IN THE SUPREME COURT OF FLORIDA

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

No. SC21-284

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COMMENT IN SUPPORT OF RULE CHANGE BY BLAISE TRETTIS, PUBLIC DEFENDER

Undersigned counsel supports the Court's change to Rule Regulating the Florida Bar 6-10.3. because the change to the rule renders inoperable discriminatory and unconstitutional racial, ethnic, sex, sexual orientation, continuing legal education (CLE) instructor policy of the Business Law Section and renders inoperable nearly identical policy of Bar organizations like the American Bar Association. The policy of the Business Law section (hereinafter BLS) is unconstitutional for the reasons that the policy results in discrimination against people based on their race, ethnicity, i.e., national origin, sex, and sexual preference and thereby violates the Equal Protection Clauses of the United States and Florida Constitutions.

It was necessary for the Court to intercede on its own motion in the instant case to prevent BLS from using its unconstitutional CLE instructor policy. The BLS is regulated by the Supreme Court and for the Court to allow the unconstitutional BLS policy to remain in-force would have resulted

in state action allowing the unconstitutional policy to continue. The Equal Protection Clause applies only to government, i.e., state action, not to action by private citizens.

The Supreme Court is vested authority by the Florida Constitution to administer the judicial system. Article V, sections 2, 15, Fla. Const. The Supreme Court's inherent authority was invoked to create the integrated Florida Bar, which the Supreme Court has exclusive authority to regulate. See *Petition of Florida State Bar Ass'n, et al*, 40 So. 902 (Fla. 1949). In 1987, the Supreme Court invoked its authority vested in Article V, section 15, Fla. Const. to make continuing legal education mandatory for Florida Bar members. See *The Florida Bar Re: Amendment to Rules Regulating The Florida Bar (Continuing Legal Education)*, 510 So. 2d 583 (Fla. 1987). Completion of continuing legal education hours as determined by the Court is mandatory, not optional, and failure to complete mandatory CLE causes an attorney to become a delinquent member who shall not engage in the practice of law. See Rule Regulating The Florida Bar 1-3.4.

The Court's administration of the Florida Bar, including the Court's authorization of CLE programs, constitutes state action because the Court's oversight and regulation of the Bar is in place of legislative oversight and regulation of the Bar by statute and executive branch action.

The Florida Legislature could possibly end the Court's independent oversight, supervision, regulation, attorney discipline, of the Florida Bar by passing legislation which transfers these powers to the legislature and the executive branch.[1] If this were to be done, then a Florida statute or executive action which enacted the same BLS CLE instructor quota would constitute state action which would be stricken as unconstitutional under *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) and *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). This fact elucidates the argument that the Florida Supreme Court's regulation of the Florida Bar constitutes state action or quasi state action[2] which is subjected-to and judged by Equal Protection strict scrutiny analysis. Under this argument, the policy of BLS would be comparable to executive agency administrative rule; Rules Regulating the Florida Bar would be comparable to legislative statutes. Under this analysis, the decisions of the U.S. Supreme Court which interpret the Equal Protection Clause of the U.S. Constitution are binding

[1] In 1984, the Florida Legislature considered legislation for legislative regulation of the Bar. See *Lawyer Regulation for a New Century*, American Bar Assoc., Sept. 18, 2018, at pg. 6; https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/.

[2] It could be called quasi state action and would be given the same Equal Protection strict scrutiny analysis as state action.

on policy that is adopted by sections of the Bar and is binding on Rules Regulating the Florida Bar enacted by the Supreme Court.

Rather than make the above comparison of Rule 6-10.3. to a legislative statute to derive that the rule is quasi state action by the Court, a simpler way to reach the same conclusion of quasi state action by the Court is to recognize that the Judiciary is one of the three branches of government under Article V, Fla. Const. and that the Supreme Court is sole administrator of the judicial branch of government. Therefore, the Rules Regulating the Florida Bar adopted by the Supreme Court necessarily constitute state action or quasi state action.

If, for the sake of argument, the Court's change to Rule 6-10.3. were not to be considered state action or quasi-state action, then the Court's change to the rule is still needed to guarantee that the reason for the Equal Protection Clause – that people who are similarly situated be treated similarly – is applied to Florida Bar members, all people who are considered to become CLE instructors, and others who might be impacted by the Court's administration of the Florida Bar. The Court's rejection of quotas, also called set-asides, based on race, sex, ethnicity, sexual orientation, gender identification, multiculturalism, reflects the opinion of the great majority of people who reject such quotas. According to a 2020

Gallup poll, 72% of U.S. adults oppose giving preference to blacks in hiring and promotion, including 43% who oppose strongly. See https://news.gallup.com/opinion/polling-matters/317006/affirmative-action-public-opinion.aspx. According to a 2019 Pew Research Center poll, 73% say colleges and universities should not consider race or ethnicity when making decisions about student admissions. See https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/.

Undersigned Counsel submits that it was smart for the Court to change Rule 6-10.3. and to not discretely in a “behind-the-scenes” manner ask BLS to repeal its CLE instructor policy as is suggested by the dissent in the instant case by informing BLS that its CLE instructor quota policy is unconstitutional under decisions of the U.S. Supreme Court. The Court’s decision in the instant case caused the American Bar Association (hereinafter ABA) to respond to the new rule by publicizing that it too has the same or nearly-same discriminatory CLE instructor policy as did the BLS. Just days after the Court rendered its decision in the instant case, the ABA published an article on its website which explained that the Court’s decision in the instant case impacted the ABA’s ability to conduct CLE programs in Florida because the ABA in 2017 implemented its diversity

inclusion CLE policy which, like the BLS CLE policy, requires all of its sponsored or co-sponsored CLE programs with three or more panelists, including the moderator, to have at least one member from a group based on race, ethnicity, gender, sexual orientation, gender identity and disability. See https://www.abajournal.com/news/article/florida-supreme-courts-order-may-also-impact-aba-programs. For CLE programs with more than three instructors, the ABA policy requires more instructor-members of "diverse groups" depending on the number of instructors. The BLS CLE instructor policy appears to be identical to the ABA policy with the exception that BLS adds an additional "diverse group" called "multiculturalism."

The ABA's announcement just days after the decision in the instant case demonstrates that discriminatory, unconstitutional, policy like BLS CLE instructor policy and like that of the ABA have been in-place for years and would have proliferated among more voluntary Bar organizations and sections and committees of the Bar had the Court not taken the action that it did in the instant case.

The Court's change to Rule 6-10.3. will likely have the salutary effect of causing the ABA to repeal its discriminatory CLE instructor quota policy. The ABA membership will want to have its February mid-winter CLE conference in 80-degree Miami Beach where members can relax by the

pool at the luxury beach hotel underneath coconut palms basking in the balmy ocean breeze while the Northeast and Midwest are in the grip of months of sub-freezing temperature, freezing rain, ice, sleet, snow, gray skies and blizzards. An ABA mid-winter CLE conference in New York City, Chicago, St. Louis, Cleveland, Philadelphia, is just not a pleasant, enticing, substitute for sunny, warm, Florida. All that the ABA has to do to continue enjoying the benefits of continuing to hold CLE conferences in Florida with Florida Bar members attending as the fourth largest number of lawyers from all states is repeal its discriminatory CLE instructor quota policy. But if the ABA decides to not repeal its discriminatory CLE instructor policy and decides to boycott the State of Florida as a venue for its CLE conferences because of the prohibition against racial, *et. al,* quotas in new Rule 6-10.3., then that's fine – Floridians don't care to host conferences for organizations which reject the constitutional right to equal protection of the law and which discriminates against people because of their race, sex, ethnicity, sexual orientation.

Racial quotas like that of the BLS CLE instructor policy are rejected as facially invalid. *Cf. Grutter v. Bollinger*, 539 U.S. 306,334 (2003); *Regents of University of Cal. v. Bakke* 438 U.S. 265,307 (1978). Racial quotas almost never pass strict scrutiny review used to judge whether

government classifications violate the Equal Protection Clause which guarantees that people who are similarly situated will be treated similarly. Strict scrutiny review is almost always fatal to a classification scheme which involves a suspect class, such as race and national origin. Only one purposeful racial or ethnic classification has survived strict scrutiny by the U.S. Supreme Court since 1944 and that is the racial classifications used to benefit blacks' admission to college as in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Regents of University of Cal. v Bakke*, 438 U.S. 265 (1978). Under strict scrutiny review, a classification will be upheld only if it is found to be necessary to the attainment of some compelling governmental objective.

National origin and ethnicity are suspect classes which receive strict scrutiny Equal Protection analysis. Cf. *Hernandez v. Texas* 347 U.S. 475 (1954) (discrimination against Mexican Americans, i.e., Hispanics, with regard to jury service was treated in the same way that discrimination against blacks would have been). The BLS policy which classifies "ethnicity" as a diverse group fails strict scrutiny Equal Protection analysis. The BLS policy on ethnicity was meant to apply to Hispanics and other ethnicities. Ancestry, i.e., national origin, is the defining element of ethnicity. "Hispanic" is not a racial classification as Hispanics can be either

black or white. The U.S. Supreme Court has held that strict scrutiny Equal Protection analysis applies to ancestry when ancestry is used as a proxy for race or national origin. *Rice v. Cagetano,* 528 U.S. 495 (2000). When BLS policy on the diverse group of "ethnicity" is applied to Hispanics or any person based on their ancestry, the policy fails strict scrutiny Equal Protection analysis.

The U.S. Supreme Court's decisions prohibiting the use of racial quotas in *Grutter v. Bollinger, supra,* and *Regents of University of Cal. v. Bakke*, *supra*, also apply to quotas used in other state action contexts such as quotas based on sex, ethnicity, sexual preference. If the *Grutter/Bakke* prohibition against quota were hypothetically to not apply to groups based on their ethnicity, sex, sexual preference, then the result would be that quotas intended to increase blacks' representation would be prohibited but would-be permissible when quotas are used to increase the representation of white women and men, Hispanics, and homosexuals. This disparate result would be an indefensible, egregious affront to blacks. Undersigned counsel submits that the *Grutter/Bakke* prohibition against quotas applies to BLS diverse groups of sex (stated as gender in the BLS policy), ethnicity (i.e., Hispanic, Pacific Islander, Indian and all other ancestry and national origin classifications), sexual orientation, and gender identity.

Regarding BLS policy which includes gender as one of its diverse groups, statistics on women lawyers should be considered given that the number of women lawyers is quickly reaching parity with men lawyers. The number of women enrolled in law school began exceeding men in 2016. In 2019, women were 53.3% of law students. The number of men in law school has declined for nine consecutive years while the number of women has increased significantly in the last three years. See *Profile of the Legal Profession,* American Bar Association; https://www.americanbar.org/news/reporter_resources/profile-of-profession/. In 2017, 49% of new Bar members were women and 51% men. Of all judges in Florida, 41.6% are women. In 2018, 45.9% of associates in law firms were women. Forty percent of Florida Bar members are women. This less-than-equal percentage is the result of law school enrollment which was mostly men by a large percentage prior to the year 1990.[3] As the large number of older white men lawyers who graduated law school prior to 1990 die in large numbers in the next 10 to 15 years, women

[3] In 1963, only 8.3% of first-year law students were women rising to 16% in 1973, 38% in 1983 and 43% by 1993. In 2019, more than twice as many law schools had women majorities (141 law schools) as schools with men majorities (59 law schools) and at four law schools in 2019 women outnumbered men by a 2-to-1 ratio. *Profile of the Legal Profession,* American Bar Association.

lawyers will quickly increase their percentage of all lawyers to reach parity with the number of men lawyers and will very likely exceed the number of men.

With the foregoing statistics in mind which show that the number of women lawyers will soon equal or surpass the number of men lawyers, undersigned counsel submits that the gender classification in BLS CLE instructor policy does not survive intermediate scrutiny that the U.S. Supreme Court uses to judge whether sex classifications are constitutional under the Equal Protection Clause. Intermediate scrutiny was formulated in *Craig v. Boren*, 429 U.S. 190 (1976): "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The gender quota in BLS CLE instructor policy does not serve any important governmental objective because the BLS policy does nothing to further any goal, such as the goal of increasing the number of women lawyers. Many CLE instructors are not lawyers but are rather experts in various fields such as psychology, medicine, construction defects, engineering, and many other fields. It is a specious argument that an important governmental objective is to improve the "networking" and expert witness employment opportunities of women CLE instructors whether they are lawyers or are not lawyers. Undersigned

counsel submits that the BLS CLE instructor gender quota does not pass intermediate scrutiny Equal Protection Clause analysis.

It is important to consider that BLS and ABA policy discriminates against women the same as it discriminates against men, blacks, and Hispanics. For example, if a BLS CLE committee of lawyers were tasked with finding instructors for a CLE program and the lawyers found three people who are white women, then that all-women panel would be prohibited under BLS CLE instructor policy. The BLS CLE committee would have to disinvite, cancel, one of the women and would then likely find a man replacement to comply with BLS CLE instructor policy. The same scenario of exclusion, canceling, would happen when all three of the original panelists were all white men or all black men, all white women or all black women, or all white women Hispanics or all white men Hispanics.

The Court was correct in its statement in the instant case that, "Quotas based on characteristics like the ones in this policy [BLS policy] are antithetical to basic American principles of nondiscrimination." BLS policy goes a step further than the usual group–identities of race, sex, ethnicity, sexual preference, and takes discrimination to a new level by including the additional identity-group "multiculturalism." The BLS diverse group called multiculturalism is new to discriminatory policy in that

multiculturalism is not an immutable trait like one's race, sex, and national origin. Instead, multiculturalism is a set of beliefs or philosophy based on political ideology which is closely associated with identity politics; the politics of difference. See Stanford Encyclopedia of Philosophy, *Multiculturalism,* substantive revision Sept. 9, 2020; https://plato.stanford.edu/entries/multiculturalism/. A tenet of multiculturalism is that there must be remedies for economic and political disadvantages that people suffer as a result of their marginalized group identities. *Id.*, at 2. Multiculturalists find common ground in rejecting the American ideal of the "melting pot" in which members of minority groups are expected to assimilate into the predominate culture. *Id*., at pg. 1. Conversely, multiculturalists argue for "group differentiated rights" that include religious exemptions from the legal system, recognition of "old country" traditional legal codes by the American legal system (for example, granting jurisdiction over family law to religious courts). *Id*., at pg. 2, 3. Feminists and homosexuals have well-founded criticism of multiculturalism because religious and legal exemptions from the justice system enable the powerful members of the religious minority group, like the theological patriarchy, to undermine, eliminate, the basic liberties and opportunity of women and homosexuals who are oppressed, subjugated, and even

imprisoned and beaten, in the practice of the old-country religion and culture. *Id*., at pg. 10-12. Not only is multiculturalism antithetical to basic American principles of nondiscrimination, multiculturalism poses a particularized threat to the American legal system in which all are equal under law.

Respectfully submitted June 29, 2021 by,

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