



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

July 13, 2020

Senator Fred Girod  
Senate Republican Leader  
900 Court Street NE S401  
Salem OR 97301

Re: Allocation of moneys based on race and gender classifications

Dear Senator Girod:

In its June meeting, the Emergency Board allocated moneys to the Oregon Business Development Department (OBDD) to establish a grant program to provide technical assistance to minority- and woman-owned businesses affected by the COVID-19 pandemic. You asked whether a grant program that identifies recipients by race or gender violates the federal or state Constitutions.

As discussed below, we think the program may potentially, but would not necessarily, violate the equal protection clause of the United States Constitution and the privileges and immunities clause of the Oregon Constitution.

**Equal Protection under the United States Constitution**

Under the Fourteenth Amendment to the United States Constitution, which prohibits states from denying “equal protection of the laws” to individuals, state laws that classify individuals according to race or gender are subject to special scrutiny.

*Standards for race-based classifications*

A race-based classification is subject to “strict scrutiny,” meaning that the classification is invalid unless the state can demonstrate that the classification is “narrowly tailored” to “further compelling government interests.” *Mt. West Holding Co. v. Montana*, 691 Fed. Appx. 326, 329 (9th Cir. 2017).

To meet this standard, a state must develop evidence of inequities caused by racial discrimination and demonstrate that its race-based classification is designed to remediate those inequities in a way that is “limited to those minority groups that have actually suffered discrimination.” *Id.* at 330. “[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.” *Associated Gen. Contrs. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) (internal quotations and citations omitted).

Indeed, courts closely scrutinize the evidence presented by states in support of race-conscious programs. For example, in *Mt. West*, the court held that Montana's race-based contracting preference did not satisfy strict scrutiny where the state attempted to prove discrimination using, first, a study that used "several questionable assumptions and an opaque methodology;" second, a decline in disadvantaged business participation after a previous affirmative action program was ended; and third, anecdotal evidence of discrimination "[w]ithout a statistical basis." 691 Fed. Appx. at 330-331.

### *Standards for gender-based classifications*

Laws that classify individuals based on gender are similarly subject to special scrutiny, although the scrutiny applied to gender classifications is less strict than that applied to racial classifications. To be upheld, gender-based classifications must be "substantially related" to the furtherance of "important governmental objectives." *Latta v. Otter*, 771 F.3d 456, 479-480 (9th Cir. 2014). This standard is "demanding;" "the state must convince the reviewing court that the law's proffered justification for the gender classification is exceedingly persuasive." *Id.* (internal quotations and citations omitted).

As with race-based classifications, courts require a state to show "evidence of past discrimination in the economic sphere at which the affirmative action program is directed," though not necessarily discrimination involving the government itself. *Engineering Contrs. Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) (internal quotations and citations omitted). The strength of the evidence required to support a gender-based classification is less than that required to support a race-based classification, though the degree of difference "may elude precise formulation." *Id.*

### *Application to the OBDD grant program*

We are not aware of any evidentiary findings by the legislature or the Emergency Board in support of the OBDD grant program at issue here. Without any such findings, the program would almost certainly be unconstitutional under the Fourteenth Amendment.

Thus, we think that in order for OBDD to constitutionally operate the grant program, OBDD would first need to develop evidence of past discrimination against minority- and woman-owned businesses in relevant industries that meets the constitutional standards described above. If OBDD were to develop such evidence and administer the grant program consistently with the evidence, the program could pass constitutional muster.

### **Privileges and Immunities under the Oregon Constitution**

Article I, section 20, of the Oregon Constitution, prohibits the state from providing privileges or immunities to a class of citizens if the privileges or immunities do not apply on the same terms to all citizens.

In construing this clause, courts distinguish between "true classes" and "nontrue classes" (a true class being a class that exists independently of the challenged law) and further between "suspect" true classes and "nonsuspect" true classes (a suspect class being one that is based on immutable characteristics of the persons within it, or one that has been the subject of adverse prejudice). Race and gender are both suspect true classes. *Tanner v. OHSU*, 157 Or. App. 502, 522 (1998).

A law that discriminates between individuals based on their membership or nonmembership in a suspect true class is “inherently suspect” and is upheld only if the law “can be justified by genuine differences between” members and nonmembers of the class. *Id.* at 523. Although the Oregon case law is somewhat sparse in this area, laws are often invalidated under this standard. See *Tanner* (invalidating Oregon Health Science University’s practice of offering insurance benefits to opposite-sex partners but not same-sex partners); *Shineovich v. Shineovich*, 229 Or. App. 670 (2009) (invalidating statute that established parentage presumption for opposite-sex partner but not same-sex partner); *Hewitt v. SAIF*, 294 Or. 33 (1982) (invalidating statute providing benefits to female partners but not male partners).

We have located no cases applying the Oregon privileges and immunities clause to an affirmative action program. We think there is a colorable argument that the likelihood of suffering from invidious discrimination constitutes a “genuine difference” between race- and gender-based classes that may suffice to withstand a privileges and immunities challenge. However, without case law on point, we cannot be certain of that conclusion.

We also think it is likely that courts would require some evidentiary showing of actual discrimination, as is required in a federal equal protection challenge. Without relevant case law, though, we cannot predict the type and strength of evidence an Oregon court would require in a privileges and immunities challenge.

As discussed above, we are not aware of any evidence developed by the state to support the grant program at issue. However, as in the equal protection context, the program could still be administered consistently with the privileges and immunities clause if OBDD were to develop the necessary evidence and tailor the program accordingly. We think it is likely that evidence that satisfies the requirements of the equal protection clause would also satisfy the requirements of the privileges and immunities clause.

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Very truly yours,

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