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May 11, 2018

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: *Senate Bill 1202 - Higher Education - Richard W. Collins III Leadership With Honor Scholarship - Establishment*

Dear Governor Hogan:

We have reviewed, and hereby approve for constitutionality and legal sufficiency, Senate Bill 1202, titled "Higher Education - Richard W. Collins III Leadership With Honor Scholarship – Establishment." The bill creates a scholarship program. We write to discuss implementation of the program in a way to comport with constitutional requirements.

Senate Bill 1202 creates a new scholarship program and requires the Governor to include at least \$1,000,000 to the program in the annual budget. To be eligible for a scholarship, an individual must be (1) a member of a Reserve Officer Training Corps ("ROTC") program; (2) a minority student or a student who is a member of another group historically underrepresented in ROTC programs; and (3) a student at a historically black college or university.

The use of race in a scholarship program raises an issue under the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Maryland Constitution contains no equal protection clause, but "the concept of equal protection is embodied in the due process requirement of Article 24" of the Maryland Declaration of Rights. *Tyler v. City of College Park*, 415 Md. 475, 499 (2010). A government program that uses a race classification is constitutional only if it is narrowly tailored to support a compelling government interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). "Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence." 91 *Op. Att'y Gen.* 181, 183 (2006). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784

(2007) (“The government bears the burden of justifying its use of individual racial classifications.”).

With regard to Senate Bill 1202, one of the eligibility requirements is that the individual be a minority student or a student who is a member of another group historically underrepresented in ROTC programs. The bill is not clear whether the term “underrepresented” was intended to encompass groups that are not based on race. If the bill is aimed at providing equal opportunities to underrepresented groups, even those based on race, outreach activities that will likely expand the pool of qualified applicants would be constitutional. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (characterizing as “race-neutral” employee recruitment programs targeting minority college students and outreach programs). On the other hand, to the extent that the scholarship program is viewed as using a race-based criteria, a reviewing court is likely to use the analysis applied to assess race-conscious university admissions programs. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). *See also Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013) (confirming that “the decision to pursue the educational benefits that flow from student body diversity ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper”) (internal quotation marks and citation omitted). That is, the racial eligibility consideration is constitutional if it is narrowly tailored to further a compelling government interest.

The focus of the bill is increasing diversity in ROTC programs. In *Grutter*, the Supreme Court cited, as one of several reasons for its finding of a compelling state interest in a diverse student body, is that it improves the military’s ability to provide national security. “[A] highly qualified, racially diverse officer corps ... is essential to the military’s ability to fulfill its principal mission to provide national security.” 539 U.S. at 331 (citing brief filed by members of the Joint Chiefs of Staff, military academy superintendents, secretaries of defense, and several members of the U.S. Senate explaining that “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies”). *See also* Autumn A. Arnett, “Diversity Key Part of Military’s Marching Orders,” *Diverse Issues in Higher Education* (Oct. 26, 2015) (citing a 2013 Department of Defense report that found that 9.4 percent of active duty officers across all branches of the military are Black, compared to 17 percent of enlisted members and that all racial/ethnic minorities are “grossly underrepresented” among the officer ranks).¹ Thus, a reviewing court is likely to find that the State has a compelling interest in having diversity in ROTC programs.

In addition, the scholarship program must be narrowly tailored. It is possible that a race-conscious scholarship could be considered narrowly tailored if used as an extension to support other legitimate policies such as increasing diversity in ROTC programs in the State. *See* Alexander S. Elson, “Disappearing Without a Case—The Constitutionality of Race-Conscious Scholarships in Higher Education,” 86 *Washington U. L. Rev.* 975, 1013-15 (2009) (arguing that

¹ <http://diverseeducation.com/article/78582/>.

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race exclusive scholarships are narrowly tailored if used in context of a larger individualized admissions plan structured to promote diversity at the university). Nevertheless, before implementing any race-based criteria for the scholarship, the agency should first engage in a "good faith consideration of workable race-neutral alternatives" to achieve diversity in the State's ROTC programs. *Grutter*, 539 U.S. at 339.² Finally, the State must subject the program to a periodic review to evaluate if any race considerations in the scholarship program are still necessary to achieve diversity in ROTC programs.

Accordingly, should you sign Senate Bill 1202, it is our advice that before implementing the scholarship program, the Maryland Higher Education Commission work with the Office of Attorney General to ensure that the program is conducted consistent with constitutional requirements.

Sincerely,



Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber

² This is especially advisable in light of *Podberesky v. Kirwin*, 38 F.3d 147 (1994), one of the few cases that addressed the constitutionality of the consideration of race in a financial aid program. In that case, the program at issue reserved a number of merit scholarships for African-American students. The State's asserted interest was rectifying past discrimination. The Fourth Circuit found that the University of Maryland failed to present sufficient evidence that a remedial race-conscious program was justified because the court held that the University had not discriminated against high achieving black students; the court also found that the program was not narrowly tailored.