ALAN WILSON
ATTORNEY GENERAL

September 18, 2023

The Honorable Marvin R. Pendarvis, Member
South Carolina House of Representatives
328-A Blatt Building
Columbia, SC 29201

Dear Representative Pendarvis:

You seek an opinion with respect to "the legality of the Small, Disadvantaged, Minority Business program currently implemented by the City of North Charleston." By way of background, you state the following:

> [i]n light of the recent decision by the U.S. Supreme Court to end race-conscious college admissions, it has become crucial for us to assess the implications of this ruling on other race-based programs. One such program is North Charleston's Small, Disadvantaged, Minority Business Program, which aims to encourage more contracts between the city and local businesses making under $500,000 annually. The program accepts any small business below the threshold, regardless of whether it is minority-owned, although its initial intent was to increase diversity in the procurement process.
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> The subsequent letter signed by you and 12 other state attorneys general, reminding employers that race cannot be a factor in hiring employees or contractors, adds further weight to this matter. We believe that it is essential to clarify whether North Charleston's business program aligns with the principles outlined in your letter and remains in compliance with state and federal laws.
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> In light of the aforementioned considerations, I respectfully request an official opinion from your office on the following matters:
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> 1. Whether the Small, Disadvantaged, Minority Business Program as currently implemented by the city of North Charleston is lawful in accordance with the recent Supreme Court decision to end race-conscious admissions.
> 2. Whether the program's use of the term "minority" in its name raises any legal concerns or implications, particularly in relation to the principles outlined in the aforementioned letter.

3. Whether any specific modifications or adjustments are necessary for the program to comply with state and federal laws while still achieving its intended goal of encouraging local business contracts with the city.

Law/Analysis

To summarize, we believe that, based upon the limited information presented, the minority business program is fraught with risk. While only a court may determine the program's constitutionality, North Charleston's disadvantaged business program is likely to be challenged on Equal Protection grounds. While arguments can be made in support, North Charleston would face an uphill battle in court in upholding the program.

We begin by noting that this Office is unable in an advisory opinion to determine facts. As we have stated many times over, "[o]f course, this Office cannot resolve factual questions in an opinion. . . ." Op. S.C. Att'y Gen., 2005 WL 774149, (March 10, 2005). And, in Op. S.C. Att'y Gen., 1989 WL 406130 (April 3, 1989), we recognized that "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions."

Further, we have noted that the constitutionality of a particular minority business program necessarily involves a fact-intensive analysis. In Op. S.C. Att'y Gen., 1989 WL 508560 (June 15, 1989), we stated:

> [a] recent decision by the United States Supreme Court clearly illustrates the importance of fact-finding in the context of whether a particular set-aside program is in conflict with the Court's guidelines set forth in Croson [Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)]. In H.K. Porter Co., Inc. v. Metropolitan Dade County, 103 L.Ed.2d 804 (1989), the Court granted a petition for certiorari, vacated the judgment and remanded for further consideration by the District Court in light of Croson. In short, the Court felt it necessary to send the case back to the trial court because factual determinations were essential to determine whether the set aside in question violated the Constitution. This case emphasizes the overriding importance of fact-finding in this area.

Therefore, based upon the foregoing – requiring a determination of facts – we are unable to fully resolve your question regarding the constitutionality of North Charleston's Small, Disadvantaged, Minority Business Program. Only a court may do that. However, we can provide you with the applicable law in this area, referencing our prior opinions, as well as pertinent case law. And, we may emphasize – and do herein – that only in rare circumstances is a minority business program, which aims to increase minority participation, upheld under current Supreme Court decisions. While the North Charleston program appears to be racially neutral on its face, a court could, depending upon the facts, deem it racially discriminatory in fact, as discussed below. If the program is based upon race-consciousness, the City would be required to present specific, strong evidence to justify it. Moreover, the program would have to be

"narrowly tailored" to meet a compelling interest. See H.B. Rowe, Inc. v. J.A. Tippett, 615 F.3d 233, 241 (4th Cir. 2010).

We have issued several previous opinions regarding the applicable law related to minority business programs, all centered upon the J.A. Croson decision, rendered in 1989. One in particular, Op. S.C. Att'y Gen., 1989 WL 406118 (March 9, 1989), discussed the Croson case at considerable length. There, it was stated:

> [i]n City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989), decided on January 23, 1989, the United States Supreme Court "confront[ed] once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." Id. at ___ 109 S.Ct. at 712. In J.A. Croson Co., the Court struck down an ordinance requiring city construction contractors to set aside thirty (30%) percent of the subcontracts for minority business enterprises because insufficient evidence was offered in support of past racial discrimination in the city's construction industry to justify the ordinance as a race-based remedy. Id. Relying upon Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986),[ ] the Chief Justice and Justices O'Connor, White, Kennedy, and Scalia agreed that a strict scrutiny test under the equal protection clause of the fourteenth amendment must be applied to governmental programs that impose racial classifications for remedial purposes. J.A. Croson Co., supra at ___, 109 S.Ct. at 721 & 735-9 (majority opinion written by Justice O'Connor and concurring opinion of Justice Scalia). The majority held, in J.A. Croson Co., that Richmond failed to establish evidence of past discrimination in the local construction industry sufficient to meet this strict scrutiny test. Id. at ___, 109 S.Ct. at 723-4. Analyzing a recitation that the ordinance had a remedial purpose, the majority determined that such a recitation is entitled to little or no weight and stated: "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." Id. at ___, 109 S.Ct. at 724. The majority in J.A. Croson Co., supra at ___, 109 S.Ct. at 724-7, also concluded that neither a generalized, conclusional assertion that there was racial discrimination in the construction industry in the area, the state, and the nation, nor a finding by Congress in connection with the set-aside approved in Fullilove v. Klutznick, 448 U.S. 448 (1980), that there had been nationwide discrimination in the construction industry was deemed sufficient to establish a need for imposing a race-based remedy in Richmond, Virginia. The majority determined that Richmond's reliance on the fact that only 0.67 percent of city contracts were awarded to minorities in a city with a fifty (50%) percent minority population was misplaced. "Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures." J.A. Croson Co., supra at ___, 109 S.Ct. at 725. In addition, the majority found that the Richmond Plan was not narrowly tailored to withstand strict scrutiny, at least in part because Richmond apparently did not consider the use of race-neutral means to increase minority business participation in city contracting. Id. at ___, 109 S.Ct. at 728-9.

In summary, the majority in Croson stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority 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. [Citations omitted.] 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. [Citation omitted.] In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.
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> Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. [Citation omitted.] Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. [Citation omitted.].
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> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. . . .

(quoting Croson at 488 U.S. 509-10). Thus, in order to justify a race-conscious remedy, there must be powerful evidence that it is necessary to address a specific instance or pattern of discrimination.

Other relevant opinions of this Office rely heavily upon Croson as well. See Op. S.C. Att'y Gen., 1997 WL 208039 (March 27, 1997) ["The courts subject this form of invidious reverse discrimination to the strictest scrutiny and the closest review." (citing Croson and Adarand Constructors, Inc. v. Pena, 155 S.Ct. 2097 (1995), as well as other authorities); Op. S.C. Att'y Gen., 1997 WL 323797 (May 29, 1997) (referencing Croson); Op. S.C. Att'y Gen., 1997 WL 255953 (April 7, 1997) ("[n]umerous courts have followed Croson and Adarand striking down all kinds of affirmative action 'set aside' programs" (citing numerous authorities).]. In

other words, Croson and Adarand have long been the law with respect to the general ban on affirmative action in minority business programs.

In Adarand, the Supreme Court held that all racial classifications must be analyzed by the reviewing court under the standard of strict scrutiny. Citing Croson, the Court "finally agreed that the Fourteenth Amendment requires strict scrutiny on all race-based action by state and local governments." 515 U.S. at 222. As the Court made clear, there is no lower standard for so-called "benign" forms of racial discrimination. Thus, any racial classification – whether invidious or benign – is "constitutional only if . . . [there are] narrowly tailored measures that further compelling governmental interests." Id. at 227.

It was argued to the Supreme Court in Adarand, that the program in question was "'based on disadvantage, not on race,' and thus should be subject to a lesser standard. The Court rejected that argument, agreeing that while "the statutes and regulations involved in this case are race neutral," the program allowed for a "race-based rebuttable presumption in the certification determinations. . . ." Moreover, the Court acknowledged that certain laws "although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." 515 U.S. at 212-13 (citing cases). Thus, all racial classifications must be subject to strict scrutiny. Id. at 226. See also Sherbrooke Turf, Inc. v. Minn. Dep't. of Transp., 345 F.3d 964, 969 (8th Cir. 2003) ["Though the DBE program confers benefits on 'socially and economically disadvantaged individuals,' a term that is facially race-neutral, the government concedes that the program is subject to strict judicial scrutiny."]. Here, it appears that while the terms of the North Charleston program appear to be race-neutral [income of less than $500,000 annually], the aim of the program and those who created it is one of race-consciousness.

Likewise, Croson and Adarand have been relied upon in Fourth Circuit decisions. In H.B. Rowe, Inc. v. Tippett, supra, for example, the Fourth Circuit recognized that because racial classifications 'are simply too pernicious to permit," courts "subject all racial preferences – even those intended to benefit minority groups – to strict judicial scrutiny." According to the Court, "to justify a race-conscious measure, a state must 'identify that discrimination, public or private, with some specificity,' and must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary. . . .'" Id.

In Tippett, the Fourth Circuit upheld the North Carolina Small Business Enterprise Program which "favors small business for highway construction procurement contracts of $500,000 or less." A suit was brought by the low bidder – a white male – who challenged the award in favor of a slightly higher bid. The state denied the lowest bidder the contract because of his failure to "demonstrate good faith efforts to attain the pre-designed levels of participation on the project." 615 F.3d at 237-39. The case involved "extensive discovery and a four-day bench trial at which numerous witnesses testified and over one thousand pages of exhibits were admitted into evidence. . . ." Id. at 240.

According to the Fourth Circuit, this extensive record proved that "the State has met its burden of producing a 'strong basis in evidence' for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American (but not Asian American or Hispanic American) subcontractors. Particularly compelling is the State's evidence that prime contractors grossly underutilized African American and Native American subcontractors during the study period and that these subcontractors are disadvantaged by a racially exclusive 'old boys network.'" 615 F.3d at 251. Thus, the State of North Carolina had to produce strong evidence to uphold the program.

Further, the Tippett Court held that the program was "narrowly tailored" because it had a specific expiration date and required a new disparity study every five years. The "sunset" provision was particularly persuasive in the Court's mind. Such ensured that the Program was "carefully designed to endure [ ] only until the discriminatory impact has been eliminated." Id. at 253 (internal quotations omitted). Accordingly, in the view of the Fourth Circuit, "... the statutory scheme is narrowly to achieve the State's compelling interest in remedying discrimination in public sector contractors against African American and Native American subcontractors." Id. at 254. The Tippett case is particularly significant to your question in our view.

Further, in Associated Utility Contractors of Md., Inc. v. Mayor and City Council of Baltimore, 83 F.Supp.2d 613 (D. Md. 2000), an affirmative action plan which mandated across-the-board subcontractor set asides of 20% and 3% covering minority business enterprises and women's business enterprises, was struck down as violative of the Equal Protection Clause. There, the Court explained in part its ruling as follows:

> [A] state entity must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination. . . . I am compelled [, therefore] to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE (minority business enterprise] participation in city construction subcontracts. For analogous reasons, the three percent WBE women's business enterprise] preference must also be justified by preenactment evidence.

83 F.Supp.2d at 621. The District Court, referencing Croson and Adarand, explained as follows:

> [t]he Fourth Circuit has interpreted Croson to impose a "two step analysis for evaluating a race-conscious remedy." [Maryland Troopers Ass'n. v. Evans, 993 F.2d 1072, 1076]. . . . First, the [government] must have a 'strong basis of evidence for its conclusion that remedial action [is] necessary. . . .' 'Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" (citing Croson).

> The second step in the Croson analysis is to determine whether the government has adopted programs that 'narrowly tailor' any preferences based on race to meet their remedial goal." Id. The Fourth Circuit summarized Supreme Court jurisprudence on "narrow tailoring" as follows:
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> > The preferences may remain in effect only so long as necessary to remedy the discrimination of which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applicants are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620 (quoting Md. Troopers, 993 F.2d at 1076-77.

We turn now to the most recent affirmative action decision by the United States Supreme Court. That decision, Students For Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S.Ct. 2141 (2023), dealt with admissions criteria for institutions of higher education. In both cases involved in Students, a nonprofit organization brought an action for declaratory and injunctive relief, alleging that admissions policies violated the Equal Protection Clause by virtue of a race-based admissions program. In summary, the Supreme Court's ruling, in striking down the affirmative action programs, read as follows:

> [e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality" – it is "universal in [its] application. Yick Wo [v. Hopkins], 118 U.S. at 369, 6 S.Ct. 1064. For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). If both are not accorded the same protection, then it is not equal." Id. at 290, 98 S.Ct. 2733.
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> Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored" – meaning "necessary" – to achieve that interest. Fisher v. University of Tex. At Austin, 570 U.S. 297, 311-312, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (Fisher I) (internal quotation marks omitted).
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> Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the

> Constitution or a statute. See, e.g. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); Shaw v. Hunt, 517 U.S. 899, 909-910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); post, at 2186-2187, 2192-2193 (opinion of Thomas, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See Johnson v. California, 543 U.S. 499, 512-513, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). . . .
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> Our acceptance of race-based action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are funded upon the doctrine of equality." Rice v. Cayetano, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (quoting Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). That principle cannot be overridden except in the most extraordinary case.

143 S.Ct. at 2161-2163.

In Students For Fair Admissions, the Supreme Court cited with approval the Croson decision. Quoting from Croson, the Court emphasized that

> [b]y promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure [ ] that race will always be relevant . . . and that the ultimate goal of eliminating race as a criterion "will never be achieved." Croson, 488 U.S. at 495, 109 S.Ct. 706 (internal quotation marks omitted).

143 S.Ct. at 2172. Moreover, in his concurring opinion in Students For Fair Admissions, Justice Thomas referenced Croson, stating that "[e]ven today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See Croson, 488 U.S. at 526, 109 S.Ct. 706 (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race." (emphasis in original)) see also ante at 2175-2176." 143 S.Ct., at 2186-87 (Thomas J., concurring).

Thus, the Supreme Court has made it clear for a number of years that there is now a very narrow window for upholding an affirmative action or race-conscious program. The Court has recognized that "[n]othing prevents an admissions preference to identified victims of discrimination." (emphasis added). Absent such a showing that the racial preference is designed to address "identified instances of past discrimination that violated the Constitution or statute," such racial discrimination is unconstitutional. As Croson emphasized, a "generalized assertion that there has been past discrimination in an entire industry" is not good enough. Such an assertion provides little or no "guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." 488 U.S. at 498. An example of the intensive factual showing required in order to uphold a program is demonstrated by the Fourth Circuit's decision in Tippett. In Tippett, the relevant statute defined disadvantaged minority-owned businesses "as only those racial or ethnicity classifications" subjected to "discrimination in the relevant

marketplace and that have been adversely affected in their ability to obtain contracts with the Department." 615 F.3d at 239. Even so, an extensive factual justification for the program was required.

Furthermore, as noted above, this Office cannot adjudicate the facts with respect to the North Charleston "Small, Disadvantaged, Minority Business Program." However, as your letter indicates, the program in question tellingly employs the term "minority," which raises concerns that the North Charleston program is a race-conscious program. While we obviously cannot conclude that such is the case from use of this term only, it does imply that the program is one primarily of race-consciousness. Moreover, as was reported in a recent article in the Charleston Post and Courier, while

> [t]he program accepts any small business making below the threshold [$500,00 annually] regardless of it is minority owned, . . . the program's intent was to increase diversity in the procurement process, said Councilman Ron Brinson, who chairs the finance committee. . . .

(emphasis added). The attorney for the City of North Charleston is quoted in that same article as saying that "'I suspected at the time of the (Supreme Court) issue that it was not going to be long until somebody connected the dots from this college admissions realm over to this contracting realm,' said Derk Van Raalte, an attorney with the City of North Charleston who brought up the topic at the July 20 finance committee meeting." "North Charleston Mulls over status of minority small-business program," Charleston Post and Courier, July 26, 2023.

Mr. Van Raalte is exactly correct. As noted, the same principles set forth in the Students For Fair Admissions decision are equally applicable to a "minority business" program, governed by Croson and Adarand. As the Supreme Court emphasized in the Students for Fair Admissions case, "'[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . That principle cannot be overridden except in the most extraordinary case." 143 S.Ct. at 2162-63. Croson and Adarand made precisely the same point decades ago.

Thus, based upon these authorities, North Charleston should have serious constitutional concerns regarding its "minority business" program. While it is conceivable that a court would uphold its constitutionality, the North Charleston program currently is at considerable constitutional risk. Particularly important to the validity of the North Charleston program is whether that program operates on the basis of "race consciousness." As emphasized above, "all race-conscious measures receive strict scrutiny under the Equal Protection Clause." Dean v. City of Shreveport, 438 F.3d 448, 454 (5th Cir. 2006). Courts have held that even if the measure does not expressly classify individuals based upon their race, it violates Equal Protection if facially neutral laws or policies are applied in an intentionally discriminatory manner or if "facially neutral laws or policies 'result in racially disproportionate impact and are motivated by a racially discriminatory purpose.'" Rothe Devel. Inc. v. U.S. Dept. of Defense, 836 F.3d 57, 63 (D.C. Cir. 2016) (citing Adarand, 515 U.S. at 213, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S.

252 (1976) and Washington v. Davis, 426 U.S. 229 (1976)). At first blush, it appears that the program is race-conscious even though it has a facially neutral appearance. A court will have to assess the facts to determine if the North Charleston program is truly race-conscious or was designed instead to increase racial representation.

Conclusion

As the Supreme Court recently emphasized in Students For Fair Admissions, "'racial discrimination is invidious in all contexts.'" Race-conscious affirmative action programs are inherently suspect and almost universally unconstitutional. The Court will permit race-based admissions only in the rarest of circumstances, within the confines of narrow restrictions – such as to remedy to identified victims of discrimination. Moreover, the Supreme Court emphasized in Croson, that "a generalized assertion . . . that there has been past discrimination in an entire industry" is insufficient. Such a generalized, conclusory determination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Croson, 488 U.S. at 498.

In short, the very same principles apply to "minority small business programs" as apply to admissions to higher education institutions. The Court in Students For Fair Admissions cited the Croson case with approval. As we have emphasized in previous opinions, "nothing in the Constitution prohibits the assistance of small businesses to grow, develop and thrive on a race-and-gender-neutral basis. . . ." But what is required, except in the rarest of cases, is that the government's action be colorblind.

As stated, this Office is not a court and thus cannot adjudicate the facts or the legality of the North Charleson program. However, the use of the term "minority business program" is concerning, to say the least. Such would suggest outwardly that the program is race-conscious. Moreover, when the North Charleston program was unveiled, it was described as a program "aimed at supporting small business run by minorities." See "North Charleston unveils program aimed at lifting up minority-run small business." Charleston Post and Courier, July 25, 2023. The City's website states that certification for the program ensures that "[m]andatory quotes will be solicited from SDMB [Small, Disadvantaged and Mandatory business] vendors on procurements between $1,500 and $50,000." What is unclear from this is what degree of preference, if any, is given these vendors. However, Councilman Brinson has stated publicly that the program's intent is to increase diversity in the procurement process. Thus, the program may be race-conscious in effect or may have been motivated by the benign purpose to increase minority representation.

We recognize that admission to the program is based upon the fact that the "disadvantaged small business" is earning no more than $500,000 annually – a race-neutral criteria on its face. However, the Supreme Court has often emphasized that a practice "fair in form [may be] discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Moreover, a court would undoubtedly seek to determine whether this threshold is, in

fact, racially neutral or "bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976); Adarand, 515 U.S. at 212-13. If the program is indeed neutral "and not one that operates on the basis of race, in accord with the letter and spirit of our Constitution," Croson, 486 U.S. at 527-28 (Scalia, J. concurring), it may be upheld. However a court will subject the program to the most exacting of scrutiny. Generally speaking, use of such scrutiny does not typically prevail in court. The Tippett decision in the Fourth Circuit is a notable exception. There, however, the Fourth Circuit emphasized that North Carolina's Minority Business Program which favored contracts below a certain amount (as North Charleson's program apparently does) was "narrowly tailored" in that a specific statutory expiration date for the program was set and a new disparity study required every 5 years. North Charleston would do well to study this decision because it is rare that a court has upheld such a program.

Again, only a court, rather than this Office, may determine the constitutionality of North Charleston's program under the Croson, Adarand and Tippett cases. We may only provide the applicable law. In short, the program would be subject to strict scrutiny by a court and it must be narrowly tailored. Based upon our limited information, it would appear that the program was intended to be a race-conscious program. The fact that it is so labelled is surely indicative of such race-consciousness. If so, it will be upheld only in the rarest of circumstances. See Tippett. We thus urge North Charleston to closely examine these decisions, referenced herein, and recognize that the Minority Business Program at present is constitutionally at risk. As Judge Niemeyer observed in his concurring opinion in the 4th Circuit decision in Tippett, '[w]hen we decide cases involving race-conscious and gender conscious government programs, we must remain especially vigilant in recalling that such programs are presumptively unconstitutional, in violation of the Equal Protection Clause." Tippett, 615 F.3d at 258 (Niemeyer, J., concurring). His words provide a good guidepost for the City of North Charleston. Again without a strong showing of justification, the North Charleston program is constitutionally at risk.

Sincerely,

Robert D. Cook
Solicitor General