



STATE OF OREGON
Legislative Counsel Committee

January 3, 2024

To: Representative Janelle Bynum

From: Alan S. Dale, Senior Deputy Legislative Counsel

Subject: Economic Equity Investment Program (EEIP) and LC 285 (2024)

We send this memorandum to raise a point not about the amendments by LC 285 to the EEIP (codified at ORS 285B.760 to 285B.763) but about the underlying program and the question of racial preferences. The language of the EEIP does not directly base grant awards on race. Rather, the awards consider certain economic equity risk factors, including, as relevant here, the “experience of discrimination because of race or ethnicity.” Thus, this factor relates to a person’s experience as a member of a race, not the person’s race in and of itself. ORS 285B.760 (2)(a).

Since the EEIP was enacted in 2022, however, the United States Supreme Court has handed down its decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), in which it held:

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies “without regard to any differences of race, of color, or of nationality”—it is “universal in [its] application.” For “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” “If both are not accorded the same protection, then it is not equal.”

Students for Fair Admissions, 600 U.S. at 206 (citations omitted).

The Court’s holding is broad but was decided in the context of university admissions, not public grant programs such as the EEIP, and we are not aware of any judicial decision since the Court’s holding that deals with public grant programs. Thus, between the indirect connection to race under the EEIP and the fact that the Court’s holding is not on point, there may be only moderate risk for the EEIP under the Equal Protection Clause. We cannot say, however, that there is no risk of litigation.

Encl.