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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 23, 2021

Representative Mark Owens
900 Court Street NE H475
Salem OR 97301

Re: Constitutional issues raised by House Bill 2026 (2021)

Dear Representative Owens:

You asked whether House Bill 2026 raises any constitutional issues. (We assume your second question about "commerce issues" refers to the Commerce Clause of the United States Constitution and so is encompassed in your first question.)

House Bill 2026 requires a public employer to give preference in hiring to a resident of the Eastern Oregon Border Economic Development Region (the Region) for a civil service position if the majority of the work will be performed within the Region. If enacted, the law could be challenged under the Equal Protection Clause, the Due Process Clause, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution, and Article I, section 20, of the Oregon Constitution.

We believe a court would be unlikely to strike down HB 2026 under the Equal Protection Clause, the Due Process Clause or Article I, section 20. There is some uncertainty under the Privileges and Immunities Clause, and somewhat less under the dormant Commerce Clause because there is so little case law. On balance, however, we believe it is more reasonable than otherwise to expect a favorable outcome under both these clauses based on such case law as there is.

Finally, we must advise caution when relying on this opinion due to the short amount of time we had to research and draft it.

A. The Equal Protection Clause

The Equal Protection Clause of the United States Constitution provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws."[1] If a plaintiff alleges that a classification in state law "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," the court will apply strict scrutiny, the highest standard of review.[2] Under HB 2026, the classification is made between those

[1] Amendment XIV, section 1, United States Constitution.
[2] *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

applicants for civil service positions who reside within the Region and those who reside outside it.

Persons residing outside the Region are not a suspect class, i.e., a class that is "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."[3] Moreover, the United States Supreme Court has held that "there is no fundamental right to government employment for purposes of the Equal Protection Clause."[4]

In such a case, the Supreme Court applies a "rational relationship test" to state legislation restricting employment opportunities.[5] The Supreme Court has described this test thus, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[6] We believe such a state of facts is reasonably conceivable and believe it highly likely that HB 2026 would be upheld under the same reasoning as in the case of an Equal Protection challenge to a municipal regulation requiring employees of the City of Philadelphia to be residents of the city, in which the Supreme Court stated:

> Neither in those cases [relied on by plaintiff], nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident at the time of his application. In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim.[7]

B. Substantive Due Process

In addition to procedural due process, the Fourteenth Amendment to the United States Constitution has been interpreted to include a right to substantive due process. The Supreme Court has stated that substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests."[8]

In the employment context, the Supreme Court "has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation."[9] In the view of the United States Court of Appeals for the Ninth Circuit, whose jurisdiction includes Oregon, "the [Supreme] Court has never held that the

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[3] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). "The traditional 'suspect classifications' encompassed by the Equal Protection Clause include race, gender, alienage, and national origin." *Dillingham v. Garcia*, 2021 U.S. Dist. LEXIS 48302, 25 (E.D. Calif. 2021).
[4] *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984), *citing Murgia*, 427 U.S. 307 at 313.
[5] *Oklahoma Education Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 933 (10th Cir. 1989).
[6] *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal citations omitted).
[7] *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646-647 (1976). Please note that the Supreme Court differentiates "between a requirement of continuing residency and a requirement of prior residency of a given duration." *Id.* at 647. Durational residency requirements have been held to violate the fundamental right to travel under several provisions of the United States Constitution. The right to travel "has been long recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 757-759 (1966).
[8] *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997). Substantive due process "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-721 (internal quotations and citations omitted).
[9] *Conn v. Gabbert*, 526 U.S. 286, 291-292 (1999).

right to pursue work is a fundamental right."[10] Consequently, the judicial review in the Ninth Circuit that applies to laws infringing on the right to pursue work is very narrow: "We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did."[11]

Thus, if a nonresident applicant for a civil service position in the Region challenged HB 2026 as a violation of substantive due process, the court would most likely find that the applicant did not have a fundamental right to government employment in the Region. The law would thus be upheld if the court found that the Legislative Assembly could have had a legitimate reason for enacting the bill, which we believe to be most likely.

C. The Privileges and Immunities Clause

The United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[12] The Privileges and Immunities Clause has been interpreted broadly as being "designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[13] Distinctions that hinder the formation, the purpose or the development of a single union of the several states are prohibited.[14] In the context of employment, the threshold question is "whether an out-of-state resident's interest in employment . . . in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'"[15]

According to the decision in *United Building & Construction Trades Council v. Camden*, the Supreme Court case most relevant to this opinion, "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."[16] However, whether public as opposed to private employment is a fundamental right within the Privileges and Immunities Clause remains unsettled.[17] The United States Court of Appeals for the Third Circuit, interpreting *Camden* in light of the origins of the clause, held in *Salem Blue Collar Workers Association v. City of Salem* that "direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause . . . ," though the Chief Judge disagreed in a vigorous dissent.[18] The problem for this opinion is that *Salem* was a case of first impression for an appellate court of how the clause applies to direct public employment and we are not aware of any that have followed.[19] Altogether, the case law under the clause is sparse, and the cases that deal with public

[10] *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004); *cert. denied, Sagana v. Tenorio*, 125 S. Ct. 1313, 1314 (2005).
[11] *Sagana*, 384 F.3d at 743 (internal quotations and citations omitted).
[12] Article IV, section 2, clause 1, United States Constitution.
[13] *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).
[14] *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 218 (1984), *citing Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383 (1978).
[15] *Camden*, 465 U.S. at 218, *citing Baldwin*, 436 U.S. at 388.
[16] *Camden*, 465 U.S. at 219.
[17] *International Organization of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843, 845-846 (9th Cir. 1987), *citing Camden*, 465 U.S. at 219-220. In our view, public employment is not a "calling" at all, but a category of employment relationship based on the nature of the employer, which is analytically distinct from the interest of an individual in pursuing a specific line of work, *e.g.*, as an attorney or commercial fisher.
[18] *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 268-270 (3rd Cir. 1994), *interpreting United Bldg. & Constr. Trades Council v. Camden*; *cert. denied, Salem Blue Collar Workers Ass'n v. City of Salem*, 1995 U.S. LEXIS 1076. *See also A. L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865, 871 (3rd Cir. 1997); *United States ex rel. Eisenstein v. City of New York*, 2006 U.S. Dist. LEXIS 14944, 21 ("Privileges that are not fundamental include the privilege of public employment."). Of note, the dissent in *Salem* remarks that the distinction between public and private employment is diminished when nearly one-sixth of all jobs in New Jersey, and one-fifth throughout the country, are held by public employees. *Salem*, 33 F.3d at 276 (Sloviter, C.J., dissenting).
[19] *Salem*, 33 F.3d at 273 (Sloviter, C.J., dissenting).

employment involve state or local law that requires *private* employers to follow resident preferences on public works projects.

Thus, it is unusually difficult to predict how a court would evaluate HB 2026 under the Privileges and Immunities Clause. If a court were to determine that the hiring preference in the Region deprived nonresident applicants of a protected privilege, the law would be subjected to a two-prong test. First, a state may not discriminate ‘‘against non-citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states.” To prove a “substantial reason” there must be “something to indicate that the non-citizens constitute a peculiar source of the evil at which the statute is aimed.” Second, there must be a “reasonable relationship between the danger represented by the non-citizens, as a class, and the . . . discrimination practiced upon them.”[20]

There is no clear precedent for how much or what kind of evidence is necessary to show that nonresidents are a “peculiar source of evil,” although the United States Court of Appeals for the Seventh Circuit, in rejecting an Illinois law establishing a resident preference on public works projects, has given some idea of what a court might consider persuasive:

> Illinois has presented no information—statistical or otherwise . . . —concerning the benefits of the preference law. We are not told the unemployment rate in Illinois’ construction industry, what such unemployment costs the state, whether it would be significantly increased by throwing open public construction projects to nonresidents (which might just cause a reshuffling of jobs between public and private projects), and whether the costs—if any—to Illinois of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, are likely to exceed any cost savings in public construction from hiring nonresident workers.[21]

It is at least clear that high unemployment by itself has not generally been held to justify resident preferences.[22] Rather, the court may inquire whether the unemployment is due to some condition *within* the state, such as lack of education or geographic remoteness, as in the Alaska Hire program that was invalidated under the Privileges and Immunities Clause.[23]

At the same time, the Supreme Court has stated, “Every inquiry under the Privileges and Immunities Clause ‘must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures,’” though no cases indicate how this deference should be applied.[24] In the end, however, we believe it is more reasonable than otherwise to expect a favorable outcome because it is far from certain that

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[20] Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws under the Privileges and Immunity Clause*, 22 SW. U. L. Rev. 1, 12 (1992), citing *Toomer v. Witsell*, 334 U.S. 385, 385-386, 396, 399.
[21] *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 497-498 (7th Cir. 1984). *See also Camden*, 465 U.S. at 222-223 (“The city of Camden contends that its ordinance is necessary to counteract grave economic and social ills. Spiralling [sic] unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city have eroded property values and depleted the city's tax base . . . Nonetheless, we find it impossible to evaluate Camden's justification on the record as it now stands. No trial has ever been held in the case. No findings of fact have been made.”).
[22] *See* George T. Reynolds, *Issues in the Third Circuit: Constitutional Law: Constitutional Assessment of State and Municipal Residential Hiring Preference Laws*, 40 Vill. L. Rev. 803, 817 n.91 (1995).
[23] *Hicklin v. Orbeck*, 437 U.S. 518, 526-527 (1978).
[24] *Camden*, 465 U.S. at 222-223, *citing Toomer*, 334 U.S. at 396.

direct public employment is a fundamental right protected by the clause, and in *Salem*, the only case we are aware of that deals with direct public employment in this context, the appellate court upheld the residency requirement.

D. The Dormant Commerce Clause

The Commerce Clause of the United States Constitution gives Congress the power to regulate interstate commerce.[25] "The dormant Commerce Clause is the negative implication of that provision . . . that 'denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'"[26] "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[27] But "[w]here [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[28]

Under the "market participant" doctrine, however, a state may impose burdens on interstate commerce within a market in which the state is a participant, although it may not attach restrictions on "downstream" transactions involving private parties. In the latter case, the state is acting as a regulator and the dormant Commerce Clause applies.[29]

In the context of public employment, the United States Supreme Court upheld an executive order by the Mayor of Boston requiring that residents of Boston constitute at least 50 percent of the workforce on all construction projects funded in whole or in part by the city.[30] The Court reasoned that insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and thus the executive order did not violate the dormant Commerce Clause.[31]

House Bill 2026 is different in that it would be a state law requiring resident preferences in hiring by *political subdivisions* of the state located in the Region. The United States Court of Appeals for the Ninth Circuit, however, has reasoned that treating political subdivisions as separate from state control for purposes of the market participant exception would be inconsistent with the proposition that political subdivisions exist at the will of the state. It thus concluded that the market participant exception applied to save Alaska's implementation through its school districts of a program challenged under the dormant Commerce Clause.[32]

We are not aware of any cases that interpret the dormant Commerce Clause, with or without consideration of the market participant exception, in the context of direct public employment. (The public employment cases such as *White* deal with hiring preferences on public works projects.) However, we think it would be anomalous to allow a public body to enact hiring preferences applicable to *private* contractors on public works projects when using its own money

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[25] Article I, section 8, clause 3, United States Constitution.
[26] *Columbia Pacific Building Trades Council v. City of Portland*, 289 Or. App. 739, 745 (2018), *citing Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 98 (1994).
[27] *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
[28] *Id.*, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[29] *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97-99 (1984). *See also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.").
[30] *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 205-206 (1983).
[31] *Id.* at 214-215.
[32] *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 952 F.2d 1173, 1179 (9th Cir. 1992).

(as in *White*), but to disallow a public body to enact hiring preferences applicable to its own political subdivisions when hiring their own employees, using, of course, their own money (as in HB 2026). It is also arguable that the employment relationship of a public body with its own employees is not the kind of commerce protected by the dormant Commerce Clause even when nonresidents are affected.[33]

In sum, in the absence of cases with fact patterns directly on point with the provisions of HB 2026, we cannot say for certain how a court would view the bill if challenged under the dormant Commerce Clause. (It is possible that the lack of cases indicates the lack of a basis for a claim under the clause in these circumstances.) We can say, however, that *White* and *Big Country Foods, Inc.* provide persuasive precedent for upholding the bill.

E. Article I, section 20, Oregon Constitution

Article I, section 20, of the Oregon Constitution, provides: "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." To claim inequality of treatment as a member of a class of citizens, a person must show membership in a "true class," the members of which are treated differently by virtue of characteristics that the members of the class share apart from the law in question.[34] A "suspect class" is a true class identified by "characteristics [e.g., race, gender, religion] that are historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice."[35]

A law that treats the members of a suspect class differently is subject to a more demanding standard and "may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted."[36] The claim of a member of a true class that is not a suspect class is analyzed under the rational basis standard: "[A] statute must be upheld as long as it is tied to a legitimate governmental purpose, regardless of whether that purpose is set out in the statute or legislative history, or was even considered by the legislature."[37] The burden is on the plaintiff "to negative every conceivable basis which might support it. . . ."[38]

"Geographical residence is the common example of a nonsuspect true class."[39] Thus, a nonresident's challenge to HB 2026 under Article I, section 20, would be analyzed under the rational basis standard. We believe it likely that the state could show a legitimate governmental

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[33] The Supreme Court in *Hughes v. Alexandria Scrap Corp.* listed the followings examples of "the kind of action with which the [dormant] Commerce Clause is concerned": the packing of fresh fruit, the shipment of raw milk, the packing and transporting of shrimp, the shelling and beheading of shrimp before export, the shipment and sale of grain and the distribution of natural gas. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 805-806. The cases overwhelmingly deal with interstate commercial transactions involving the movement of goods (as in the examples above) or the provision of services (*e.g.*, waste disposal, scrap processing of junked cars).

[34] *State v. Scott*, 96 Or. App. 451, 455 (1989). *See also Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 521 (1998) ("The standard example of a nontrue class . . . is the classification created by a statute that imposes a filing deadline for filing a petition for review. Such legislation creates two classes of persons: (1) those who timely file petitions for review, and (2) those who do not. . . . But in the absence of the statute, [the classes] have no identity at all.").

[35] *Morsman v. City of Madras*, 203 Or. App. 546, 557 (2006).

[36] *Id.* at 559; *Tanner*, 157 Or. App. at 523.

[37] *Morsman* 203 Or. App. at 557, 559.

[38] *Id.* at 559.

[39] *Tanner*, 157 Or. App. at 523. *See also Sherwood Sch. Dist. 88J v. Wash. County Educ. Serv. Dist.*, 167 Or. App. 372, 386 (2000) ("[T]here is no question that plaintiffs are members of a true class for Article I, section 20, purposes; they are subject to disparate treatment on the basis of their geographic residence.").

purpose behind the bill and unlikely that a plaintiff could negative every conceivable basis which might support the law.

Finally, our conclusion accords with the Oregon Attorney General's 1976 opinion that local government requirements that public employees reside within the boundaries of the governmental unit that employs them do not violate the equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution or Article I, section 20, though the same federal analysis was used for both.[40]

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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[40] 38 Op. Att'y Gen. 437 (1976).