In The
Supreme Court of Florida
Case No. SC21-284

IN RE: AMENDMENT TO RULE REGULATING THE FLORIDA BAR 6-10.3

COMMENTS OF TWLYA SKETCHLEY, J.D., B.S.C.

For the first time in this Court's history, it invoked the legal precedent of *University of California Regents v. Bakke,* 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) in SC21-284 ("Order") and immediately amended a Florida Bar rule affecting every licensed Florida attorney: rule 6-10.3 of the Rules Regulating The Florida Bar ("Rule"). The sudden change invalidated my pending Florida continuing legal education ("CLE") credit for an American Bar Association (ABA) course for which I, *a board-certified attorney*, was a panelist. I prepared for the course with diligence and competence, and the ABA had already submitted my CLE course to The Florida Bar ("Bar") for approval and received a course number.

The *sua sponte* Order immediately prohibited any CLE credit for Florida attorneys who *choose* to listen to programs that require faculty on course panels be diverse. It also eliminated CLE credit for more than 45 ABA courses (and countless future ones), including lectures by competent, accomplished female authors with now-ironic titles such as "Diversity, Equity,

and Inclusion in the Legal Profession," "ADA Compliance and the Continuing Challenge of Internet and Website Accessibility," and "Leadership Lessons for Lawyers."

This Court amended the Rule immediately instead of postponing the effective date under Fla. R. Gen. Prac. & Jud. Admin. 2.140(d) so that negatively-affected members of The Florida Bar like me could be part of the discussion and provide comments and feedback. Considering the Order gave no advance notice to or received input from affected Bar members, it may be that my *post-hoc* comments are futile. However, as a proud female member of the Bar, I would be remiss if I did not submit these comments to become part of this historic record and ask that this Court reconsider the Rule that has already harmed me and other Bar members.

At issue (superficially) was a policy that required a minimum number of "diverse" faculty members on course panels, but placed no limits on the number of participants or faculty for those panels or courses ("Policy"). Diversity was defined in terms of membership in "groups based upon race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism." Reducing two complex constitutional opinions into a

single paragraph analysis, devoid of any factual record,[1] the Order manufactures a constitutional injury on behalf of a fictitious victim (a White Male Heterosexual Non-disabled Monoculturalist)[2] the Court imagines is excluded by the Policy. The Court incorrectly concludes that the Policy is a quota, which violates unspecified "American principles of nondiscrimination." Presumably, through its citation to *Bakke* and *Grutter*, the Court concluded the Policy is entitled to presumptive invalidity, as evaluated under a strict scrutiny level of judicial review, and ultimately violated the Equal Protection Clause because it is not narrowly tailored to serve a compelling government interest.

The Equal Protection Clause (or any other "basic American principles of nondiscrimination") does not address optional educational lectures

[1] The factual record in *Grutter* was the result of a 15-day trial; the factual record in *Bakke* was developed after extensive discovery.

[2] The undersigned requested copies of any complaints that prompted or preceded the Court to change the Rule; there were none, except a National Review blog post, written by a regular contributor to the Federalist Society who is not a member of the Florida Bar, who criticized the Policy with the completely inaccurate headline "Florida Bar Imposes Diversity Quotas for CLE Panels." Less than a week after the blog post was forwarded to the Chief Justice, this action appears to have been docketed on February 24, 2021. Yet, the Court provided no advance information and sought no advanced input from Florida Bar members until after issuing its Order.

conducted by private actors and merely approved by government agents such as The Florida Bar. The Court's Order fails to consider that the Constitution is not concerned with such private action, and that diversity policies in optional educational lectures have nothing to do with the allocation of state resources (or "benefits"), or the imposition of a constitutional "burden," and does not impose a state "fix" on opportunities.

The Order also places Bar staff with the unenviable, if not impossible, task of investigating and auditing organizations and private businesses that present educational lectures, purportedly on behalf of the fictitious victim, with respect to their policies. The Order has already resulted in needless confusion, immediate harm to members of The Florida Bar like me, and wide-ranging misapplication with respect to the largest voluntary bar association in the world.[3] This Court should reverse the incomplete and ill-charted course of the Order, which itself interferes with the freedom of association and private speech.

I. The Order does not address the parameters of the Policy, going far beyond its actual diversity requirements, while not addressing the classification of "multiculturalism," allowing it to continue.

[3] https://www.americanbar.org/events-cle/mcle/jurisdiction/florida/florida-rule-change/.

Because of the absence of any factual record and the Court's paltry analysis, it was entirely unclear what the goal of the Rule actually is, and whether the Policy was the actual problem. *See* note 2, *supra*. The Order did not attach or fully recite the Policy. Only after public records requests were fulfilled and the undersigned obtained a full and complete copy was it clear that the Policy did not even apply to an individual speaker or even a panel of two speakers. Those panels were free to be fully comprised of White Male Heterosexual Non-disabled Monoculturalists, and receive full sponsorship of the bar section. Further, the Policy set no caps on panelist or participants. The Policy merely states that panels with three or more participants have some diversity. For panels of "three or four" panel participants, only one had to qualify as "diverse." A panel could have eight or more panel participants but only two had to be "diverse."[4] Even then, "an exception or appeal" could be granted. Further, the Policy did not guarantee any amount of speaking time to a diverse member. The Policy followed Policy 2.02 of the Policies Governing Continuing Legal Education Committee of The Florida Bar: the sections, divisions and committees must recognize

[4] The current composition of the Florida Supreme Court would qualify as a diverse panel under the Policy.

the diversity of the legal community and shall select qualified speakers who reflect that diversity.

None of these factors were mentioned by the Court. All of these factors remove the Policy from the realm of a "quota," which "fixes the opportunities" of the excluded:

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." [citation omitted]. Quotas "'**impose a fixed number or percentage which must be attained, or which cannot be exceeded**,'" *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 495 . . . (1986) (O'Connor, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all other candidates for the available seats," *Bakke, supra,* at 317, 98 S. Ct. 2733 (opinion of Powell, J.).

Grutter, 539 U.S. at 335 (emphasis added).

Apart from enacting an Order that goes far *beyond* the Policy's diversity requirements, the lack of clarity is compounded because the Rule now enumerates forbidden diverse categories contained in the Policy, but then specifically permits "multiculturalism" by excluding it from the Rule. By excluding this broad category, the mark of which would be hard to miss by even the most ardent monoculturalist, the Order does not address this category of diversity and invites similar policies to proceed unimpeded.

II. Mere state approval of private actions does not constitute state action, and does not implicate any constitutional rights.

The Order applies not only to educational programs sponsored by voluntary bar sections to which attorneys might *choose* to belong, but any continuing legal education programs "tainted" by the diversity requirement of the Policy. This includes programs by private not-for-profit entities such as the American Bar Association, and programs by the vast number of private for-profit organizations that offer CLE to Bar members.

But action by private entities is not state action under the Equal Protection Clause, which prohibits only state action: the Equal Protection Clause of the Fourteenth Amendment commands that "[n]o State" shall "deny to any person within its jurisdiction the equal protection of the laws."

While it is true a private actor presenting education courses or Bar members requesting credit for course attendance must request approval from The Florida Bar staff (via a one-page form) for course credit, the mere acquiescence or "approval" by a state actor does not transfer private action into state action under the Equal Protection Clause, even if the private entity performs a function serving the public. *See Wasatch Equality v. Alta Ski Lifts Co*., 820 F.3d 381 (10th Cir. 2016); *Application of Equal Protection Clause to Private Act as Governmental Acts*, 16B Am. Jur. 2d Constitutional Law § 839 ("The mere fact that a private entity performs a function serving the public also does not make it state action. Furthermore, the mere fact that a

private entity is subject to state regulation or is licensed by the state does not make the Equal Protection Clause applicable. The mere receipt of some sort of governmental benefit or service by a private entity also does not necessarily subject it to the Equal Protection Clause.").

Since there is no state action by private actors in creating diversity policies for optional educational credit, there is no offense to the Equal Protection Clause.

III. Permitting attorneys to have an option to receive credit for listening to diverse lecturers does not allocate state benefits or impose any constitutional burden on the fictitious victim.

Even if this Court determined that private educational programs approved for credit by The Florida Bar were state action, the Equal Protection Clause is still not violated by policies that boost diversity like the one the Order prohibits.

The first step in determining whether a law violates the Equal Protection Clause is to identify the classifications that it draws, which then informs the level of judicial scrutiny to be applied. The Order performs none of these tasks.

The alleged constitutionally infirm Policy expresses numerous, common sense goals for diversity. If state action was involved, preferences in the Policy that address alienage and race require strict scrutiny analysis,

which applies presumptive invalidity and requires the state action to be narrowly tailored to serve a compelling government interest.

Insofar as the Policy addresses gender, intermediate scrutiny is required, and would uphold a gender preference so long as it is substantially related to an important government objective. *See Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288, 1293–94 (11th Cir. 2001) (Florida county fire department's affirmative action program to recruit more female firefighters, which had goal of hiring a percentage of females for entry-level positions, did not violate Equal Protection Clause; the plan as it actually was applied was "substantially related" to the goal of redressing the effects of prior unlawful discrimination, the target was not applied as a rigid quota, and indeed, did not appear to be used at all in implementing the plan from year-to-year, and there was no showing that the target, even if unsustainably high, caused plaintiffs, males who applied unsuccessfully for entry-level firefighter positions, any injury.).

The Policy addressing "multiculturalism" (again, found to be constitutionally infirm as a policy, but which classification did not make the editorial cut in the actual administrative rule), is of course not a suspect classification at all, and would require only a rational basis level of scrutiny,

and would be upheld if the state action was a rational means to serve a legitimate end.

Neither intermediate scrutiny nor a rational basis analysis was applied to the Policy, or even mentioned.

The Court instead cites two Equal Protection cases that addressed race-based classifications, subjecting the Policy's multitude of classifications to a presumption of invalidity that is not constitutionally required. However, classifications that neither involve fundamental rights nor proceed along suspect lines (such as multiculturalism) are accorded a strong presumption of validity and upheld if there is rational relationship between disparity of treatment and some legitimate governmental purpose.

The race-based admissions policies in *Bakke* and *Grutter* have nothing to do with policies related to optional, professional instruction. In fact, both cases support the use of diversity in such instances.

Bakke produced six separate written opinions, and involved the denial of the admission of a White applicant to a state medical school due to the school's set-aside program that expressly reserved 16 seats for certain minorities out of a possible 100 seats (which were fixed). Similarly, *Grutter* addressed the use of race in the admissions policy of a state university law

school, and concluded that law schools have a compelling interest in attaining a diverse student body.

Both *Bakke* and *Grutter* involved consequential, gateway "political determinations" relating to state university admissions policies. Barring the applicants under race-based policies created a hurdle to beginning their professions (doctors and lawyers, respectively). And both cases required unequal treatment and *injury* as a constitutional threshold:

> As we have explained, 'whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.'

Grutter v. Bollinger, 539 U.S. 306, 327 (2003), citing *Bakke*, 515 U.S. at 229–230.

Here, the educational Policy (and those like it) that offended the Court (but not any licensed member of The Florida Bar) is not superimposed on any member of The Florida Bar. It is *optional* for the presenter(s) and the listener(s).

This Court does not identify a single complaint from a Florida attorney (nor was one produced by The Florida Bar or this Court). The Court does not express any concern about program quality. The Court does not identify a single reallocation of a benefit that is added to the purse of another or a

burden that is placed upon the weary back of the White Male Heterosexual Non-disabled Monoculturalist. *Compare Bakke*, 438 U.S. at 299 ("When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

Creating opportunities for diverse educational credit, the so-called "preference approved," does not result in the "denial of the relevant benefit … to anyone else." *Cf*. *Bakke*, 438 U.S. at 304 (citation omitted) (distinguishing other case law that created educational opportunities for non-English speaking children because "[n]o other student was deprived by that preference ….").

The omitted White Male Heterosexual Non-disabled Monoculturalist experiences no special burden from being omitted from private educational faculty, and his opportunities are not "fixed," a distinguishing feature from a "quota," repeatedly misused in the Order. *Grutter*, 539 U.S. at 335 (citation omitted) (a "quota … is a program in which a certain *fixed number or proportion of opportunities* are 'reserved exclusively for certain minority groups.'") (emphasis added). Unlike the *Bakke* and *Grutter* plaintiffs, who were emphatically denied admission to study (full stop), the White Male

Heterosexual Non-disabled Monoculturalist is free to compose, apply, and present a continuing legal education lecture for Florida Bar credit with sponsorship under the Policy. He is also free to join another non-diverse panel member under the Policy. If he wanted to have a four-member panel, only one member would have to be diverse, and even then, he could deny speaking time to the diverse participant under the Policy without recourse. If this constitutional burden was too much for him to bear, he could appeal under the previous rule 6-10.3 of the Rules Regulating The Florida Bar to ensure that all four members lacked diversity. Alternatively, he could apply for his own educational lecture by completing a one-page application form: the number of courses approved for credit are not capped, unlike the entering class of medical or law school. He will have to wait "2-4 weeks" for processing, just like everyone else. In his lecture, his panel choices were limitless. Apart from speaking, he is also free to educate himself by listening to only like-minded White Male Heterosexual Non-disabled Monoculturalists for credit, which includes thousands of courses.

None of these scenarios "fix opportunities," unlike a quota.

The need for diversity of thought, as explained in *Bakke*, is specifically honored and distinguished from admissions policies, and should be recognized by the very Court[5] that cited it:

> "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372."
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> The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. [I]t is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples."

Bakke, 438 U.S. at 311–13 (1978) (citations omitted).

Certainly, Florida attorneys will be "baited" by this Court's Order into providing comments that justify diversity requirements, lament the unequivocal statistics regarding unequal pay of women and minority attorneys, refer to the stark lack of diversity in law firm leadership and

[5] The Florida Supreme Court's Standing Committee on Fairness and Diversity has recognized the importance of diversity in leadership in its 2015-2016 Best Practices Guide: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." (citing *Grutter*) (O'Connor, J.). *See* https://www.floridabar.org/about/diversity/sccommitteefairdiversity/.

partnership, inform the Court as to how diversity and inclusion makes Bar members better lawyers, cite the high attrition rates and lack of advancement or leadership opportunities for women and other diverse populations, point out the lack of diversity on the Judicial Nominating Commissions and on the bench, and bemoan the placement of unqualified, less diverse applicants in high-level government appointments. However, this Court is already aware of all these issues and has been for many years. This Court is aware that diversity and inclusion makes the judicial system and legal system better because it[6] and The Florida Bar[7] publish resources dedicated to diversity and inclusion issues because of well-documented bias. They provide reports, research, and studies on the lack of diversity and the problems it causes. They have issued reports, prepared best practices, and established committees. This Court and The Florida Bar maintain standing committees dedicated to improving "diversity and inclusion." Yet, these efforts continue to fall short, and the Order undermines these efforts.

VI. In the absence of rectifying a constitutional violation, this Court's jurisdiction to dictate how attorneys educate themselves is limited to their "admission" and "discipline," using this Court's supremacy-of-text principles.

[6]https://www.floridasupremecourt.org/content/download/421908/file/AOSC18-33.pdf.

[7] https://www.floridabar.org/about/diversity/.

By going beyond what the Policy actually accomplished (creating limited diversity panel availability but not guaranteeing participation), and failing to address other diversity categories that fall under multiculturalism, the Order extends beyond the constitutional grant of authority to interfere with the chosen associations of lawyers in their private lives in the absence of addressing constitutional violations.

The Court exercises jurisdiction solely under article V, section 15, Florida Constitution and Fla. R. Gen. Prac. & Jud. Admin 2.140(d) ("rule 2.140"). None of these sources provide this Court with the jurisdiction to interfere with how attorneys choose to educate themselves for credit, especially when the competence and quality of such diverse panels is unchallenged.

"The supreme court shall have exclusive jurisdiction to regulate [1] the *admission* of persons to the practice of law and [2] the *discipline* of persons admitted." Art. V, § 15, Fla. Const. (emphasis added). If this Court holds true to its preferred method of constitutional and statutory interpretation, then we must analyze the Court's jurisdiction based on the words of the text using the ordinary meaning as it was understood at the time it was issued:

> we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56

> (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69).
>
> We thus recognize that the goal of interpretation is to arrive at a "fair reading" of the text by "determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Scalia & Garner, *Reading Law* at 33. This requires a methodical and consistent approach involving "faithful reliance upon the natural or reasonable meanings of language" and "choosing always a meaning that the text will sensibly bear by the fair use of language." Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. Rev. 538, 541 (1934), *quoted in* Scalia & Garner, *Reading Law* at 34.

Ham v. Portfolio Recovery Associates, LLC, 308 So. 3d 942, 946–47 (Fla. 2020); *see id*. at 952 (Muniz, J., dissenting) (also citing Justice Scalia and endorsing "supremacy of text" principles but also requiring a test that does not defy "consistent and objective application."); *see also Thompson v. DeSantis*, 301 So. 3d 180, 187 (Fla. 2020), *reh'g denied*, 2020 WL 5362111 (Fla. Sept. 8, 2020) (also citing Justice Scalia and holding "[t]he goal of constitutional interpretation is to arrive at the fair meaning of the constitutional text. We ask how a reasonable member of the public would have understood the text at the time of its enactment.").

Article V, section 15 was adopted in 1972, and originated from the 1956 amendment to the 1885 Constitution, which granted the Supreme Court exclusive jurisdiction over the admission and discipline of attorneys. Fla. Const. art. V, § 15 (Commentary) ("The earlier version also gave the court explicit authority to set up an agency to handle the admissions of attorneys and directed circuit courts, the district courts of appeal, or a commission consisting of members of the bar to handle disciplinary matters.").

"Admission" in the context of a profession means "the right or permission to join or enter a place, a group, etc.." https://www.merriam-webster.com/dictionary (visited June 14, 2021). "Discipline" means "punishment." *Id*. Once attorneys have entered or joined the Bar, it should not have to interact with this Court as a regulator unless attorneys are to be punished under section 15.

None of the plain meanings of the jurisdictional text in 1972 limiting jurisdiction to "admission" and "discipline" support any interpretation that the Court can regulate private professional lectures once an attorney is admitted and prior to any wrongdoing.

In terms of "admission," admitted attorneys have cleared the massive hurdles imposed by this Court. Once admitted, attorneys need not pass additional bar exams or otherwise have to illustrate their competency to

practice law. No reasonable person at the time of the adoption of this Court's jurisdiction would have understood "admission" to mean ongoing intermeddling in attorneys' lives, absent wrongdoing necessitating "discipline."

Mandatory continuing legal education was not instituted in Florida until 1987 and was not imposed on attorneys in this country at the time of the adoption of the Florida Constitution in 1972.[8] *See The Florida Bar re: Amendment to Rules Regulating The Florida Bar (Continuing Legal Educ.)*, 510 So. 2d 583 (Fla. 1987), *modified sub nom. The Florida Bar re Amendment to Rules Regulating The Florida Bar (Continuing Legal Educ.)*, 510 So. 2d 585 (Fla. 1987), *approved sub nom. The Florida Bar re Amendment to Rules Regulating the Florida Bar (Chapter 6)*, 515 So. 2d 977 (Fla. 1987) (hereafter "CLE Adoption"). While the Florida dissenters in 1987 (which included the then-Chief Justice) had concerns that the proposed CLE programs would lack substance and constitute a "sham," no one appears to have questioned the Court's jurisdiction to implement such a measure. Indeed, the jurisdiction appears to be rooted in an effort to increase the competency of lawyers, heading off the need to exercise the Court's

[8] Minnesota was the first state to institute mandatory continuing legal education in 1975.

jurisdiction regarding the "*discipline* of persons admitted." CLE Adoption at 584 ("Our responsibility here is to determine whether the proposed mandatory CLE program will benefit the public by improving the competence of the legal profession.").

The "back-to-school" requirements are not part of the plain meaning of the words "admission" and "discipline," and could not have been understood by a reasonable reader of the text in 1972 because the concept of mandatory, continuing education did not exist for attorneys. This Court's exercise of jurisdiction is an unsupported intrusion into the private professional lives of admitted attorneys that have committed no act of wrongdoing. To find such jurisdiction, this Court will have to ignore the plain meaning of the jurisdictional text and seek out a subjective and inconsistent "spirit", "philosophy" or "policy" of section 15 that would allow it to exercise jurisdiction to manage private attorneys, after admission and before discipline, despite the fact that no reasonable person would read the text as allowing such expansive jurisdiction because the concept did not exist.

Rule 2.140 provides no additional jurisdiction for the Rule.

The fount of jurisdiction for the Florida Rules of General Practice and Judicial Administration comes from article V, section 2(a). But that jurisdiction is to pass rules "for the practice and procedure in all courts . . . ."

Fla. Const. art. V, § 2(a). The scope of the Florida Rules of General Practice and Judicial Administration makes it clear that they apply to "administrative matters in all courts to which the rules applicable by their terms." And Rule 2.140 is the procedure to "[amend] rules of court." Optional educational panel makeup has nothing to do with court rules.

Because the competency and quality of the education resulting from the Policy is not in question (thus heading off any professional requirements that attorneys maintain competence), the Rule can be justified only through the exercise of this Court's jurisdiction or rectifying a constitutional problem. As illustrated above, there is no such constitutional issue and the Court's jurisdiction is limited by its plain text as understood by a reasonable reader, fully competent in the language, in 1972. Or 1956.

CONCLUSION

The Rule does not directly address the Policy. The Policy also does not present any constitutional issue because the private conduct of attorneys educating themselves is not state action by virtue of gaining Bar approval for course instruction. The Policy grants no benefit to any group nor imposes a constitutional burden upon another. The Policy does not "fix" opportunities. In the absence of a constitutional violation, there is no jurisdiction for such intermeddling into attorneys' continuing education.

I request that the Court withdraw its change to rule 6-10.3 of the Rules Regulating The Florida Bar.

Respectfully submitted this 17th day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing comments was filed with the Clerk of Court via the Florida Courts ePortal this 17th day of June, 2021.

s/ Twyla Sketchley
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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, the undersigned certifies that the foregoing comment complies with the applicable font requirements (14-point Arial). To the extent applicable, the word count is 4710. Fla. R. App. P. 9.210.

s/ Twyla Sketchley
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