SB703

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

CONFIDENTIAL
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The Honorable Erek L. Barron
414 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Barron:

You have asked for advice concerning whether the State Constitution could be amended to require that a jurisdiction's judicial bench reflect the diversity of the State or that particular jurisdiction. It is my view that a requirement of this type would likely be found to violate the Equal Protection Clause of the United States Constitution.

I have found only one case addressing the validity of setting quotas for diversity on the bench. *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga.1994), involved a settlement agreement between the parties to a case challenging the Georgia judicial system under the United States Constitution and the Voting Rights Act. The agreement provided for all judges to be appointed by the Governor subject to retention elections. It further provided that by the end of 1994, there would be at least 25 African American superior court judges and that 5 additional African Americans would be appointed to either the state court or the superior court. *Id.* at 1551. The court found this agreement to be invalid, in part because it violated the Fourteenth Amendment. I have also found two cases in which states have attempted to address the issue of judicial diversity by requiring diverse membership on judicial nominating commissions. In *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995) the requirement was challenged by a white man whose application for membership on the commission was rejected because he was not a woman or a minority. In *Back v. Carter*, 933 F. Supp. 738 (N.D. Ind. 1996) the requirement was challenged by a white man who was removed from a judicial nomination commission as part of the implementation of the diversity requirement. Both requirements were held invalid.

In each of these cases, the court first noted that racial classifications are subject to the most rigid scrutiny. *See Brooks*, 848 F. Supp. at 1570 citing *Shaw v. Reno*, 509 U.S. 630, 643-644 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). This strict scrutiny has two requirements: the racial classification must be justified by a "compelling government interest," and the means chosen by the state to effectuate its purpose must be "narrowly tailored" to achieve that goal. *Brooks*, 848 F. Supp. at 1570, citing *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 274 (1986).

It is well established that remedying of past discrimination is a compelling governmental interest. *Back v. Carter*, 933 F. Supp. 738, 755 (N.D. Ind. 1996), citing *City of Richmond v. J.A. Croson*, 488 U.S. 469, 492-493 (1989). In order to rely on this purpose, however, the state must identify past discrimination with "specificity," *J.A. Croson*, 488 U.S. at 504, "based upon 'particularized' findings of earlier discrimination in the affected industry." *Brooks*, 848 F. Supp. at 1570. An interest in racial diversity alone is not sufficient to permit a race-conscious policy. *Mallory*, 895 F. Supp. at 1560. Thus, in the absence of a showing of a need to remediate past discrimination, a race based classification cannot be upheld. *J.A. Croson*, 488 U.S. at 505.

In *Brooks*, the court was faced with a situation where the usual findings had not been made and the government motivation for the settlement agreement was apparently to avoid continuing litigation, which would not meet the compelling interest test. *Brooks*, 848 F. Supp. at 1571. Because the State had recommended the settlement agreement, however, the court determined that it should treat the case as if the consent decree had been approved by the State as an affirmative action plan, and ascribe to the State "the strongest possible interests to support the provisions of the consent decree - the eradication of its history of discrimination against blacks in the legal and judicial fields and the elevation of public confidence in its judicial system by increasing diversity on the bench." *Id.* The Court further found, at length, that there was sufficient evidence to support those ascribed state interests. *Id.* at 1571-1572.

In the *Back* and *Mallory* cases, however, the courts found that the states had not met the compelling interest test. In *Back* the court noted that neither remedying general societal discrimination nor a desire for diversity was sufficient. *Id.* at 755-756. Moreover, the court found that a disparity between the percentage of minorities in the general population and those holding the positions in question was not appropriate to show discrimination where the position in question required special qualifications. *Id.* at 756. Applying this rule, the court did not find that the disparity shown was sufficient to show discrimination. *Id.* In *Mallory* the court found that no showing had been made of prior discrimination by the judicial nominating commissions in their screening of applicants and that there were not significant disparities between the number of minority attorneys in the bar and the numbers on the judicial nominating commissions. *Id.* at 1559-1560. The *Mallory* court also held that comparison to the percentage of minorities in the general population was irrelevant. *Id.* Based on these cases, it would appear that a law requiring that the racial composition of the bench reflect the racial composition of the state or local jurisdiction could not meet the compelling interest requirement.

Even if a compelling interest could be established, however, the narrow tailoring requirement presents a significant obstacle. In none of the three cases did the court find that the quota approach was narrowly tailored. The relevant factors considered are: (1) the efficacy of alternative remedies; (2) the flexibility of the proposed remedy; (3) the duration of the burden imposed by the proposed remedy; (4) the relationship between the number of minority people benefitted by the plan versus the number of minority people in the relevant population; (5) the effect of the remedy on innocent third parties; and (6) the availability of waiver provisions. *Brooks*, 848 F. Supp. at 1572.

The *Brooks* court found that the state had not considered race-neutral means to achieve their interest. *Id.* at 1573. It also found that this factor would ordinarily be dispositive, "as the existence of a race-neutral solution would indicate that a race-based solution was not necessary." *Id.* It did not find it dispositive, however, because of the unusual way in which the quota had been adopted. *Id.* The courts in *Back* and *Mallory* also found no consideration of race neutral alternatives. *Back*, 933 F. Supp. at 757; *Mallory*, 895 F. Supp. at 1561.[1]

In *Brooks*, the court found that the 30 judge quota was inflexible, and stated that the inflexibility "weighs heavily against, if it is not dispositive of, the validity of this provision." *Id.* at 1573-1574. The *Mallory* court, noting that the required preference was absolute and provided for no waiver, also found that the remedy was inflexible. *Id.* at 1562. Although the 30 judge requirement cut off after 1994, and a related requirement had a duration of 10 years, the court found that the duration was effectively indefinite and also that the 1994 date did not provide for an earlier ending if the goal was met. Thus, it found that this factor also indicated invalidity. *Brooks*, 848 F. Supp. at 1574, *see also Back*, 933 F. Supp. at 757 and *Mallory*, 895 F. Supp. at 1562.

The court in *Brooks* also found that the relationship between the proposed remedy and the relevant population did not support a finding of narrow tailoring. While the state argued that the percentage of judges should reflect the percentage of minorities in the general population, the court found that the proper comparison should be the percentage of minority attorneys qualified to become judges. *Id.* at 1575. The court then found that the percentage of black judges currently serving at each level of the Georgia judiciary exceeded the percentage of blacks in the Georgia Bar. The court also rejected the idea that the total population should be used because in the absence of prejudice, the percentages would be the same, saying it "is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." *Id.* at 1575-1576, citing *J.A. Croson*, 488 U.S. at 507), *see also Mallory*, 895 F. Supp. at 1561.

The *Brooks* court also held that hard and fast quotas imposed "significant and unreasonable burdens on innocent third parties." *Id.* at 1576. The 30 judge limit effectively required hiring of minorities only until that quota was met. The quota in *Mallory* had a similar effect, leading the court to state that it was aware of no federal court that had "deemed the burden imposed by a rigid quota reasonable or insignificant where the asserted goal of the program was no more than racial and gender diversity for its own sake." *Id.* at 1562. Finally, the *Brooks* court found that the lack

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[1] Many commentators have discussed race neutral alternatives. Jennifer L. Thurston, Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench, 82 Law and Contemporary Problems 63, 94 (2019); K.O. Myers, Merit Selection and Diversity on the Bench, 46 Ind. L. Rev. 43, 51 (2013); Improving Judicial Diversity, Brennan Center for Justice (2010) <https://www.brennancenter.org/our-work/research-reports/improving-judicial-diversity>; Leo Romero, Enhancing Diversity in an Appointive System of Selecting Judges, 34 Fordham Urb. L.J. 485, 487-497 (2007); Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity, Lawyer's Committee for Civil Rights, Judicial Independence and Access to Courts Project (June 2005) <https://www.opensocietyfoundations.org/publications/answering-call-more-diverse-judiciary-review-state -judicial-selection-models-and-their-impact>.

of waiver provisions further supported the conclusion that the limitations were not narrowly tailored.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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