BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 19, 2020

The Honorable Nick Mosby
205 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Mosby:

You have asked for advice regarding House Bill 416, "Medical Cannabis - Medical Cannabis Business Development Fund - Establishment," which would repeal a race neutral program that provides grants to appropriate educational and business development organizations to train and assist small, minority, and women business owners and entrepreneurs seeking to become licensed as medical cannabis growers, processors, or dispensaries and replace it with a Medical Cannabis Development Fund operated by the Department of Housing and Community Development that would provide grants for training of, or provide financial assistance directly to, minority and women owners and entrepreneurs who are seeking to obtain licensure as medical cannabis growers, processors, or dispensaries, or establish new businesses to provide necessary services solely to medical cannabis growers, processors, or dispensaries.[1] You have asked whether it is necessary to include nonminority women in the new program. It is my view that the exclusion of nonminority women from the program raises significant legal issues.

It is well-settled law that race-based classifications are subject to strict scrutiny under the Equal Protection Clause. *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989). In Maryland, sex based classifications are also subject to strict scrutiny. *In re Roberto d.B.*, 399 Md. 267, 279 n. 13. As a result, such classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Supreme Court has recognized that "remedying the effects of past or present racial discrimination" is a compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *Croson*, 488 U.S. at 492.

To rely on this compelling interest, however, the government must demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 500,

[1] The proposed legislation would retain the requirement in Health-General Article ("HG"), § 13-3302(f)(1)(i) that the Maryland Medical Cannabis Commission conduct outreach to small, minority, and women business owners and entrepreneurs who may have an interest in applying for licenses.

citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion). The established way to make this showing in the context of programs benefitting minority and women owned businesses is a disparity study, that is, a study that shows "a significant statistical disparity between the availability of minority owned firms and the utilization of those firms in the jurisdictions geographic and product markets. *Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 36 F.3d 1513, 1522 (10th Cir.1994). Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Croson*, 488 U.S. at 509.

If a study demonstrates disparities in the relevant market, any remedial measures implemented by the government must be narrowly tailored. Any goals that are set must be closely related to the findings in the disparity study. *Croson,* 488 U.S. at 507-508. Other narrow tailoring factors include the duration of the program and the flexibility of the relief, including the availability of waiver provisions and the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Midwest Fence Corp. v. US DOT*, 2015 WL 1396376 (N.D. Ill. March 24, 2015). In addition, it is generally necessary to first consider race-neutral alternatives. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 312 (2013); *Croson*, 488 U.S. at 507. All of these factors should be considered if a race-based government business program is to be created.

In this case, there is a January 17, 2018 letter report by Dr. Jon Wainwright ("the Report"), available on the MMCC website, which concludes that the State disparity study, *Business Disparities in the Maryland Market Area* (2017), provides "a strong basis in evidence for applying race- and/or gender-conscious remedial measures, including the State's MBE Program, to the types of work involved in the medical cannabis business." Although the Commission determined that this Report was sufficient to establish remedial measures for the State's medical cannabis licensing process, neither the Commission nor the Maryland Department of Transportation (the State certification agency responsible for the availability and utilization studies periodically required by the General Assembly) has determined whether this Report supports the remedial measures prescribed in House Bill 416. The Wainwright Report, however, would not appear to provide support for the exclusion of nonminority women because based on the regression analyses summarized in Tables 1 through 5 of the Report, there are adverse disparities for nonminority women with respect to wage and salary earnings, business owner earnings, and business formation rates in every medical cannabis licensing category. The only instance in which there was not an adverse disparity for nonminority women was in the business formation rate for ancillary activities. Failure to include nonminority women in the new program when other minorities with similar adverse disparities are included would raise Equal Protection issues. In addition, the replacement of the prior race neutral remedy with a race-based one, or even a race- and gender-based one, is in itself a change that should be supported by evidence that the race-neutral measures have not worked.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General