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May 6, 2024

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: Senate Bill 960, "Maryland Clean Energy Center – Climate Technology Founder's Fund"

Dear Governor Moore:

We have reviewed and hereby approve Senate Bill 960 for constitutionality and legal sufficiency. It is our view that the bill is not clearly unconstitutional; nevertheless, we discuss below how two provisions should be implemented to be consistent with federal and State constitutional requirements.[1]

This bill establishes the Climate Technology Founder's Fund in the Maryland Clean Energy Center to provide early-stage funding for start-up companies focused on qualified projects in climate technologies. The following provisions appear on page 6, lines 1 through 12:

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

> (f) (1) Subject to paragraphs (2) and (3) of this subsection, in determining the qualified projects to receive investment from the Fund, the Center shall give preference to companies that are small, minority, women–owned, and veteran–owned businesses in the clean energy industry.
>
> (2) At least 40% of the funds awarded by the Center shall be used for equity investments in minority, women–owned, and veteran–owned businesses start–up companies.
>
> (3) Forty percent of the funding from the Center's overall appropriation that is allocated for Maryland energy innovation institute seed grants shall be used to provide grants for start–up companies from minority serving institutions.

As for subsection (f)(1), we believe the Clean Energy Center can comply with equal protection limitations by construing the provision to require that the Center give preference to small businesses generally, including small businesses that are minority-owned, women-owned, or veteran-owned. That view is consistent with how the Office of the Attorney General has construed similar provisions. Subsection (f)(2), which sets aside 40% of the funding for investments in minority-owned, women-owned, and veteran-owned businesses, presents a different problem.

The use of race and gender in a government 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. Maryland's 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). The use of numerical goals based on individual racial classifications must meet strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). And when a government program uses gender as a consideration, courts apply an "intermediate scrutiny" standard of review. *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010).

No doubt exists that the government has a compelling interest in remedying identified past and present race or gender discrimination. *Croson*, 488 U.S. at 509. Race- or gender-based numerical programs are permissible, however, only when the governmental entity seeks to address discrimination by the government entity itself, or to prevent the public entity from acting as a "passive participant" in a system of racial or gender exclusion practiced by elements of local industry by allowing tax dollars "to finance

the evil of private prejudice." *Id*. at 492; *Associated Utility Contractors of Maryland v. Mayor and City Council of Baltimore*, 83 F. Supp. 2d 613, 619 (D. Md. 2000).

In accordance with constitutional requirements, we believe that before the set aside in (f)(2) could be implemented, the State would need to confirm that there is a strong basis to conclude that imposing the requirement is narrowly tailored to remedy discrimination against minority- and women-owned businesses. "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 *Opinions of the Attorney General* 181, 183 (2006). The legislative record appears to be devoid of any evidence upon which the State could rely in this regard.

Additionally, before implementing any race- or gender-based criteria, the State should first engage in a "good faith consideration of workable race-neutral alternatives" to achieve the State's goals. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The legislation also fails to include a planned duration for the set aside or mandate that the State periodically review the program to evaluate whether any race or gender considerations are still necessary. *Id*. at 341-42. *Accord Belk*, 269 F.3d at 344 (stating that the Fourth Circuit "has emphasized that "[t]he use of racial preferences must be limited so that they do not outlast their need; they may not take on a life of their own") (quoting *Hayes v. North State Law Enforcement Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993)).

In conclusion, it is our view that a reviewing court would likely determine that the (f)(2) set aside is unconstitutional. We believe, however, that provision is likely severable from the other provisions in the bill. General Provisions Article, § 1-210. As a result, while we approve the bill, the provisions of Senate Bill 960 should be implemented as race neutral outreach measures and not as numerical goals or preferences based on race or gender.

Sincerely,

Anthony G. Brown

AGB/SBB/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber