UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

July 21, 2009

Senator Ray Miller
Senate Building
Room #228, Second Floor
Columbus, Ohio 43215

Via Email and
U.S. Mail

Distribution: Senate Committee on Finance and Financial Institutions

Re: S. B. No. 146: "To amend section 3358.10 and to enact sections 3354.161, 3355.121, and 3357.161 of the Revised Code to require community colleges, state community colleges, technical colleges, and university branches to comply with minority business enterprise set aside requirements."

Dear Senator Miller:

Thank you for the opportunity for the undersigned Commissioners to present our views on the issue of whether the State of Ohio should direct community colleges, state community colleges, technical colleges, and university branches to comply with minority business enterprise set-aside requirements.[1] By definition, S.B. 146 would require the listed educational institutions to give consideration to the race, ethnicity, and sex of business owners in the award of contracts. (Hereinafter, the terms "racial" or "race" are used as shorthand to refer collectively to "racial, gender, and/or ethnic groups".)

At a minimum, the racial preference requirements contained in S.B. 146 raise serious constitutional issues. Using such classifications and preferences will invite costly litigation challenging the constitutionality of the program, litigation the state will almost certainly lose as it did in 2000 in *Associated General Contractors of Ohio v. Drabik.*[2] In *Drabik,* the 6th U.S. Circuit Court upheld the ruling of the District Court for the Southern District of Ohio, which struck down an Ohio race-based contracting set-aside program. The circuit court affirmed the district court's ruling that awarding public construction contracts which gave preferences to bidders owned by racial or ethnic minorities violated the Equal Protection Clause of the Constitution.

Furthermore, in 1998 a federal judge ruled that Ohio's Cuyahoga Community College trustees were *personally* liable for damages resulting from their 1996 decision to impose an unconstitutional racial set-aside policy on contractors. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District,* No. 196CV2136 (N.Dist.OH, 10/21/98).

[1] The decision to send this letter was voted upon by a majority of the Commissioners on July 10, 2009 and whose names appear as signatories. Commissioners who voted against sending this letter were Arlan Melendez and Michael Yaki.
[2] 214 F.3d 730 (6th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001).

Ohio's own Legislative Service Commission has wisely advised the Ohio legislature that various proposed bills incorporating racially preferential goals, quotas, or targets would be legally problematic.

For example, in 2005 the Ohio Legislative Service Commission conducted an analysis of then-pending Senate Bill 289 which would have required that 10% of certain state financial transactions be performed by minority-owned firms. In its report, the Legislative Service Commission cited *Drabik* in expressing its concern about the constitutionality of such a set-aside:

> The reservation of 10% of equity trades for minority agents may be unconstitutional in the absence of proof of discrimination and a showing that the reservation is a narrowly tailored remedial action necessary to remedy past discrimination. See *Associated General Contractors of Ohio, Inc. v. Drabik* (6th Cir., 2000), 214 F.3d 730, *cert. denied*, (2001), 531 U.S. 1148).[3]

As an additional example, in 2004 the Ohio Legislative Service Commission also cited *Drabik* in explaining why a racial set-aside provision had been removed from then-pending House Bill 568:

> The bill also removes the provision that states that a minority business enterprise must first apply to the coordinator of administrative services for certification before bidding on a public improvement contract. That provision required the Director of Administrative Services to set aside a number of contracts with an aggregate value of 5% of the total estimated value of contracts to be awarded in the current fiscal year to be bid upon by minority business enterprises. The bill subjects minority business enterprises to the same bidding procedures as other contractors and has no fiscal impact, as it appears to conform the law to current public improvement and bidding procedures. In November of 1998, in [sic] the set aside provisions were deemed unconstitutional in *Associated General Contractors of Ohio, Inc. v. Drabik*, [U.S. District Court for the Southern District of Ohio, No. 98-00943] and as such, the Department of Administrative Services has not implemented these provisions since that date.[4]

Besides the serious legal concerns with such legislation, contracting programs that discriminate on the basis of race are divisive and unfair, and any policy to award contracts to those other than the lowest qualified bidder will cost Ohio and its taxpayers money.

Using classifications and setting goals for contract awards to businesses owned by particular racial groups inevitably encourages discrimination as a means to meet such goals, and such goals trigger strict constitutional scrutiny. *See, e.g., Lutheran Church–Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998); see also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200,

---

[3] Ohio Legislative Service Commission, "Bill Analysis", S.B. 289, 124th General Assembly, http://www.lsc.state.oh.us/analyses124/s0289-i.pdf (accessed June 23, 2009).

[4] Ohio Legislative Service Commission, "Fiscal Note & Local Impact Statement", H.B. 568, 125th General Assembly, http://www.lbo.state.oh.us/fiscal/fiscalnotes/125ga/HB0568IN.HTM (accessed June 23, 2009).

227 (1995) ("all racial classifications … must be analyzed by a reviewing court under strict scrutiny").

You may well be presented with evidence of racial *disparities* in contracts awarded by Ohio's community colleges, state community colleges, technical colleges, and university branches. Such evidence must be viewed with an appropriate degree of skepticism, especially if it is presented by interested parties who stand to benefit financially from the implementation of so-called "remedial" racial set-asides.

More importantly, a *disparity* is not necessarily evidence of discrimination, let alone proof of discrimination. The U.S. Commission on Civil Rights found serious problems with the use of disparity studies to justify racially preferential programs.[5]

> Most current disparity studies are not only outdated, but have common flaws. They fail to measure availability according to requirements to compare qualified, willing, and able businesses that perform similar services. They use simple counts of businesses without taking capacity into account. The researchers (1) use obsolete or incomplete data; (2) report results in ways that exaggerate disparities; (3) fail to test for nondiscriminatory explanations for the differences; (4) find purported discrimination without identifying instances of bias or general sources; (5) rely on anecdotal information that they have not collected scientifically or verified; (6) do not examine disparities by industry; and (7) neglect to identify which racial and ethnic groups suffer from the disparities.[6]

In preparing that report we also received compelling testimony that government contracting programs should be race-blind and race-neutral. There is virtually no justification for racial classifications and preferences today, especially in contracting, since a race-blind approach to awarding government contracts is possible.

Even if there is statistical or anecdotal evidence suggesting a pattern of recent discrimination, it does not follow that racial preferences must be used to correct it. There are better ways for the Ohio legislature to end such real or perceived discrimination. Effective, *race-neutral* responses Ohio could consider include:

- If Ohio companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for *all* companies, regardless of the race of the owner.
- If Ohio companies who could submit bids are not doing so, then the procedures used in soliciting bids should be opened up -- but, again, to all potential bidders regardless of race, not just for some bidders.
- If it is shown that bids are being denied to the lowest bidder because of that bidder's race, then there should be put in place safeguards to detect discrimination and sanctions to

[5] *See* U.S. Commission on Civil Rights (2006), *Disparity Studies as Evidence of Discrimination in Federal Contracting,* http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf (accessed June 25, 2009).
[6] *Ibid.*, p. 76.

punish it -- but, again, those safeguards and sanctions should protect *all* companies from race discrimination regardless of the race of the companies' owners.

- Ohio could encourage prime contractors to subcontract portions of the work to smaller, qualified firms regardless of the owner's race.

Even if there might, in theory, be a few victims of discrimination who would seek court remedies in the absence of legislative race-balancing, many more claims of discrimination by non-preferred races will result from the institutionalization of racial preferences as proposed in S.B. 146.

A study that the Commission published in 2005 presented an excellent discussion of legally and constitutionally defensible *race-neutral* alternatives to using racial preferences.[7] While that report addressed the importance of race-neutrality in *federal* contracting, the core principles are the same for *state* contracting programs. In that report, we listed a number of ways to reduce discrimination while adhering to applicable case law:

> (1) Enforce nondiscrimination and subcontractor compliance;
>
> (2) Increase knowledge about opportunities to contract with the … government;
>
> (3) Provide education or technical assistance to improve business skills and knowledge of [government] procurement and how to win contracts;
>
> (4) Give financial assistance or adjustments to offset the difficulties struggling firms encounter; and
>
> (5) Expand contracting opportunities and promote business development in underutilized geographic regions.
>
> These strategies are available to all businesses meeting size and income criteria, and are therefore race-neutral.[8]

One point *Federal Procurement after Adarand* did not make clear is that the aim of race-neutral contracting alternatives is to correct and end discrimination -- *not* to achieve a particular percentage of contracting by any particular racial group. But that is obvious in light of the case law in this area: Numerous judicial decisions make very clear that the desire to achieve a particular racial mix for its own sake is not itself a compelling or important government interest; that would be "discrimination for its own sake. This the Constitution forbids." *University of California Regents v. Bakke*, 438 U.S. 265, 307 (Powell, J.). Rather, the use of preferences can be justified only if there is an interest beyond such racial, gender and ethnic bean-counting -- and that compelling interest is ending racial discrimination. It is very unlikely that, in 2009, the only avenue open to Ohio's educational institutions to end presumed race discrimination (or mere *disparities*) in contracting is through "remedial" race discrimination.

As Chief Justice Roberts wrote in 2007, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (U.S. 2007).

---

[7] *See* U.S. Commission on Civil Rights, 2005, *Federal Procurement after Adarand,* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf (accessed June 25, 2009).
[8] *Ibid*., p. 31.

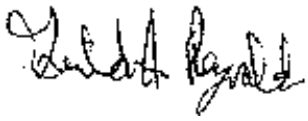
Moreover, if Ohio uses such preferences, they are extremely likely to be challenged in court and struck down as unconstitutional. This is exactly what happened in *Associated General Contractors of Ohio v. Drabik*.[9] It also happened in the cities of Jackson and Atlanta. *See W.H. Scott Construction Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D. Ga. 1999). Note that in the event of a legal challenge to the race-based provisions of S.B. 146, Ohio will have to pay its lawyers and expert witnesses. Additionally, if Ohio loses such a challenge, as it has in the past, it will also have to pay the other side's lawyers and expert witnesses.

Finally, we ask, legality aside, why should Ohio want to use something as constitutionally suspect as racial classifications and preferences -- and why should it want to award contracts to any entity other than the lowest qualified bidder?

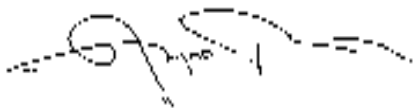
Thank you very much in advance for your consideration of our concerns. We request that you reconsider Ohio's S.B. 146 in particular, and the state's entire minority business enterprise program in general, and redesign both to use race-neutral measures as current case law dictates.

Please feel free to contact Mr. Tim Fay, Special Assistant, at (202) 376-8340 if you have any questions or would care to discuss this matter further.

Sincerely,

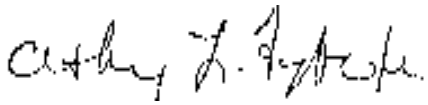


Gerald A. Reynolds
Chairman

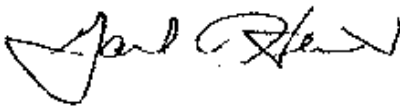


Abigail Thernstrom
Vice Chair

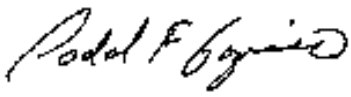
Peter Kirsanow
Commissioner



Ashley Taylor, Jr.
Commissioner



Gail Heriot
Commissioner



Todd Gaziano
Commissioner

cc: Commissioner Arlan Melendez (dissenting)
Commissioner Michael Yaki (dissenting)

Distribution: Ohio Senate Committee on Finance and Financial Institutions

[9] *Associated General Contractors of Ohio, Inc. v. Drabik*, op.cit.

Republican Members:
Sen. John Carey, Chair
Sen. Mark Wagoner, Vice Chair
Sen. Gary Cates
Sen. Keith Faber
Sen. Tom Niehaus
Sen. Thomas F. Patton
Sen. Bill Seitz
Sen. Jimmy Stewart
Sen. Chris Widener

Democratic Members:
Sen. Dale Miller, Ranking Minority Member
Sen. Ray Miller (S.B. 146 sponsor)
Sen. Shirley Smith
Sen. Jason H. Wilson