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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 1, 2019

From the Desk of
Rep. Margaret Doherty

Margaret Doherty

Representative Jennifer Williamson
House Majority Leader
900 Court Street NE H295
Salem OR 97301

Re: Potential constitutional challenges to A-engrossed Senate Bill 1008

Dear Representative Williamson:

You have asked our office whether a person sentenced before January 1, 2020, could successfully claim that, unless A-engrossed Senate Bill 1008 is applied retroactively, the bill violates the equal privileges and immunities guarantee of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The answer is no.

A-engrossed Senate Bill 1008 makes several changes to the prosecution and sentencing of persons who were under 18 years of age at the time of committing a crime. For example, the bill ends the automatic prosecution of 15-, 16- and 17-year-olds as adults for Measure 11 offenses, and authorizes adult prosecution and the imposition of Measure 11 sentences only after the court holds a hearing and waives the person to adult court.¹ The bill authorizes a conditional release hearing for a person who received a Measure 11 sentence for a crime the person committed as a 15-, 16- or 17-year-old after the person has served half of the sentence imposed.² The bill also authorizes a conditional release hearing for a person sentenced to a term of imprisonment for a crime committed when the person was under 18 years of age if the person's release date falls between the person's 25th and 27th birthdays.³ The bill prohibits the imposition of a life sentence without the possibility of parole on a person who was under 18 at the time of committing the offense.⁴ The bill also authorizes a parole hearing after 15 years of imprisonment for persons sentenced for a crime committed when the person was under 18 years of age.⁵ The provisions of the bill apply only to sentences imposed on or after January 1, 2020.⁶

I. Oregon Constitution analysis

Article I, section 20, of the Oregon Constitution, states, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." The provision protects against the disparate treatment of both individuals and classes of individuals.

¹ Sections 4, 5 and 6 of A-engrossed Senate Bill 1008.

² Section 22 of A-engrossed Senate Bill 1008.

³ *Id.*

⁴ Section 24 of A-engrossed Senate Bill 1008.

⁵ Section 25 of A-engrossed Senate Bill 1008.

⁶ Section 32 of A-engrossed Senate Bill 1008.

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An analysis of a claim that Article I, section 20, has been violated begins with the question of whether a person was denied a privilege or immunity.⁷ We assume, for the purposes of this opinion, that the elimination of automatic waiver to adult court and the opportunities for early release in A-engrossed SB 1008 are privileges.

The next step of the analysis is to determine whether the claim involves “inequality of treatment as an individual or inequality of treatment as a class.”⁸ In A-engrossed SB 1008, all persons sentenced after January 1, 2020, would be sentenced under the provisions of the bill, while those sentenced prior to January 1, 2020, would not. In your question, a person claiming that Article I, section 20, requires the retroactive application of A-engrossed SB 1008 would have been sentenced prior to January 1, 2020, and be arguing for the same treatment as those persons sentenced after January 1, 2020. This is therefore a claim of inequality of treatment as a class.⁹

In order to bring a successful class-based claim under Article I, section 20, a person “must be a member of a true class, whose disparate treatment is ‘by virtue of characteristics they have apart from the law in question.’”¹⁰ In other words, the class must exist as a distinct group apart from A-engrossed SB 1008. Examples of a true class include persons of a particular race or gender, persons who reside in a particular area or persons who have served in the military.¹¹ Since A-engrossed SB 1008 itself creates the distinction between the two groups at issue in your question, there is no true class under these circumstances. In addition, Oregon courts have at least twice rejected, on the grounds of “no true class,” arguments that the imposition of Measure 11 sentences violated Article I, section 20.¹² As the Oregon Supreme Court has stated, “[i]aws involving classifications created by statute ‘are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I, section 20.’”¹³

II. United States Constitution analysis

The Fourteenth Amendment to the United States Constitution provides, in what is known as the Equal Protection Clause, that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” A law challenged under an equal protection claim is examined at different levels of scrutiny depending upon the class of persons or the type of legal right at issue. The Oregon Supreme Court has summarized the analysis as follows: “[i]n the absence of fundamental rights or a suspect class, statutory schemes are examined to determine whether they rationally further legitimate objectives of state law. . . . Stated otherwise, a statutory scheme violates equal protection if it discriminates without any rational basis in terms of the purposes of the act.”¹⁴ In examining the persons affected by A-engrossed SB 1008, we conclude that neither fundamental rights nor a suspect class is involved.

The term “fundamental rights,” in the context of equal protection analysis, means an established implied or express constitutional right, such as the right to interstate travel¹⁵ or the right to marry.¹⁶ There is no fundamental right to receive an opportunity for conditional release

⁷ *State v. Scott*, 96 Or. App. 451, 455 (1989).

⁸ *Id.*

⁹ *Scott* at 455-456.

¹⁰ *Scott* at 456, quoting *Hunter v. Oregon*, 306 Or. 529 (1988).

¹¹ *State v. Clark*, 291 Or. 231, 240 (1981).

¹² *State v. George*, 146 Or. App. 449, 457 (1997); *State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 610 (1997).

¹³ *Huddleston* at 610, quoting *Sealey v. Hicks*, 309 Or. 387, 397 (1990).

¹⁴ *Klamath Falls v. Winters*, 289 Or. 757, 772 (1980).

¹⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

¹⁶ *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

or to remain in juvenile court. The Oregon Supreme Court rejected an equal protection challenge to Measure 11 based on a claim of a fundamental right to be free from cruel and unusual punishment.¹⁷

A suspect class, under a federal constitutional analysis, is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁸ A group consisting of defendants sentenced before January 1, 2020, does not constitute a suspect class.

Without a fundamental right or suspect class at stake, A-engrossed SB 1008 must only rationally further a legitimate objective of state law to survive an equal protection challenge. The application of sentencing reductions to some defendants but not others has survived a rational basis analysis.¹⁹ As the Oregon Supreme Court has stated, “the Equal Protection Clause does not prevent a state from increasing the punishment actually imposed for a particular crime.”²⁰ We conclude the same is true when reducing punishment, and that A-engrossed SB 1008 would survive an equal protection challenge.

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Very truly yours,

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By
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¹⁷ *Huddleston* at 627-628.

¹⁸ *San Antonio Indep. Sch. Dist.* at 28.

¹⁹ *U.S. v. Padilla-Diaz*, 862 F.3d 856, 862 (2017).

²⁰ *Huddleston* at 630.