IN THE

Supreme Court of Florida

Case No.: SC21-284

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

COMMENTS OF THE AMERICAN BAR FOUNDATION

The American Bar Foundation ("ABF") shares with the American Bar Association ("ABA") an unwavering and enthusiastic commitment to creating a diverse, equitable, and inclusive legal profession. Consequently, the ABF confers with the ABA and other organizations that have provided comments objecting to this Court's proposed amendment to the Florida Bar Rules regarding the composition of Continuing Legal Education ("CLE") programs and panels.

The ABF is among the world's leading research institutes for the empirical and interdisciplinary study of law. An independent, nonprofit organization for nearly 70 years, the ABF seeks to advance the understanding and improvement of law through research projects of unmatched scale and quality on the most

pressing issues facing the legal system in the United States and the world. Since 1952, the ABF has been at the forefront of using the power of ideas to confront injustice and inequality. Many current and former ABF researchers have spent decades studying and documenting the relationship between law and structural racism and institutional inequality. This scholarship reflects the ABF's core values, ideals, and commitments.

It was with the goal of creating a more equal and inclusive legal profession that the ABA implemented its diversity and inclusion policy for selecting panels for CLE programs. The ABA policy requires that individual CLE programs include representation from one or more "diverse" groups, defined as "race, ethnicity, gender, sexual orientation, gender identity, and disability." Any program consisting of a panel of three or more participants, including a moderator, must include a certain minimum number of "diverse" members, depending on the size of the panel. Under the policy, the ABA "will not sponsor, co-sponsor, or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted."

The Business Law Section of the Florida Bar recently enacted a version of the ABA's policy for selecting panels for its CLE programs. It adopts the ABA requirement that CLE panels include representation from designated "diverse" groups, including the minimum representation requirements for panels with three or more participants. The Florida Business Law Section policy allows for panels that do not meet the diversity requirements in the following circumstances: when a confirmed diverse panelist becomes unavailable, and there is not time to find a replacement; or when, "after a diligent search and inquiry," the program organizers are still unable to "obtain the participation of the requisite diverse members of the CLE panel." These exceptions add a degree of flexibility to the Business Law Section's CLE diversity policy.

The Florida Supreme Court's conclusion that the Business Law Section's CLE diversity policy violates United States Supreme Court precedent prohibiting public colleges and universities from using racial quotas in their admissions policies is flawed on two counts. First, it mischaracterizes the CLE policy as using a racial quota. Second, even if one were to characterize the policy as a racial

quota, the Supreme Court's rulings on affirmative action in higher education do not resolve its constitutionality.

In a line of precedents beginning with *Bakke,* the Supreme Court has ruled on the constitutionality of racial preferences in admissions policies of institutions of higher education. See Grutter v Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. University of Texas, 579 U.S. ___ (2016). The Court has made clear in each of these decisions that institutions of higher education violate the Equal Protection Clause of the Fourteenth Amendment if they use admissions policies that rely on racial quotas. See, e.g., *Bakke,* U.S. 438, at 319–20; *Grutter,* 539 U.S., at 334.

Although these opinions offer guidance on the constitutional parameters of race conscious decision making by public entities, the Supreme Court limited its holdings—including the categorical prohibition on racial quotas—to the context of student admissions to college and university programs. They should not be cited as conclusively resolving constitutional questions relating to non-racial diversity-enhancing preferences or to settings other than higher education admissions. Yet this is exactly what the Florida Supreme

Court has done in justifying its proposed amendment to Florida Bar Rule 6-10.3.

The Florida Business Law Section's CLE panel policy is not a racial quota. It imposes no requirement that any particular number of panel slots be filled by people of certain races. The diversity requirement can be met by considering any number of factors other than race—gender, sexual orientation, gender identity, disability—none of which the Supreme Court has indicated requires the same level of scrutiny under the Equal Protection Clause as race. Even apart from its exceptions for "non-diverse" panels, the Business Law Section can fully meet its policy requirements with panels that include no members of disadvantaged racial groups—exactly what a racial quota system would not allow. In the decision in which the Supreme Court first declared racial quotes impermissible in university admissions, Regents of California v. Bakke, 438 U.S. 265 (1978), Justice Powell wrote that for a race-conscious selection policy to be constitutionally permissible—that is, for it to be deemed *not* a quota—it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each

applicant." Id. at 317. This is precisely how the Business Law Section's CLE panel selection policy operates.

Even if one were to assume that the Business Law Section's CLE panel policy amounts to the kind of racial quota struck down in *Bakke* and *Grutter*, the reasoning of the Florida Supreme Court fails to account for the fact that the Business Law Section's CLE policy differs in meaningful and significant ways from the university admissions policies at issue in these cases.

The higher education cases were brought by individuals who sought and were denied admissions to a particular educational program; they claimed that their denial was the result of a racially discriminatory admissions policy. The situation is much different with regard to CLE panels. There are no formal standards or scores that are used in selecting panels. The process of putting together panels is necessarily permeated with discretionary decisions. No one applies to be on a panel, and therefore no one can claim to be impermissibly excluded.

For these reasons, the Florida Supreme Court's use of U.S. Supreme Court precedents such as *Bakke* and *Grutter* as

justification for its conclusion that the Business Law Section's CLE panel policy is impermissible is misguided.

Since nothing in the U.S. Supreme Court's affirmative action cases foreclose diversity and inclusion policies such as the ones adopted by the Florida Business Law Section or by the ABA, the focus of attention should not be on whether the policy is permissible, but whether it is justified as a measure to expand diversity and inclusion in the legal profession. And on this count, generations of empirical and interdisciplinary scholarship sponsored by ABF has shown the persistence of structural inequities and the benefits of diversity in the legal profession.

The ABF's peer-reviewed journal, *Law & Social Inquiry*, recently published an article, "Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace," (Nelson, R., Sendroiu, I., Dinovitzer, R., & Dawe, M. *Law & Social Inquiry, 44*(4), 1051-1082. (2019)), co-authored by ABF researchers, which described the very different professional worlds experienced by attorneys of color, white women attorneys, and LGBTQ attorneys as compared to white male attorneys. Women in every racial and ethnic group reported higher levels of perceived discrimination than

their male counterparts. LGBTQ men were twice as likely as non-LGBTQ men to report discrimination. Almost half of Black male attorneys surveyed reported workplace discrimination, a significantly higher percentage than in other professions.

These findings are one piece of the ABF's *After the JD* project, a long-term study examining the lives and experiences of lawyers over the past two decades. The findings demonstrate that bias and discrimination in the legal workplace negatively affect the professional lives of traditionally disadvantaged groups and limits the extent to which the legal profession offers equal opportunity to all lawyers. To address this situation, employers and bar leaders must remain vigilant in their efforts to promote diversity and eliminate discrimination in the profession.

Any assessment of the CLE diversity policies must recognize the context in which these policies were created and the harms they are intended to remedy.

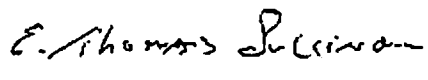
In its own institutional programming, the ABF aims to meet the aspirations of the ABA's Goal III to eliminate bias and enhance diversity in the legal profession. The ABF supports work by established and emerging scholars from underserved and

underrepresented backgrounds who can be the catalysts for greater diversity, equity, and inclusion in the legal and academic professions.

The purpose and effect of CLE diversity policies is to include underrepresented persons more broadly in CLE programming and thus to expand the pool of talent participating in these important endeavors. The ABF believes that such policies are not only constitutionally permissible but based on the findings of empirical scholarship by ABF researchers and many others, that they are justified measures to create a more equitable and inclusive legal profession.

June 23, 2021

Respectfully submitted,



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