6218 Library

STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

April 7, 1997

The Honorable Edith M. Rodgers
Member, House of Representatives
304-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Rodgers:

You seek an opinion as to "the application of the Charter School Act of 1996 of South Carolina, which was passed by the South Carolina Legislature with the purpose of increasing the choices for education of South Carolina families." You are concerned that "school boards may make discretionary decisions in opposition to charter school while cloaking it as being denied on the basis of the Act." Specifically, you desire an opinion concerning the following question:

(1) Are the racial quotas contained in the Act (specifically the requirement that the school will be within ten percent of the district-wide population) constitutional; and if not, is that provision severable from the remainder of the Act?

(2) Can an entity seeking a charter school meet the provisions of the Act by providing estimates and enforceable promises such as a viable financial plan, detailed budget and significant pledges; a commitment not to build any building which does not meet the safety and building codes of South Carolina, along with architectural drawings which meet these provisions; an estimate of the demographic mix of the student population and assurances that transportation will be provided to any student in the district, or must the entity seeking a charter show actual results such as actual funds on hand; an inspectable building; the names and races of the students, which would allow the school to show how each student would be served by the transportation plan?

(803) 734-3970 (803) 734-3646 Facsimile

Request Letter

LAW / ANALYSIS

The "South Carolina Charter Schools Act of 1996" is found at S.C. Code Ann. Sec. 59-40-10 et seq. The General Assembly expressed its intent regarding the new enactment in the statute's preamble:

> [t]he General Assembly hereby makes the following findings and declarations:
>
> (1) it desires to provide all children with schools that reflect high expectations and to create conditions in all schools where these expectations can be met;
>
> (2) the strengthening of the performances of elementary and secondary public school pupils can be achieved by education decisions made by those who know the students best and who are responsible for implementing the decisions;
>
> (3) parents and educators have a right and a responsibility to participate in the education institutions which serve them; and
>
> (4) different pupils learn differently and public school programs should be designed to fit the needs of individual pupils, and there are educators, citizens, and parents in South Carolina who are willing and able to offer innovative programs, educational techniques, and environments.

Section 59-40-30 further provides that "[i]n authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system." Furthermore, this Section states that

> [t]he General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities is actively pursued, and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, the provision of the chapter should be interpreted

> liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

Section 59-40-40 defines a "charter school" as a "public, nonsectarian, nonreligious, nonhome-based, nonprofit corporation forming a school which operates within a public school district, but is accountable to the local school board of trustees of that district, which grants its charter." In essence, a "charter school" is a school "that is free of many of the constraints of state regulation and that uses creative and unconventional instructional techniques and structures ... ." Howard, "Rewarding and Sanctioning School District Performance By Decreasing or Increasing The Level of State Control," 5 Kansas Journal of Law and Public Policy, 187, 189 (Spring, 1996).

The provision contained in the Charter Schools Act of 1996 which is of particular concern to you is found at Section 59-40-50(B)(6). This provision states that

> ... (B) A charter school shall:
>
> > ... (6) admit all children eligible to attend public school in a school district who are eligible to apply for admission to a charter school operating in that school district, subject to space limitations. However, under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent. (emphasis added).

Your question, in essence, is whether the highlighted portion of this statute is constitutional under the Equal Protection Clause of the United States and South Carolina Constitutions. Because a charter school must, by law, contain a certain racial proportion, or as you term it a "quota," the issue is thus whether such requirement is unlawfully discriminatory on the basis of race. It is my conclusion that it is.

UNITED STATES SUPREME COURT DECISIONS

The seminal case in the area of "reverse discrimination" is City of Richmond v. J.A. Croson Co. 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). In Croson, the City of Richmond, Virginia adopted a Minority Business Utilization Plan which required that prime contractors awarded city construction contracts to subcontract at least 30% of

the dollar amount of each contract to one or more "Minority Business Enterprises" as defined. Such "minority business enterprises" (or MBE's) were deemed to be businesses which were at least 51% owned or controlled by "minority group members." In turn, "minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Eskimos or Aleuts." Richmond's purpose in adopting this plan was declared to be "remedial" in nature, enacted for "the purpose of promoting wider participation by minority business enterprises in the construction of public projects."

Notwithstanding this declared benign purpose, however, the United States Supreme Court held that Richmond's plan contravened the United States Constitution's guarantee of Equal Protection of the Laws. Because, concluded the Court, Richmond's Plan denied citizens the opportunity to compete for a certain percentage of public contracts "based solely upon their race," the Plan would be subjected to the strictest of constitutional scrutiny. This meant that in order to pass constitutional muster, it would have to be shown that Richmond's Plan served a compelling governmental interest. Classifications based upon race carried with them a danger of stigma, observed the Court, and, therefore, unless such classifications were reserved for "remedial settings," they "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." That is why the Court demanded a "searching judicial inquiry into the justification for such race-based measures" because without such painstakingly specific proof of past racial discrimination

> ... there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

Id. at 721. In the Court's view, the purpose of the "strict scrutiny" analysis of racial classifications of whatever kind or variety is to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Moreover, this test "also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Id.

Relying upon its earlier decisions such as University of California Regents v. Baake, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 750 (1978) and Wygant v. Jackson Board of Ed. 476 U.S. 276, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Croson Court concluded that Richmond simply had not met the heavy burden of justifying its plan that was required of such race-based classifications. In Wygant, a plurality of the Court has struck down a race-based system of employee layoffs, concluding that the statistical racial disparity between students and teachers was in and of itself "not probative of employment

discrimination" and that unless there was specific hard evidence of such past employment discrimination, so-called "affirmative action" remedies would be without end, or in the Court's words, "ageless into their reach into the past and timeless in their ability to affect the future." 106 S.Ct. at 1848.

Likewise, Croson concluded that "the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in Wygant." A "generalized assertion that there has been past discrimination in an entire industry" was not good enough because it provided little or no "guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." While, in the eyes of the Court, the "sorry history" of both public and private discrimination contributed to a lack of opportunity for black entrepreneurs, such history alone "cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." Id. at 724.

Thus, in the view of the Court in Croson "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." Particularly unconvincing to the Court was Richmond's "[r]eliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond ... ." Unlike the qualifications for entry level jobs requiring minimal training,

> ... where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task ... .
>
> In this case, the city does not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects ... . Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.
>
> To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors will not hire minority firms ... . Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

109 S.Ct. at 726.

Further, the Court's view was that it was "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." Specifically, Richmond did not "use race-neutral means to increase minority business participation in city contracting." No evidence existed that "the Richmond City Council ... considered any alternatives to a race-based quota." Moreover, the 30% quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." Id. at 729.

The Court observed that the fact the City already considered waivers and bids on a case-by-case basis, made it "difficult to see the need for a rigid numerical quota." No inquiry had been made into "whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." Rather than "investigating the need for remedial action in particular cases," the City was content to employ "a rigid line drawn on the basis of a suspect classification." Id.

The Court was careful to note, however, that the City was not precluded "from taking action to rectify the effects of identified discrimination within its jurisdiction." Said the Court,

> [i]f the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. ... Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. ... In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Id. at 730. Moreover, "[w]here such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination." Id.

The key, in the Court's view, was to present hard evidence of past discrimination by the governmental body, unadulterated by factors which had nothing to do with discrimination. However, in Croson,

> the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." Wygant, 476 U.S. at 277, 106 S.Ct. at 1849.

Id. (emphasis added).

Six years after Croson, in 1995, the Court decided Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995). Adarand involved the constitutionality of a federal program which required that a federal contractor would receive additional compensation if it hired subcontractors that were small business certified and controlled by "socially and economically disadvantaged individuals." The contract, in this instance, came about as a result of the Surface Transportation and Uniformed Relocations Assistance Act of 1987. That Act provided that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Such Act also required the Secretary of Transportation to establish "minimum uniform criteria for State government to use in certifying whether a concern qualifies ... ." Pursuant to the federally required clause in the highway contract, the contractor would receive 10% of the final amount of the DBE subcontract, not to exceed 1.5% of the original contract amount if a subcontract is awarded to one DBE. If subcontracts were awarded to two or more DBE's, the contractor would receive an even larger percentage.

In Adarand, the United States Supreme Court overruled Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), concluding that all racial classifications, whether the result of federal, state or local governments, "must be analyzed by a reviewing court under strict scrutiny." Summarizing its previous decisions regarding racial classifications, the Court noted that

> [d]espite lingering uncertainty in the details, ... the Court's cases through Croson had established three general proposi-

> tions with respect to governmental racial classifications. First, skepticism ... . Second, consistency [standard of review not dependant on the race of those benefited or burdened] ... . And third, congruence....

115 S.Ct. at 2111. Furthermore, the Court made it clear that "... federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Id. at 2117. Rather than declare the federal set-aside scheme unconstitutional, however, the Court remanded to the lower court for further adjudication.

Concurring in the judgment of the Court, Justice Scalia was of the opinion that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." Id. at 2118. And, Justice Thomas expressed a similar point of view:

> [i]n my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Id. at 2119.

OTHER COURT DECISIONS APPLYING CROSON AND ADARAND

Numerous courts have followed Croson and Adarand, striking down all kinds of affirmative action "set-aside" programs. See, e.g., Podberesky v. Kirwan, 3 F.3d 147 (4th Cir.1994), cert.den. 115 U.S. 2001 (1995); Md. Troopers Assn., Inc. v. Evans, 993 F.2d 1072 (4th Cir.1993); Hopwood v. Texas, 78 F.3d 932 (5th Cir.1996); Contractors Assn. v. Philadelphia, 91 F.3d 586 (3d Cir.1996); Associated Genl. Contractors of America v. City of Columbus, 936 F.Supp. 1363 (S.D.Ohio, Eastern Division 1996). In addition, several Attorneys General have applied Croson and Adarand, concluding that the particular set aside program in question was constitutionally suspect. Texas Atty.Gen.Op. February 5, 1997 (race-based scholarships suspect); Georgia Atty.Gen.Op., 25 (December 23, 1996)[race-based classifications and gender-based classifications in government disadvantaged business enterprise programs are inherently suspect]; Op.Atty.Gen. (S.C.), Op.No.89-28 (March 9, 1989)[despite a presumption of constitutionality, set aside programs may not survive constitutionality].

In Podberesky, a separate merit scholarship program was established at the University of Maryland where only African-American students were eligible. The University attempted to justify the program on the basis that past discrimination had resulted in a severe underrepresentation of African-American students there.

The Fourth Circuit of Appeals concluded, however, that this program was unconstitutional because it discriminated on the basis of race. The Court cautioned that in order to "have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." 38 F.3d at 153. General societal discrimination "cannot be used as a basis for supporting a race-conscious remedy," concluded the Court.

With respect to a statistical showing of underrepresentation of African-Americans at the University of Maryland, the Court made it clear that "the selection of the correct reference pool is critical." In other words, in the Court's judgment,

> [t]he district court must first determine as a matter of law whether it is appropriate to apply a pool consisting of the local population or whether another pool made up of people with special qualifications is appropriate. In the employment context, this determination is made by looking at the job requirements. If the job is an unskilled one, the general population is more likely the relevant pool. If, however, the job requires some special skills or training, the relevant pool is made up of only those people who meet the criteria. ... The method of determining the relevant pool by looking at the qualifications needed to take advantage of the opportunity from which minorities historically have been excluded and the prevalence of those qualifications in the population is not limited to the employment context.

Id. at 156. In short, said the Court, "[t]he reference pool must factor out, to the extent practicable, all nontrivial, nonrace-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity." Id. at 160. Applying this standard, the Court reversed the District Court's grant of summary judgment on behalf of the University of Maryland. Finding that the reference pool to determine underrepresentation at the University of Maryland was fatally flawed, the Court's analysis was in part as follows:

> [m]oreover, and more important, eligibility is not the only relevant criterion in determining the reference pool in this case. We note the critical fact that application for admission to college is voluntary rather the obligatory. In addition, the choice of which institution to attend is voluntary, and is dependent upon many variables and other than race-based considerations. Further, economic concerns and other factors, offered by Podberesky below, may induce many otherwise-eligible African-American high school students not to enter college in numbers which are proportionately higher than those of their non African-American peers.
>
> In short, the district court failed to account for statistics regarding that percentage of otherwise eligible African-American high school graduates who either (1) chose not to go to any college; (2) chose to apply only to out-of-state colleges; (3) chose to postpone application to a four year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions. What if, for example, in some year only 2/3 of those academically eligible African-American Maryland high school graduates applied to any college while 90% of eligible non-African-American Maryland high school graduates did? What then would be relevance of measuring the percentage of those eligible against the percentage of African-Americans in the [University of Maryland College Park] student body?

38 F.3d at 159.

The Supreme Court of Louisiana also recently addressed the validity of a minority set-aside program in Louisiana Associated General Contractors, Inc. v. State of Louisiana, 669 So.2d 1185 (1996). There, the Louisiana Minority and Women's Business Enterprise Act "requires that a certain percentage of funds, expected to be expended on public works and procurement contracts be designated solely for participation by 'certified' minority business enterprises and women's business enterprises." 669 So.2d at 1185. Although the percentage each year is set by the Executive Director of the Division of Minority and Women's Business Enterprises, such percentage "cannot exceed 10% for minority business enterprises and 2% for women's business enterprises." Id. The program was made

mandatory on each state agency and applied to all contracts for the procurement of goods and services by state agencies. The requirements of the program were met by the setting aside of certain contracts solely for bidding by certified business enterprises. Further, certain contracts were awarded to minority-owned businesses "'when the price bid by such businesses is within five percent of the otherwise lowest responsive and responsible bidder'" and where "the minority business enterprise agrees to adjust its bid to that of the lowest bidder, as long as the minority business enterprise's original bid was within 5% of that bid." Id. at 1188. The Court thus summarized the program with the following description:

> [i]n sum, the Act mandates that state agencies employ a system of set-asides and preferences with regard to procurement and public works contracts from which only certified minority business enterprises and women's business enterprises benefit ... .
>
> Therefore, while certified minority businesses are able to bid on approximately 100% of the public works and procurement contracts let by the State, non-minority businesses are only able to bid equally on approximately 90% of such contracts put out to bid by state agencies.

Id.

The Louisiana set-aside program was challenged under the Equal Protection Clause of the Louisiana Constitution, which the Court concluded "was intended to give the citizens of this State greater equal protection rights than are provided under the Fourteenth Amendment." Id. at 1196. Nevertheless, the Court held that under either the state or federal Equal Protection Clauses such provisions "apply regardless of the race of the party burdened by or benefited under the law." Id. at 1198. The Court further found that the State did not have "a constitutional duty under the Fourteenth Amendment to engage in race-preference programs to cure the effects or past discrimination ... ."

> Our review of the jurisprudence convinces us the United States Supreme Court has never interpreted the Fourteenth Amendment to require discrimination on the basis of race for any reason whatsoever. If the Supreme Court had intended the Fourteenth Amendment to be so interpreted and applied, it had several opportunities to do so in the various affirmative actions and set-aside cases it has dealt with in the past. In

> fact, instead of concluding states have a duty to employ reverse discrimination to remedy past discrimination, the Court imposed the highest level of scrutiny in such cases, holding that not only are such programs not mandated but that they will not be tolerated unless they survive the rigorous strict scrutiny analysis.

Id. at 1198-1199.

In addition, the Court rejected defendant's argument that unless the Court were to allow for racial classification in the imposition of quotas or set-aside programs, it would "require the state to withdraw from federal programs which may condition the state's receipt of federal funds on, among other things, the state's use of minority preferences and set-asides in the use of funds." To this, the Court responded:

> [t]he absolute and mandatory language used in prohibition against laws which discriminate on basis of race found in Louisiana Constitution does not change simply because the state may stand to lose federal funds if it has to withdraw from participating in voluntary federal programs wherein the distribution of federal funds may be contingent on state's violation of its own constitution.

Id.

Thus, the Court found that the Louisiana set-aside program violated the Louisiana Constitution. Explaining its reasoning, the Court put it this way:

> [t]he Act on its face sets up a system whereby state agencies are mandated to meet "annual goals for participation by certified minority business enterprises." The goals are to be met under the Act mainly through the use of set-asides and also through preferences in the awarding of public works and procurement contracts. Generally speaking, with regard to the set-asides, when a contract is designated as a minority set-aside project, only certified minority business enterprises may bid. As explained earlier, only members of certain races can obtain a minority business enterprise designation. Therefore, the set-aside provisions under the Act discriminate against members of those races which cannot obtain a minori-

> ty business enterprise designation because they cannot bid on the set-aside project. The Act deprives certain citizens of the opportunity to compete for contracts which have been set aside solely on the basis of race, thereby creating an absolutely prohibited racial classification.

Id. at 1200. Furthermore, the Court believed the Louisiana "preference" system to be unconstitutional as well. Said the Court,

> [l]ikewise, certain provisions under the Act, most specifically La.R.S. 39:1962, create a system of preferences which generally operate such that although members of all races can bid on the project, a certified minority business will receive the contract if his bid is within five percent of the lowest responsive and responsible bidder provided he agrees to adjust his bid to the amount of the original lowest bid. Preferences such as this also discriminate against non-minority business enterprises. Although they are able to bid on the project, non-minority enterprises who have the second lowest bid are not given the opportunity to match the lowest bid and thereby obtain the contract, although the Act on its face gives this same benefit to minority-owned business enterprises. Therefore, with respect to preferences, the Act on its face treats business enterprises differently solely because of the race of its owners and officers.

Thus, the Act was invalid, and the Court concluded:

> [i]n sum, the Act provides to members of certain designated races and excludes from members of non-designated races the opportunity to bid on certain contracts and the opportunity to match the lowest bid made by a non-minority bidder and thereby obtain the contract on certain other projects. The set-asides and preferences under the Act clearly discriminate against a person on the basis of race, and the Act, to that extent, is unconstitutional under La. Const. Art. I, Sec. 3. Additionally, to the extent the Act requires the Division of Minority and Women's Business Enterprise to foster and implement the above unconstitutional minority based set-asides

> and preferences, those portions of the Act are also unconstitutional.

Id.

A wealth of other court decisions have struck down set-aside programs in the construction industry. Almost every one of them has concluded either that the statistical study upon which the particular set-aide plan was based did not meet the standards of Croson or that the program itself was not sufficiently narrowly tailored to comply with the mandates of that decision. See, Contractors Assn. of Eastern Pa. v. City of Phil., supra; Coral Const. Co. v. King Co., 941 F.2d 910 (9th Cir. 1991); Associated Genl. Contractors of Conn. v. City of New Haven, 791 F.Supp. 941 (D. Conn. 1992); F. Buddie Contracting Co v. City of Elyria, Ohio, 773 F.Supp. 1018 (N.D. Ohio E.D. 1991); Main Line Paving Co. v. Bd. Ed. Sch. Dist. Phil., 725 F.Supp. 1349 (E.D. Pa. 1989); Associated Genl. Contractors of Amer. v. City of Columbus, supra.

Other affirmative action cases are likewise in accord with Croson's mandate. In Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994), the Court found that a race-based affirmative action provision of a consent decree was not "narrowly tailored" to the compelling interests it was intended to serve. There, a consent decree had been negotiated in suits alleging discrimination against blacks and women in local government employment. The Eleventh Circuit Court of Appeals concluded that the long-term racial goals of the decree were "fundamentally flawed." Such goals were "designed to create parity between the racial composition of the labor pool and the race of the employees in each job position." Referencing Croson, the Court concluded that

> [b]y striving for racial parity rather than an end to racial discrimination, these decrees actually promote racial discrimination in contravention of the Constitution. Some might argue that an end to discrimination requires parity between the racial composition of the labor pool and the racial composition in each job position. The Supreme Court, however, has rejected that contention, because it "rests upon the completely unrealistic assumption that minorities will choose a particular profession in lockstep proportion to their representation in the local workforce." Croson, 488 U.S. at 507, 109 S.Ct. at 729 ... .

The Ensley Court, therefore, ordered that "[o]n remand, the district court must re-write the decrees to reflect that their true long-term purpose is to remedy past and present discrimination, not to achieve work-force parity."

And in Maryland Troopers, supra, the Fourth Circuit reversed the District Court's upholding of a consent decree under which the Maryland State Police agreed to hire and promote certain percentages of black troopers at each state trooper rank. The Court found that the statistical disparity between minority percentages in state police and minorities among state residents who were minimally qualified to be troopers did not warrant the remedies agreed to and approved in the consent decree. Reasoned the Court,

> [t]he recent history of the MSP [Maryland State Police] is a study in contrast. The district court here made no more than a conclusory finding that the MSP had racially discriminated in hiring or in promotions. Even in 1985, before the Coalition filed this lawsuit, blacks were represented in the above-corporal ranks of the MSP ... .
>
> In sum, the record in this case is devoid of anything approaching the "gross disparity" that must be present when statistics are offered as a predicate for race-conscious relief. A race-conscious remedy is simply too drastic a measure to rest upon the slender reed of appellees' statistical comparisons. The most the appellees have proven by their evidence is that the MSP was once vulnerable to parochial practices that undermined its effectiveness. One remedy for such parochialism is to widen the hiring net to all those persons, black and white, who previously locked an inside track to this form of public employment. Another is to retain an outside firm to develop a more honest and open promotional system, as the MSP did here. Such remedies are a far cry, however, from the adoption of numerical preferences based explicitly on race.

993 F.2d at 1078.

In Back v. Carter, et al., a white male challenged the validity of the statute relating to the composition of the Indiana Judicial Nominating Commission. Pursuant to Indiana law, in addition to the Chief Justice, the other eight members of the Commission consisted of four attorney members and four nonattorneys. Such statute, however, also imposed racial and gender quotas upon Commission membership. Specifically, at least one of the attorney members and one of the nonattorney members was required to be a minority. The statute also mandated that two of the attorney members be women and the two others be men. The same general restrictions applied to the nonattorney members.

The District Court found that the quota requirements contravened the Equal Protection Clause. With respect to the racial quota, the Court relied upon Croson. Noting that "[u]nder strict scrutiny, racial classifications have been held constitutional only when imposed strictly for remedial purposes ...[,]" and then only "when the government can show that the classification is a response to specific instances of prior discrimination ...[,]" the Court found that the Indiana quota did not pass constitutional muster. Said the Court,

> [a]lthough past history of generalized private and public discrimination may have contributed to lack of opportunity for minorities, this alone does not support race-based actions by the government. .... Remedying such general societal discrimination does not provide a compelling interest. ... The desire for diversity or to have more minorities is not an interest sufficient to justify government race-based actions ... . The historical imbalance between minority representation in a profession and the percentage of minorities in the community alone does not provide the government with a compelling interest ... .

933 F.Supp. at 755. The Court's criticism stemmed from the fact that defendants "did not introduce any direct evidence of racial discrimination." Instead, defendants relied upon the fact that no minority had ever been elected as the attorney member of the Commission. Also presented were the members of minorities in the community and the members of minority lawyers who had run for JNC membership.

This was irrelevant, however, concluded the Court. Indeed,

> [w]hile significant statistical disparity can lead to an inference of specific discrimination, ... the Court does not find that the number of minority attorneys compared to the lack of minority representation among JNC attorney members is significant enough to meet the standard of J.A. Croson ... .
>
> Evidence at the hearing showed that minority attorneys have never been prevented from registering for JNC elections or from otherwise running in the elections ... . It is clear that minority attorneys have not found any barriers against participating in the elections, since the percentage of minority candidates is greater than the percentage of minority lawyers .... Because Defendants have not shown that discrimination has

> occurred in the election of JNC attorney members, the Court does not find that the government had a compelling interest in establishing racial classification. ...
>
> Even assuming a compelling interest, the Court doubts that the amendment would meet the "narrowly tailored" requirement. In this case the legislation imposed a racial classification an attorney membership in the JNC without first attempting to create diversity through racially neutral means ... . The amendment included other racially neutral changes that might increase diversity in the Commission, such as increasing the number of the commissioners and changing the voting system for attorney members. Without time to observe the effect of these provisions, the Court cannot conclude that the only way to increase minority attorney representation in the Commission, even if assuming specific past discrimination, is through a racial classification.

933 F.Supp. at 756.

Hopwood v. State, supra, is also persuasive. There, the Fifth Circuit concluded that the University of Texas had demonstrated no compelling state interest for an affirmative action program at the University Law School designed to increase racial diversity. Relying upon the Podberesky case, discussed above, the Court held that the University program was unconstitutional. Concluded the Court,

> [i]n sum, for purposes of determining whether the law school's admission system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the alleged past discriminator. The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the legislator, does not change the fact that the relevant putative discriminator in this case is still the law school. In order for any of those entities to direct a racial preference program, it must be because of past wrongs at that school.

Id. at 951-952. The District Court found that there was no evidence of officially sanctioned discrimination at the University of Texas. Accordingly, the Fifth Circuit held that

> ... the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

Id. at 962.

Race-based quotas in other affirmative action plans have also fallen by the wayside as a result of Croson's strict scrutiny mandate. In Middleton v. City of Flint, Michigan, 92 F.3d 396 (6th Cir.1996), the Sixth Circuit Court of Appeals struck down a plan requiring that 50% of all police officers promoted to the rank of sergeant be members of specified minority groups. Likewise, in Brooks v. State Bd. of Elections, 848 F.Supp. 1548 (S.D. Ga. Brunswick Div. 1994), the District Court held that provisions of a proposed decree requiring the State to have a minimum number of black judges would violate the Equal Protection Clause of the Fourteenth Amendment. Calling the thirty judge requirement a "quota," the Court found that "these provisions are based on a purely speculative notion that given a world free from all prejudice, the percentage of black judges would approximate the percentage of blacks in the general population." 848 F.Supp. at 1575.

And in Knight v. State of Alabama, 787 F.Supp. 1030 (N.D. Ala. S.D. 1991), the Court invalidated a state statute requiring at least half of the Board of Trustees of Alabama State University to be members of the prevailing minority. There, it was argued that the statute was a remedy for past discrimination in the governance of higher education and it served to prevent a return of discrimination in the appointment of trustees. The Court rejected the argument that the State possessed a compelling interest. Unless a racial preference was a remedy for past discrimination -- which this was not, concluded the Court -- it was "clearly offensive to the Equal Protection Clause." Quoting Baake, the Court said that "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special ward entitled to a degree of protection greater than that accorded others." Id. at 1376.

Finally, this same constitutional analysis has been applied in the public school context as well. In Smiley v. Blevins, 514 F.Supp. 1248 (S.D. Tex., Galveston Div. 1981), the Court stated that "... a district court, in considering appropriate desegregation measures should view the school system as a whole, not focusing on the racial balance of individual schools, and may not require that any fixed ratio of student population be

achieved." Id. at 1255. Moreover, in Stanley v. Darlington Co. Sch. Dist., 915 F.Supp. 764 (D.S.C. 1996), Judge Currie imposed a 50/50 plan, but made clear that such plan was "as a remedial measure to correct the long documented resistance to desegregation in the Darlington School District." Id. at 774.

And in United States v. State of La., 718 F.Supp. 525 (E.D.La. 1989), the United States objected to the Court's imposed admission exceptions in Louisiana schools of higher education which generally required each school to admit minority students in numbers of at least 10% on the basis that such quotas violated Croson. The Court, in rejecting the argument, found that "this Court has made a specific judicial finding of prior desegregation in Louisiana's public higher education system." 718 F.Supp. at 529. Moreover, the Court also concluded that its decree was "not an overreaching remedy such as was found to be impermissible in Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) ... ." Further, the Court observed that

> ... the admissions procedure [is not as] inflexible as the United States perceives it to be. Cf. Pasadena City Board of Educ. v. Spangler, 427 U.S. 424, 434, 96 S.Ct. 2697, 2703-04, 49 L.Ed.2d 599 (1976). It was not the Court's intent that the figure of ten percent be deemed immutable or unchangeable in the inevitable change of circumstances. ... The Court has not attempted to require that the schools have a particular racial balance; such would ignore the wealth of non-race related factors that may legitimately affect make-up at different schools and organizations. Cf. Bazemore v. Friday, 478 U.S.385, 106 S.Ct.3000, 92 L.Ed.2d 315 (1986); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S.1, 24, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971). Instead, the provision is merely a useful starting point in the process of shaping a remedy. See id. at 25, 91 S.Ct. at 1280.

718 F.Supp. at 530.

Equal Open Enrollment Assn. v. Bd. of Ed. of Akron School Dist., 937 F.Supp. 700 (N.D. Ohio Eastern Div. 1996) is also compelling in this context. There, the District Court issued a preliminary injunction restraining a school board policy prohibiting white students from transferring out of the Akron Public Schools to an adjacent school district. Such policy prohibited white Akron Schools students from taking advantage of Ohio's Open Enrollment Law. Applying the Croson strict scrutiny analysis, the Court rejected as a compelling interest the Akron Board's purpose in its policy -- the prevention of de

jure segregation in its schools. In order to avoid such interdistrict racial segregation, the Board "took advantage of the 'racial balance' exception provided in the Ohio Open Enrollment statute by adopting a policy of objecting to the transfer out of any white student." However, in the Court's view, "the board's compelling interest can only be seen as a preventative measure directed to an anticipated problem, rather than as a remedial measure to right an already recognized discriminatory practice or condition." 937 F.Supp. at 705. Since there was no strong basis in evidence for the Board's conclusion that the evil of segregation was present, the Court found there was no constitutional need for such a policy.

Moreover, even if past discrimination could be proven, the Board's policy was not "narrowly tailored" as Croson required. Such policy was the "most drastic available" and "denies white children the opportunity to go to the school of their choice" and "more importantly, through its policy the school board tells those whom it is charged to advocate that they are less entitled to the benefit of the law solely by the color of their skin." 937 F.Supp. at 707-708.

CONCLUSION

Based upon the foregoing wealth of authorities, it is my opinion that Section 59-40-50(B)(6) is unconstitutional under Croson. Clearly, there has been no demonstration of, or even a specific allegation of, any past discrimination with respect to the charter school program. Nor could there be. In view of the fact that charter schools are just now beginning to be organized in this State, there is little or no history at all. This law is thus written on a clean slate. See, Knight, supra at 1376 ["the State of Alabama can have no compelling interest in remedying discrimination which did not occur."]. And even if there had been past discrimination in the particular school district where a charter school is organized, such is irrelevant for the purpose of any constitutional need for mandating a rigid quota in the charter school law. Hopwood and other cases teach that there must have been a documentation of past discrimination by the particular entity or agency where the quota is being applied. See also, Croson, supra; Knight, supra. Again, by definition, no discrimination in admission could have occurred in a program just barely off the ground.

Moreover, even assuming for the sake of argument, a documented history of past discrimination, the General Assembly has presented no need for the kind of unforgiving quota present in this statute. Such a quota clearly is not "narrowly tailored" as is required by Croson. There may be any number of non-race-related reasons why persons would decide not to seek application at a charter school. In the words of the Court in Brooks,

it is "purely a speculative notion" that persons would desire to attend the charter school in the same numbers and the same proportions as other schools in the District.

To impose right off the bat a rigid racial quota upon the charter school program is legally suspect. Without waiting to see whether any discrimination even occurs or without any effort to rely on existing individual remedies or other race-neutral measures, the Legislature has required that every charter school possess the same racial balance as is present in the school district. Such amounts to nothing more than a legislative edict to achieve a particular racial composition. Thus, an educational program quickened by creativity and flexibility is then paralyzed by the rigor mortis of racial quotas. A statute which professes to be on the cutting edge of educational progress, at the same time, adheres to the repudiated idea of admitting students by their race. The courts have ruled that such racial set-asides are presumptively illegal and constitutionally infirm. See, Op. Atty. Gen., March 27, 1997. Accordingly, since the quota in question has in no sense been adopted in a "remedial setting" or as a remedy for demonstrated past discrimination, it is, in my opinion, violative of the Equal Protection Clause. Cf. Missouri v. Jenkins, 115 S.Ct. 2038 (1995).

With respect to your question as to whether such provision is severable from the remainder of the statute, it is my opinion that it is. Justice Moore recognized recently in Thomas v. Cooper River Park, 471 S.E.2d 170 (1996) that "[t]he test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." This test has been applied in a number of other cases, including Joint Leg. Comm. for Judicial Screening v. Huff, 464 S.E.2d 324 (1995); Tucker v. S.C. Dept. of Highways and Public Transp., 309 S.C. 395, 424 S.E.2d 468 (1992); and Shumpert v. S.C. Dept. of Highways and Public Transp., 306 S.C. 64, 409 S.E.2d 771 (1991). The question of severability is an issue of state law. S.C. Tax Comm. v. United Oil Marketers, 306 S.C. 384, 412 S.E.2d 402 (1991). The issue is one of "whether the intention of the Legislature can be fulfilled absent the offending provision." Id.

Here, the legislative findings of the Charter Schools Act are instructive. The General Assembly mandated that the "provisions of his chapter should be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education." Plainly, the Legislature wished the Act to stand even if a particular provision might be unconstitutional. Courts tend to strike the quota provisions in such situations and allow the remainder of the Act to stand. Back, supra. In my judgment, therefore, the unconstitutional provision is severable form the rest of the Act.

Set-aide programs usually classify people by their race just as did the old racial stereotypes did in a bygone era. That is why such quotas are inherently suspect. Thus, it is my opinion that Section 59-40-50(B)(6) would be declared unconstitutional by the courts, but that this provision would be severable from the rest of the Act.[1]

Sincerely,

Charlie

Charles Molony Condon
Attorney General

CMC/ph

---

[1] Of course, only a court can declare any Act or portion thereof to be unconstitutional. This opinion is thus an effort to predict how a court would rule if faced with the question of the constitutionality of Section 49-40-50(B)(6). Moreover, the issue of severability is not free from doubt and again, only a court can determine this issue with finality.

You have also asked for an interpretation of the Act as applied to a particular "entity seeking a charter school ..." Of course, the issue of whether any entity complies with the Act's requirements depends in large part upon the particular facts involved. This Office cannot make factual determinations. Op. Atty. Gen., December 12, 1983. Issues such as the adequacy of a particular financial plan of an entity, its proposed budgets, its meeting of safety and building codes, etc. would be primarily factual in nature and would have to be applied on a case-by-case basis, depending upon the entire factual record in a given case.