



Law School Admission Council

June 22, 2021

Florida Supreme Court
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

To the Honorable Court,

We are writing to you on behalf of the Law School Admission Council regarding the Florida Supreme Court's motion to amend Rule 6-10.3(d) regulating the Florida Bar. The Law School Admission Council is a not-for-profit organization committed to promoting quality, access, and equity in law and education worldwide. We have a rich history of creating a vibrant and supportive ecosystem for law schools and their candidates along the legal education continuum, from prelaw to practice. The services we provide open access to legal education so that one day the profession can truly reflect the diversity of society and thereby move ever closer to the promise of equal justice for all. Equity is a commitment that does not stop at admission. It is an enduring commitment that extends to the profession and the practice of law. Accordingly, we strongly urge the court order modifying Rule 6-10.3(d) be vacated.

Never more than now does the legal profession need to take proactive steps to demonstrate its commitment to justice and equal opportunity. After a year in which the systemic injustices and inequities faced by individuals from marginalized identities have been the focus of national conversation – from the murders of George Floyd, Ahmaud Arbery, Breonna Taylor, and others, to the disparate negative health outcomes and disproportionate COVID-19 fatalities experienced by Black and brown people to the disturbing increase in violence against individuals who identify as Asian, Asian-American and Pacific Islanders, the need for proactive systemic change ought to be abundantly clear. These recent events, however, are not the sole impetus for equity policies such as the one at issue in this matter. To the contrary, the need for and, more importantly, the existence of such policies goes back decades and is entirely lawful.

As a threshold matter, the Court's reliance on Grutter v. Bollinger and Regents of University of California v. Bakke is misplaced because the facts in Grutter v. Bollinger and Bakke are patently different from and therefore distinguishable from the matter at hand. Grutter v. Bollinger and Bakke involve student admissions to post-secondary institutions where slots in incoming classes are necessarily limited and finite. Selecting faculty to deliver continuing legal education programs to practicing attorneys is a very different process where the number of slots is discretionary. The facts of the matter at hand are more analogous to the employment context and should be analyzed using Title VII and voluntary affirmative action principles.<sup>1</sup>

In 1965, President Johnson signed into law Executive Order 11246. This executive order established affirmative action in employment and requires that federal contractors (i.e. companies and organizations doing business with the U.S. government) provide equal opportunity and take affirmative action against discrimination in employment based on protected identities including race. This Executive Order is in effect to this day and has been amended in recent years to expand protections to gender identity and sexual orientation. Moreover, organizations that are not federal contractors – like the Business Law Section of the Florida Bar – can, on their own initiative, create and follow voluntary affirmative action plans that are consistent with the Executive Order. In his 1965 commencement address at Howard University, Johnson explained, "We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result."<sup>2</sup>

<sup>1</sup> See United Steelworkers of America v. Weber, 443 US 193 (1979); Johnson v. Transp. Agency, Santa Clara County, Cal., 480 US 616 (1987). See e.g. University and Community College System of Nevada v. Farmer, 930 P2d 730 (Nev. 1997) (finding that a university did not violate non-discrimination laws when, according to its voluntary affirmative action plan aimed at rectifying a racial imbalance in its faculty, it hired a black professor and subsequently created another position to hire a white professor who was the other finalist in the search).

<sup>2</sup> History of Executive Order 11246, U.S. Department of Labor, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history

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To obtain equality as a fact and as a result, we cannot simply ignore lack of representation. We need to consciously and proactively include. That is the reason Executive Order 11246 and its implementing regulations expressly require organizations to not only adhere to non-discriminatory employment practices, but also to engage in affirmative, proactive action to provide equal opportunity. Non-discrimination, alone, is insufficient. Proactive outreach is a necessary component to achieve equity and that is exactly what the policy at issue in the matter at hand does.

As stated by the Business Law Section of the Florida Bar, the underlying objective of the composition policy is "eliminating bias, increasing diversity and implementing tactics aimed at recruiting and retaining diverse attorneys." The policy at issue seeks to expand access and provide greater opportunity without prohibiting or denying access to anyone else. There is a woeful underrepresentation of diversity in the profession and a manifest racial imbalance in CLE faculty. An appropriate and lawful remedy in such a situation, is to do what the Business Law Section has done and take affirmative steps to rectify the imbalance. The policy of the Business Law Section is wholly consistent with both the letter and the spirit of non-discrimination laws.

In closing, we remind the Court that non-discrimination is the law aimed at preventing harm. However, it is neither the end goal nor the professional standard for which we strive. The rich diversity of this country benefits all of us and moves us forward. This is being recognized by states and other industries.<sup>3</sup> We, as attorneys, must hold ourselves to a higher standard for we are truly the gatekeepers of justice. Two quotes from former U.S. Supreme Court Justice Thurgood Marshall incapsulate what is at stake:

"We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future."

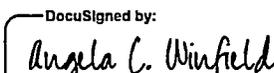
"We will only attain freedom if we learn to appreciate what is different and muster the courage to discover what is fundamentally the same. America's diversity offers so much richness and opportunity. Take a chance, won't you? Knockdown the fences, which divide. Tear apart the walls that imprison you. Reach out. Freedom lies just on the other side. We shall have liberty for all."

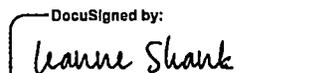
For the foregoing reasons, the April 15, 2021 order should be vacated.

Respectfully submitted,

Law School Admission Council

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<sup>3</sup> See Nasdaq Proposes New Board Diversity Requirements <https://www.skadden.com/insights/publications/2020/12/nasdaq-proposes-new-board-diversity-requirements>

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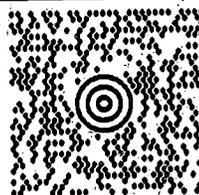
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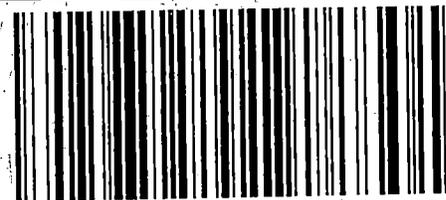
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