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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 4, 2022

Senator Dennis Linthicum
900 Court Street NE S305
Salem OR 97301

From the desk of:
Dennis Linthicum

Re: Constitutionality of Senate Bill 1510

Dear Senator Linthicum:

You have asked whether Senate Bill 1510 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, or any other aspect of the United States and Oregon Constitutions, specifically the "sections that are making ethnic and race based money allocations and qualifications," which we understand to mean section 15.

Section 15 of SB 1510 creates the Justice Reinvestment Equity Program, in which moneys transferred by the Oregon Criminal Justice Commission to the Northwest Health Foundation Fund II are distributed as subgrants to "culturally specific organizations and culturally responsive service providers."[1] A culturally specific organization is defined, in pertinent part, as "an organization . . . that serves a particular cultural community, that is primarily staffed and led by members of that community and that demonstrates self-advocacy, positive cultural identity and intimate knowledge of the lived experience of the community."[2] A culturally responsive service is defined, in pertinent part, as "a service that is respectful of, and relevant to, the beliefs, practices, cultures and linguistic needs of diverse consumer or client populations and communities whose members identify as having particular cultural or linguistic affiliations by virtue of their place of birth, ancestry or ethnic origin, religion, preferred language or language spoken at home."[3] The purpose of the program is, in part, to "promote racial equity [and] reduce racial disparities."[4] As discussed below, we think that depending on how section 15 is interpreted and implemented, the program could possibly violate the Equal Protection Clause of the United States Constitution and the privileges and immunities clause of the Oregon Constitution, but a more definitive answer to this question would depend on the legislative record for SB 1510.

I. Analysis under the Fourteenth Amendment to the United States Constitution

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause mandates that state and local governments treat similarly situated persons equally under the law.[5] If a law contains an express, race-based classification,

[1] Section 15 (1), SB 1510.
[2] Section 15 (4)(c), SB 1510.
[3] Section 15 (4)(b), SB 1510.
[4] Section 15 (2), SB 1510.
[5] *See Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591, 601-602 (2008).

strict scrutiny applies and courts need not inquire into the underlying legislative purpose.[6] By contrast, however, where a law is facially neutral, strict scrutiny will apply only if the law was motivated by racial purpose or object or if the law is unexplainable on grounds other than race.[7] Under a strict scrutiny level of review, in order to survive constitutional challenge, legislation must serve a compelling government interest and must be narrowly tailored to achieve that interest.[8]

Section 15 does not explicitly mention race, nor does it require that subgrants be distributed based on the race of employees of or persons served by the organization or service provider. The definition of culturally responsive service does mention communities who identify by their members' "place of birth, ancestry or ethnic origin, religion, preferred language or language spoken at home," which could be interpreted as being a proxy for a description of a racial group. However, section 15 requires only that the services be "respectful of, and relevant to" such communities, and we therefore do not see this language as constitutionally problematic.

On the other hand, a culturally specific organization by definition "serves a particular cultural community [and] is primarily staffed and led by members of that community." "Cultural community" is not synonymous with race. However, coupled with the Justice Reinvestment Equity Program's express purpose of "promot[ing] racial equity [and] reduc[ing] racial disparities," it is possible that in the implementation of the program, "cultural community" could be interpreted as a proxy for a specific racial group, and the program could provide grant funds to an organization based on the organization's explicit categorization of persons it has served or will serve based on race. We think it is therefore possible that a court could find that section 15 is a facially neutral law that may be motivated by a racial purpose and subject to strict scrutiny. We further conclude that this determination would likely depend on how section 15 is interpreted and implemented.

Assuming, for purposes of this opinion, that a court would find that section 15 is subject to strict scrutiny, we turn to how a court would apply that level of review. Remedying past discrimination can be a compelling government interest; however, it must be demonstrated that a state either played a role in the discrimination or was a passive participant in the discriminatory practices.[9] In determining whether a law is narrowly tailored to remedying the present effects of the past discrimination identified as a compelling government interest, courts consider a series of factors, including "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; . . . and the impact of the relief on the rights of third parties."[10] While narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative," it does require demonstrated "good faith consideration" of less restrictive, workable alternatives and may not unduly burden members of unfavored racial groups.[11] As to how such a showing by the state to survive strict scrutiny must be made, courts have shown skepticism toward and inconsistency in weighing post-enactment evidence when evaluating the constitutionality of legislation,[12] so evidence in the legislative record is strongly favored.

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[6] *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[7] *Id.*
[8] *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003).
[9] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).
[10] *United States v. Paradise*, 480 U.S. 149, 171 (1987).
[11] *Grutter*, 539 U.S. at 339-341.
[12] *Compare Coral Construction Co. v. King Cty.*, 941 F.2d 910, 919-921 (9th Cir. 1991) (holding post-enactment evidence admissible), *with Rothe Development Corp. v. U.S. Dept. of Defense*, 262 F.3d 1306, 1326-1328 (Fed. Cir. 2001) (holding post-enactment evidence inadmissible).

The question of whether section 15 could survive strict scrutiny therefore depends in large part on the legislative record. Since the record for SB 1510 has not yet been fully developed, we are unable to definitively provide an answer to this question, but evidence of the state's active or passive participation in past discrimination against organizations serving certain racial groups, and testimony concerning how providing funds specifically to those organizations is narrowly tailored to remedy the past discrimination, would be the types of evidence in the record a court would look for.

II. Analysis under Article I, section 20, of the Oregon Constitution

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.

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.[13] We assume, for purposes of this opinion, that the provision of Justice Reinvestment Equity Program subgrants are a privilege. 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."[14] 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.'"[15] 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.[16] Members of specific cultural communities would almost certainly constitute a true class. The final step of the analysis is to determine the type of class involved and apply the appropriate level of court scrutiny. If a true class exists, courts then determine whether the true class is a suspect class. A suspect class, such as race or gender, is "based on immutable traits or traits on the basis of which class members are subjected to adverse social or political stereotyping or prejudice."[17] Depending on how section 15 is interpreted, members of certain cultural communities could constitute a suspect class.

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.[18] Although the Oregon case law is somewhat sparse in this area, laws are often invalidated under this standard.[19] We have not found any cases analyzing a program like the Justice Reinvestment Equity Program under Article I, section 20. We think there is a colorable argument that the likelihood of suffering from invidious discrimination constitutes a "genuine difference" between race-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.

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[13] *State v. Scott*, 96 Or. App. 451, 455 (1989).
[14] *Id*.
[15] *Scott*, 96. Or. App. at 456, *quoting Hunter v. Oregon*, 306 Or. 529, 533 (1988).
[16] *State v. Clark*, 291 Or. 231, 240 (1981).
[17] *Advanced Drainage Systems, Inc. v. City of Portland*, 214 Or. App. 534, 540 (2007), *quoting Cox v. State of Oregon*, 191 Or. App. 1, 9 (2003).
[18] *Tanner v. OHSU*, 157 Or. App. 502, 523 (1998).
[19] *See Tanner* (invalidating Oregon Health and 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 also think it is likely that courts would require, as in an Equal Protection Clause challenge and as discussed above, some evidentiary showing of actual discrimination. 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.

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Very truly yours,

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