

Executive Summary

The Oregon Cares Fund: A Fund For Black Relief And Resiliency

Without targeted legislation, COVID-19 will exacerbate past disparate impacts of discrimination—which gives rise to both the imperative and legal justification for the State to take race-conscious action for Black people, Black-owned businesses, and Black community-based organizations. These Oregonians are suffering disproportionate economic harms from COVID-19 and yet, in disproportionate numbers, are not being aided by existing and ostensibly race-neutral relief efforts. To provide narrowly tailored relief to address these discrimination-related disparities, the State should work with The Contingent to administer the Oregon Cares Fund and distribute a portion of the Coronavirus Relief Funds (under Section 5001 of the CARES Act) as part of the Oregon CARES Act. Such action is urgently needed by Black Oregonians.

1. Targeted Relief Is Needed to Mitigate Discrimination’s Disparate Economic Impacts on the Black Community.

The COVID-19 pandemic poses unprecedented challenges, including mitigating its economic effects in underserved communities. The risk of incomplete mitigation is particularly pronounced for Black Americans. After past disasters that affected Black communities, studies have found that the disasters exacerbated existing economic disparities along racial lines and governments have failed to mitigate effectively those racial disparities. As in those prior disasters, Black communities in Oregon are already experiencing disproportionate impacts from COVID-19. And, as in those prior disasters, the State must anticipate that a failure to target funds at its Black community will widen the economic gap between that community and the rest of Oregon. The State cannot be blind to past and present economic disparities associated with discrimination against the Black community without unwittingly exacerbating them.

2. The State May Lawfully Adopt a Race-Conscious Program by Funding the Oregon Cares Fund to Target Funds at Black Oregonians.

Although the Oregon Cares Fund would constitute a race-conscious program and, should it be challenged, litigation always poses risks, the State will have persuasive arguments, applying existing precedent, that the Oregon Cares Fund is legal.

States have a compelling interest “in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination [in industry].” *Western States Paving Co. v. Wash. State DOT*, 407 F.3d 983, 991 (9th Cir. 2005). To pass constitutional muster, a race-conscious program like the Oregon Cares Fund must meet the courts’ test for “strict scrutiny,” which requires that the program: (1) address a “compelling governmental interest;” and (2) be “narrowly tailored” to achieve that interest. *Id.*

a. There is a strong basis in evidence to show the necessity of remedial action.

There is the requisite “strong basis in evidence” for concluding that race-conscious remedial measures are necessary in Oregon to ensure that CARES funding is not distributed in a manner that perpetuates discrimination-related racial disparities. Further, if the funding is challenged, an Oregon district court assessing the legality of a race-conscious program *will*

be entitled to rely on post-enactment evidence to find the program constitutionally permissible.

Oregon has a sad history of discriminating against Black people. As enacted, the Oregon constitution banned Black people. Later, Oregon outlawed Black businesses, segregated Black students, and forbade interracial marriage. Even once Black-owned businesses were lawful, Black Oregonians had unequal access to and insufficient funding for business loans. Even the repeal of discriminatory laws, which occurred within the lifetime of many Black Oregonians, has not displaced that systemic discrimination that pervades our institutions, programs, and policies.

Owing to that history, Black persons in Oregon are more likely to live in poverty—a situation being exacerbated by COVID-19’s disproportionate impacts on the health of Black Americans. According to the CDC, Black persons have been hospitalized at four times the rate as non-Hispanic Whites because of “increased [the] risk of getting COVID-19 or experiencing severe illness” associated with “[l]ong-standing systemic health and social inequities.” Similar causality exists in the economy, where statistics show that Black business owners have been hit hardest by COVID-19’s economic upheaval. McKinsey Global Institute recommends that risks to Black people’s economic futures should be mitigated with “interventions [that] target the places where black people live, work, and do business[.]” including through “[c]ommunity development financial institutions (CDFIs), churches, and nonprofits [that] could help black-owned businesses and residents to access recovery funds.”

b. The Oregon Cares Fund is narrowly tailored to remedy a compelling State interest.

Centuries of systemic and institutional discrimination—perpetuated and exacerbated by current systems—have cause economic disparities and exacerbated the Black community’s vulnerability. The Oregon Cares Fund would ensure that the distribution of CARES funds does not perpetuates discrimination-related racial disparities. It is narrowly tailored to the State’s compelling interest because, as required: (1) alternative remedies are ineffective; (2) the scope and duration of the program are limited; (3) the program is flexible and targets the specific minority group suffering disparities arising from discrimination, perpetuating through programs intended to be race-neutral; and (4) the program will not improperly disadvantage other groups because of other governmental efforts to supply funding accessible to the boarder community.

Further, the Oregon Cares Fund has been tailored to specifically meet the requirements of the CARES Act and the promulgating guidance from the Department of Treasury.

To be clear, the Oregon Cares Fund does not seek to address the longstanding, general economic disparities experienced by Black Oregonians. Rather, it narrowly targets the disproportionate harm, traceable to discrimination, that COVID-19 is causing Black Oregonians in the form of employment and business interruption. The impact on the Black community is disproportionately great due not only to the uneven pre-pandemic economic, health, and educational playing field (attributable to discrimination), but also the more recent “race-neutral” programming that, despite intentions to support the Black community as part of the larger community, has failed to do so effectively. Therefore, the Oregon Cares Fund is

narrowly tailored to be limited in scope and duration, flexible, not overly inclusive, and to target a specific minority group suffering disparate treatment resulting from identified discrimination by only addressing the disproportionate COVID-19 impacts on the Black community, without improperly disadvantaging other groups.

Concluding Thoughts.

Relative to other groups and owing to discrimination, Black people are already suffering worse economic outcomes from COVID-19, including lost jobs, property, and businesses. Yet Black people are obtaining disproportionately fewer federal dollars than other groups from ostensibly race-neutral remedial programs. The State should address its Black communities' rapidly multiplying losses through targeted relief to address discrimination, which is causing disparate economic impacts in relation to COVID-19. Further, to better understand these still-accumulating economic consequences, the State should collect disaggregated economic data and study that data for disparities. Mitigation and studies should be undertaken in parallel and as a high priority. Like the virus itself, COVID-19's economic harms will be most insidious when unaddressed and unstudied. Unchecked, that economic harm, which is multiplied by past and present discrimination, will only deepen for Black Oregonians.