injunctive Relief, filed on February 1, 2024, in the matter of Tyler Lynn v. Melissa Goff, in her official capacity as Interim Executive Director of the Teacher Standards and Practices Commission, Case No. 1:24-cv-00211-CL. In this complaint, a white teacher brought an equal protection challenge against the state alleging the Diversity License Expense Reimbursement Program violated the Equal Protection Clause for employing race-based eligibility requirements. The commission settled the lawsuit. As a condition of settlement, the commission discontinued the challenged reimbursement program. We believe a substantively analogous lawsuit could be filed against the scholarship program in HB 3030, if enacted.

Your question requires answering two distinct yet related questions. First, who is eligible to receive money under the scholarship program for culturally and linguistically diverse administrator candidates. Second, whether discrimination under the scholarship program violates the Equal Protection Clause. Each question is addressed in turn.

I. Who is eligible to receive money under the scholarship program in HB 3030 for culturally and linguistically diverse administrator candidates?

House Bill 3030 states:

> SECTION 2. (1) In addition to any other form of student financial aid authorized by law,
> the Higher Education Coordinating Commission may award grants to culturally and linguistically
> diverse school administrator candidates to use at approved educator preparation programs,
> as defined in ORS 342.120, for the purpose of advancing the goal described in ORS
> 342.437 (1)(a).

The goals of the scholarship program are described in ORS 342.437 (1)(a), which states:

> (1) As a result of this state's commitment to equality for the diverse peoples of this state, the goals of the state are that:

(a) The percentage of diverse educators employed by a school district or an education service district reflects the percentage of diverse students in the public schools of this state or the percentage of diverse students in the district.

Section 2 (4) of HB 3030 incorporates by reference the definition of "diverse" in ORS 342.433, which provides:

(1) "Diverse" means culturally or linguistically diverse characteristics of a person, including:
(a) Origins in any of the black racial groups of Africa but is not Hispanic;
(b) Hispanic culture or origin, regardless of race;
(c) Origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;
(d) Origins in any of the original peoples of North America, including American Indians or Alaska Natives; or
(e) A first language that is not English.

Paragraph (a) is a racial classification and also likely a national origin classification. Paragraph (b) is an ethnic classification. Paragraph (c) is likely a racial and national origin classification. Paragraph (d) is a racial classification and also likely a national origin classification. Paragraph (e) is not a suspect classification.

Read together, the scholarship program in HB 3030 conditions eligibility for a publicly funded scholarship on an individual satisfying the definition of "diverse" in ORS 342.433. It does this by authorizing the Higher Education Coordinating Commission to award scholarships to culturally and linguistically diverse administrator candidates for the purpose of advancing the goal of having the percentage of diverse educators employed by a school district or an education service district reflect the percentage of diverse students in the public schools of this state or the percentage of diverse students in the district. To qualify as diverse, an individual must satisfy one of the racial, ethnic or national origin classifications in ORS 342.433 (1)(a) to (d) or speak a first language that is not English. The commission is not authorized to award scholarships to individuals whose subsequent employment as an administrator would not advance the diverse educator goal in ORS 342.437 (1)(a). Based on a plain reading of the text, we believe a court would conclude that the scholarship program for culturally and linguistically diverse administrator candidates in HB 3030 discriminates against individuals on the basis of race, ethnicity and national origin.

II. Do the racial, ethnic and national origin classifications under the scholarship program violate the Equal Protection Clause?

The United States Supreme Court's decisions have established that all laws that classify citizens on the basis of race, ethnicity and national origin are so inherently suspect that they violate the Equal Protection Clause unless they satisfy strict scrutiny, which requires the government to demonstrate the law is narrowly tailored to achieve a compelling governmental interest. As discussed above in question I, HB 3030 establishes a scholarship program with eligibility criteria that discriminate against individuals on the basis of race, ethnicity and national origin. A court would thus apply strict scrutiny. Because the racial classification case law is the most developed of these three suspect classifications, our analysis focuses on strict scrutiny as applied to race.

Under strict scrutiny, courts employ a two-step legal test. Under step one, a court determines whether a compelling governmental interest supports the suspect classification. If the answer is yes, the court proceeds to step two to determine whether the law is narrowly tailored to the compelling governmental interest identified in step one.

Under step one, Supreme Court precedent recognizes only two compelling governmental interests that can justify racial classifications. The first is "remediating specific, identified instances of past [governmental] discrimination that violated the Constitution or a statute," and the second is "avoiding imminent and serious risks to human safety in prisons," e.g., race riots. By contrast, "ameliorating societal discrimination does not constitute a compelling [governmental] interest that justifies race-based state action." "[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." In rare situations, where a significant statistical disparity can be demonstrated—for example, between the availability of qualified minority businesses in an industry and geographic area and the utilization of those minority businesses—such 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. Courts carefully consider both statistical and anecdotal evidence under step one and examine a statute or government program on its face.

If a compelling governmental interest is substantiated by the evidence presented under step one, narrow tailoring under step two requires that "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose."[1] To determine whether a race-based law is narrowly tailored, a court considers such factors as "(1) the availability of race-neutral alternative remedies; (2) limits on the duration of the . . . programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness." Importantly, a race-based law 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.

Here, the state under step one would need to demonstrate specific, identified instances of past governmental discrimination that violated the Constitution or a statute in the education workforce in Oregon for individuals who are members of the racial, ethnic or national origin groups that are eligible for the scholarship program under ORS 342.433 (1)(a) to (d). To that end, a court may consider strong quantitative evidence of a significant disparity in the education workforce sufficient to raise an inference of such discrimination. But that is far from guaranteed, and to make this difficult empirical showing, governments typically rely upon a disparity study conducted by independent consultants. We have been unable to identify an education workforce disparity study for Oregon, and, as of March 26, 2025, no such quantitative or qualitative evidence has been submitted as written testimony for HB 3030 on OLIS that would satisfy step one of strict scrutiny.

We offer three additional considerations. First, we have been unable to identify any case law in which a court has held that increasing representation of historically or presently underrepresented racial, ethnic or national origin groups in the workforce is itself a compelling governmental interest under strict

[1] *Wygant*, 476 U.S. at 280. *See also Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Grutter v. Bollinger*, 539 U.S. at 333; *SFFA*, 600 U.S. at 252–53 (Thomas, J., concurring) ("[A]ttempts to remedy past governmental discrimination must be closely tailored to address *that* particular past governmental discrimination.").

scrutiny. Second, to make the requisite disparity showing, the state would not compare the race, ethnicity or national origin of administrators to the race, ethnicity or national origin of students or the race, ethnicity or national origin of the general population. Instead, the state would likely need to show a significant disparity between the availability of qualified diverse administrators and the utilization of qualified diverse administrators in school districts or education service districts. Finally, the 2024 Oregon Educator Equity Report prepared by the Educator Advancement Council offers extensive information on the state's past and ongoing educator workforce diversification efforts; however, the report does not appear to include the type of quantitative disparity data that courts have required to demonstrate a compelling governmental interest.

In conclusion, given the difficulty of satisfying step one and the absence of necessary quantitative evidence in the legislative record to show a compelling governmental interest, we believe a court would almost certainly conclude that the scholarship program in HB 3030, if enacted, violates the Equal Protection Clause for discriminating against individuals on the basis of race, ethnicity and national origin.

If a court disagreed with our analysis under step one of strict scrutiny, the scholarship program would also need to satisfy step two. Here, step two would require that the state demonstrate that the scholarship program is narrowly tailored to the strong evidence of specific historical discrimination or significant disparity identified under step one. In doing so, a court would scrutinize the law for overinclusion and underinclusion of suspect groups to ensure the scholarship program excludes demographic groups for whom no history of relevant past discrimination or disparity is identified under step one and includes all demographic groups for whom a history of relevant past discrimination or disparity is identified under step one. In addition, the court would examine the availability of race-neutral alternatives and the flexibility of the scholarship eligibility criteria. For instance, whether offering the scholarship to all individuals regardless of race, ethnicity or national origin is a workable alternative. Or allowing individuals who do not meet the racial, ethnic or national origin eligibility criteria to establish eligibility through an alternative means such as economic disadvantage. In the end, as a matter of logic, it is impossible to analyze step two fully if step one is not satisfied. Without a strong evidentiary record under step one and a legislative and administrative record demonstrating efforts to narrowly tailor the scholarship program, step two is an exercise in speculation.

III. Conclusion

To summarize, HB 3030, if enacted, establishes a scholarship program for culturally and linguistically diverse administrator candidates described. That scholarship program expressly discriminates on the basis of race, ethnicity and national origin to confer economic benefits to individuals. If subject to an equal protection challenge, a court would apply strict scrutiny and almost certainly conclude that the scholarship programs violates the Equal Protection Clause.