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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 18, 2025

Senator Lew Frederick
900 Court Street NE S419
Salem OR 97301

Re: A-engrossed House Bill 3026 under the Equal Protection Clause

Dear Senator Frederick:

You asked for an opinion applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to the scholarship program for teacher candidates in A-engrossed House Bill 3026.

In short, we conclude the text of HB 3026-A likely would be upheld against a facial equal protection challenge under rational basis review. However, HB 3026-A delegates rulemaking authority to the Higher Education Coordinating Commission to specify the meaning of "experience with diverse populations." Depending on the content of that definition, the rules may themself employ suspect characteristics and trigger strict scrutiny. Therefore, we emphasize that an independent equal protection analysis will be required following adoption of rules. Lastly, if the commission in practice considers the suspect characteristics of applicants to determine which receive state moneys, and reliable evidence of such consideration becomes publicly available, then the commission's implementation of the scholarship program likely would be vulnerable to a successful as-applied equal protection challenge. As a general matter, but for these hypothetical rulemaking scenarios, the scholarship program would likely comply with equal protection jurisprudence.

We begin with an overview of equal protection jurisprudence, followed by a discussion of Article III standing and facial versus as-applied challenges, and conclude with an analysis of your question.

Equal Protection—generally

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In essence, the Equal Protection Clause mandates that state and local governments treat similarly situated persons equally under the law.[1]

Courts employ a two-step test when analyzing an equal protection challenge to a law: (1) courts first identify the class of persons subject to differential treatment under the law; and (2) courts then apply a corresponding level of scrutiny to determine whether the law is constitutional. Laws premised on classifications such as age or medical condition receive rational basis review,

[1] *See Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591, 601-602 (2008).

which "require[s] only that the classification challenged be rationally related to a legitimate state interest."[2] Laws that discriminate based on sex receive heightened (or "intermediate") scrutiny, requiring the government to prove that the law serves "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[3] Laws premised on "suspect" classes—such as race, ethnicity, religion, national origin or alienage—are reviewed under strict scrutiny, which requires the government to show that laws employing a suspect classification (1) serve a compelling government interest and (2) are narrowly tailored to achieve that interest.[4]

Article III standing and facial versus as-applied challenges

Before analyzing questions about the applicable standard of review, a court must first have jurisdiction to hear a challenge. One jurisdictional requirement is that a plaintiff must satisfy the standing requirements of Article III, section 2, of the United States Constitution. To do so, the plaintiff must demonstrate that (1) the plaintiff has suffered an "injury in fact," which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) the injury is caused by the defendant; and (3) it is likely, rather than speculative, that the injury is redressable by the court.[5] Even where government discriminates on the basis of race, the resulting injury "accords a basis for standing only to those persons who are personally denied equal treatment."[6] In such cases, the injury for purposes of Article III standing is not the inability to obtain the benefit, but rather the inability to compete on an equal footing.[7]

It is important to understand the nature of the two types of claims that may be brought against a law under the Equal Protection Clause: a facial challenge and an as-applied challenge. A facial challenge requires a plaintiff to demonstrate that the text of the law on its face—that is, in all its applications—is unconstitutional. By contrast, an as-applied challenge requires a plaintiff to demonstrate that, although the text of the law is not unconstitutional in all its applications, the law is unconstitutional as applied to the particular facts of the plaintiff's case. A successful facial challenge typically results in the invalidation of the law in its entirety, while a successful as-applied challenge typically results in the invalidation of the law as applied to the plaintiff in the litigated case. Courts favor as-applied challenges because they conform more appropriately with the judicial function to resolve concrete disputes and defer to the legislative branch's lawmaking prerogative.[8]

Analysis

The Higher Education Coordinating Commission administers a scholarship program for culturally and linguistically diverse teacher candidates under the existing provisions of ORS 348.295. House Bill 3026-A amends the scholarship program, in part, as follows:

> (1) In addition to any other form of student financial aid authorized by law, the Higher Education Coordinating Commission

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[2] *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
[3] *United States v. Virginia*, 518 U.S. 515, 533 (1996), *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).
[4] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206-207 (2023).
[5] *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003).
[6] *Id.*, *quoting Allen v. Wright*, 468 U.S. 737, 755 (1984).
[7] *Id.* at 941.
[8] *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190-1191 (2008) (discussing preference for as-applied challenges over facial challenges).

> may award scholarships to [*culturally and linguistically diverse*] teacher candidates **who have experience with diverse populations** to use at approved educator preparation providers, as defined in ORS 342.120[*, for the purpose of advancing the goal described in ORS 342.437 (1)(a)*].[9]

ORS 348.295 (4)(b), as amended by section 5 of HB 3026-A, defines "teacher candidate" as "an individual who is preparing to be a teacher or other school professional licensed, registered or certified by the Teacher Standards and Practices Commission[,]" and subsection (3) directs the commission to adopt rules establishing ways candidates can demonstrate "experience with diverse populations."

Considered together, the scholarship program, as amended by section 5 of HB 3026-A, establishes two conditions precedent to receive a scholarship for use at an approved educator preparation program: the individual must (1) be preparing to be a teacher or other school professional licensed, registered or certified by the Teacher Standards and Practices Commission; and (2) have "experience with diverse populations," as defined by rule by the Higher Education Coordinating Commission. The first condition precedent is a nonsuspect class requirement and therefore would be upheld under rational basis review. The second condition precedent, however, warrants further discussion.

The second condition precedent to be eligible for a scholarship is that applicants must have "experience with diverse populations." ORS 348.295 (4)(a), as amended by section 5 of HB 3026-A, 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.

Because "experience" is not defined in HB 3026-A, a court would likely consult a standard dictionary to ascertain its ordinary meaning.[10] The definition of "experience" is broad and vague, and includes: the "direct observation of or participation in events : an encountering, undergoing, or living through things in general as they take place in the course of time"; "the state, extent, duration, or result of being engaged in a particular activity (such as a profession) or in affairs

[9] ORS 348.295 (1), as amended by section 5 of HB 3026-A. "'Approved educator preparation provider' means a sponsor or provider of an educator preparation program that meets the standards of the Teacher Standards and Practices Commission, as provided by ORS 342.147." ORS 342.120 (4).
[10] *See Fresk v. Kraemer*, 337 Or. 513, 521 (2004) (consulting *Webster's Third New International Dictionary* to determine the plain meaning of a term that was not defined in the applicable statutes).

generally"; and the "knowledge, skill, or practice derived from direct observation of or participation in events : practical wisdom resulting from what one has encountered, undergone, or lived through."[11]

Under these dictionary definitions, we believe any individual—regardless of suspect characteristics—could satisfy the condition precedent of having experience with diverse populations. Accordingly, we conclude that, if challenged, the text of HB 3026-A likely would be subject to rational basis review and survive an equal protection challenge.

However, ORS 348.295 (3), as amended by section 5 of HB 3026-A, directs the commission, in consultation with the Educator Advancement Council and the Department of Education, to adopt rules necessary for the implementation of the scholarship program, including rules establishing "ways candidates may demonstrate experience with diverse populations." By delegating this definition to the rulemaking authority of the commission, HB 3026-A in essence outsources the critical equal protection question to the administrative branch.[12] An independent equal protection analysis will be necessary following the commission's adoption of rules. To shed light on the equal protection concerns that may arise in the rulemaking process, we offer observations on two hypotheticals.

Hypothetical one—facial challenge to rules under strict scrutiny

If the commission adopts by rule a definition of "experience with diverse populations" that is based in full or in part on a suspect characteristic of individuals applying for the scholarship, then the scholarship program would likely be subject to a successful rule-based facial equal protection challenge under strict scrutiny.

Again, 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.[13] By contrast,

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[11] Merriam-Webster Unabridged Dictionary, https://unabridged.merriam-webster.com/unabridged/experience (last visited May 16, 2025).

[12] The Higher Education Coordinating Commission is cognizant of the equal protection concerns attendant to its rulemaking authority as evidenced by written testimony submitted to the Oregon Legislative Information Service website. Written testimony on House Bill 3026-A, submitted by Kyle Thomas, Higher Education Coordinating Commission, May 7, 2025 ("This bill allows HECC to operate the program in a manner that is aligned with federal law and respects concerns that have been raised relative to equal protection and the use of eligibility requirements that can be based on race. These amendments alter the intent of the program, but also result in a program that the Commission believes, in consultation with the Department of Justice (DOJ), is free of constitutional concerns. This analysis is dependent on program implementation and how HECC determines the eligibility of participants under this new statutory standard. We will determine how to screen eligibility through the public rulemaking process and in close discussion with DOJ to ensure that the eligibility process established by HECC cannot be construed as a pretext for awarding grants on the same basis as the original program, or on some basis that creates related concerns.").

[13] *SFFA*, 600 U.S. at 207. *See also Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-477 (1989); *Strickland v. U.S. Dep't of Agric.*, 736 F. Supp. 3d 469, 481 (N.D. Tex. 2024); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 482 (N.D. Tex. 2024), *appeal dismissed*, No. 24-10603, 2024 WL 5279784 (5th Cir. July 22, 2024); *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 765 (E.D. Tenn. 2023).

"ameliorating *societal* discrimination does not constitute a compelling [governmental] interest that justifies race-based state action."[14] "[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."[15] 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.[16] 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.[17] Courts carefully consider both statistical and anecdotal evidence under step one and examine a statute or government program on its face.[18]

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."[19] 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."[20] 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.[21]

Here, if the commission's rule-based definition of "experience with diverse populations" employed suspect classes, 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 each suspect class

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[14] *SFFA*, 600 U.S. at 226 (emphasis added); *Nuziard*, 721 F. Supp. 3d at 480.

[15] *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 500, *cert. denied*, *Johnson v. Associated Gen. Contractors of Ohio, Inc.*, 531 U.S. 1148 (2001); *J.A. Croson Co.*, 488 U.S. at 500-501 ("A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists."). *See also Western 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.") (cleaned up), *quoting Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995); *J.A. Croson Co.*, 488 U.S. at 505-506; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-278 (1986).

[16] *See J.A. Croson, Co.*, 488 U.S. at 509.

[17] *Id.* at 507 ("[Racial balancing] rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.") (internal quotations omitted), *quoting Local 28 of Sheet Metal Workers*, 479 U.S. at 494 (O'Connor, J., concurring in part); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000).

[18] *Western States Paving, Co.*, 407 F.3d at 991 ("Both statistical and anecdotal evidence of discrimination are relevant in identifying the existence of discrimination."); *Adarand Constructors, Inc.*, 228 F.3d at 1166 ("Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not."); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 970 (8th Cir. 2003) ("Compelling government interest looks at a statute or government program on its face.").

[19] *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.").

[20] *Adarand Constructors, Inc.*, 228 F.3d at 1178.

[21] *J.A. Croson*, 488 U.S. at 508 ("Based upon proper findings, such 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.").

included in the definition. 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 workforce disparity study conducted by independent consultants. We have been unable to identify an education workforce disparity study for Oregon, and, as of date of writing, no such quantitative or qualitative evidence has been submitted to the Oregon Legislative Information Service website as written testimony for HB 3026-A that would satisfy step one of strict scrutiny.[22]

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 scrutiny. Second, to make the requisite disparity showing, the state would not compare the race, ethnicity or national origin of teachers 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 teachers and the utilization of qualified diverse teachers in school districts or education service districts.[23] 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 a rule-based definition of "experience with diverse populations" that employed suspect characteristics would violate the Equal Protection Clause. Under this scenario, an individual who applied for the scholarship and satisfied all eligibility criteria except for those based on suspect characteristics would have Article III standing to bring a facial equal protection challenge because that individual would not be able to participate in the application process on an even footing.[24]

Hypothetical two—as-applied challenge to statute or rules under strict scrutiny

If the commission adopts by rule a definition of "experience with diverse populations" that is not based on a suspect characteristic of individuals applying for the scholarship, yet the commission in practice considers a suspect characteristic of individuals to determine whether to award a scholarship, and reliable evidence of such consideration becomes publicly available, then an individual who applied for the scholarship and satisfied all written eligibility criteria would have Article III standing to bring an as-applied equal protection challenge.[25] If such challenge were brought, we believe a court would likely hold the scholarship program as applied to the plaintiff violates the Equal Protection Clause. In such case, the court would invalidate the scholarship

[22] *Nuziard*, 721 F.Supp.3d at 482 (A report offered as evidence of disproportionate difficulty in accessing commercial capital and credit among minority entrepreneurs failed to "address[ ] causal factors, much less 'specific, identified instances of past discrimination that violated the Constitution or a statute,'" *quoting SFFA*, 600 U.S. at 207. The court thus held, "Without more granularity, the Agency cannot establish a compelling interest.").
[23] It is possible that the disparity showing could be between the availability of qualified diverse teacher candidates and the enrollment of qualified diverse teacher candidates at an approved educator preparation program. But the relevant case law on public contracting does not fit this formulation neatly.
[24] *Carroll*, 342 F.3d at 941.
[25] *Id.*

program only as applied to the plaintiff, but otherwise the scholarship program would remain in effect. Although this factual scenario seems improbable, we raise it to ensure you are fully aware of the equal protection risks at issue.

We hope this opinion is helpful. Please contact us for further assistance if necessary.

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Very truly yours,

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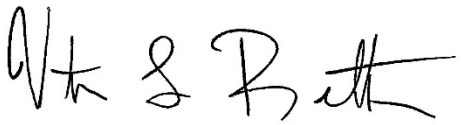

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