IN THE
Supreme Court of Florida
Case No: SC21-284

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

COMMENTS OF THE F. MALCOLM CUNNINGHAM, SR. BAR ASSOCIATION

We, the members of the F. Malcolm Cunningham, Sr. Bar Association ("FMCBA"), hereby submit this comment in opposition to the Court's Order entered on April 15, 2021 concerning the amendment to the rule regulating the Florida Bar 6-10.3:

The Florida Bar's Business Law Section ("Section") sought to lead the charge on advancing the interest of an often overlooked, but much needed goal in the legal field. In doing so, it did not create an arbitrary and capricious scheme, but modeled its framework after a long-standing, respected organization, the American Bar Association. To the dismay of many diverse legal practitioners, this Court, on its own accord, mistook this charge towards much-needed progress as a means to further discrimination. In fixating on whether the Section's policy was a racial quota, we fear that this Court may have missed the forest for the trees: the policy was expressly broader than race or ethnicity and only sought to further the Business Law Section in forward motion that no other section has endeavored. Fortunately, it

is not too late for the Court to undo its mistake. We respectfully request that the court reconsider its stance and reverse its Order in *In re Amend. to Rule Regulating Fla. Bar 6-10.3*, No. SC21-284, 2021 WL 1418863 (Fla. Apr. 15, 2021).

A review of both the language of the Section's proposed policy and the Supreme Court jurisprudence applying strict scrutiny to race-conscious programs reveals that the Business Law Section's laudable effort did not pertain exclusively to race or ethnicity and could not, therefore, have been characterized as a race-conscious program. As a result, it begs the question of whether strict scrutiny should have been applied to this broad policy. Nevertheless, to the extent it was proper to do so, the court should not have ignored those facets of the Section's policy that demonstrated that it was narrowly tailored to pass strict scrutiny, notwithstanding any race-conscious components of the policy.

A. The Court erred in applying the strict scrutiny test because the Section's policy did not pertain exclusively to race or ethnicity.

Because race and ethnicity were just two of at least four diversity factors, it is dubious that the Section's proposed policy should have been wholly subject to the strict scrutiny of *Bakke* and its progeny. Indeed, the Supreme Court has held that equal protection claims challenging gender classifications are subject to intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190 (1976). Disability classifications are subject

to rational basis review—the lowest level of scrutiny. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985). Moreover, the Section's "multiculturalism" diversity factor is even more likely to bear numerous other suspect and non-suspect classifications subject to rational basis review. Therefore, the Court erred in basing the decision to amend Rule 6-10.3 on the strict scrutiny test instead of a less restrictive test and we submit the Court should reverse.

B. Even if strict scrutiny applies, the Section's policy was narrowly tailored

Since the Section's policy proposed to apply beyond race or ethnicity-based quotas, it was error for the court to seek to apply the *Grutter* and *Bakke* cases that analyzed strictly race-conscious programs. Nevertheless, even applying the rubric of these cases, the mere fact that the Section's diversity policy was, well, diverse, would lead to the policy being upheld in much the same way as the prior cases upholding similar policies.

In *Grutter* and *Bakke,* the Supreme Court noted that in order to be narrowly tailored, a race-conscious program cannot be a quota and must only consider race as a 'plus'. Furthermore, "[w]hen using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's

race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S, 336–37. Indeed, the Supreme Court noted that "[t]he denial [of the] right to individualized consideration without regard to [] race is the principal evil of [a] special admissions program." *Id.,* citing *Bakke*, 438 U.S, 318 (1978).

Race or ethnicity was just one of several criteria for diversity under the instant policy. As the court recognized, the Section's aspirations were a cornucopia of variations of diversity: "race, ethnicity, gender, sexual orientation, gender identity, disability, and"—that broadest of broad categories—"multiculturalism." *In re Amend. to Rule Regulating Fla. Bar 6-10.3*, No. SC21-284, 2021 WL 1418863 (Fla. Apr. 15, 2021). It is undisputed that the other factors of diversity include aspects apart from race and ethnicity. As such, the Section's policy could not help but to have been flexible enough to guarantee the individual evaluation of proposed panelists subject to the policy.

For the foregoing reasons, the Florida Supreme Court should reverse its order amending Rule 6-10.3. In the alternative, the court should at a minimum defer amending Rule 6-10.3 until a record exists supporting a conclusion that the Section's policy as applied conflicts with Supreme Court case law. On the journey towards diversity and inclusion, too many times has there been a rush to dismiss the next step

towards progress. "Good trouble" has been called lawlessness; advocacy has been deemed ingratitude. A failure to course-correct now could have a chilling effect that erases all of the recent efforts of the Bench and Bar to gain public's confidence that the legal system is by and for all of the People. Given the division in other areas of our society, this is something the law can ill-afford.

Respectfully Submitted,

/s/Denise A. Mutamba
Denise A. Mutamba
President, FMCBA
FBN: 111727
Email: fmcunninghambar@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing comments was filed with the Clerk of Court via Florida Courts ePortal this 15th day of July, 2021.

/s/Denise A. Mutamba
Denise A. Mutamba
President, FMCBA
FBN: 111727

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 and 9.210, the undersigned certifies that the foregoing comment complies with the applicable font requirements and word limit, excluding those parts exempted by Rule 9.045(e).

/s/Denise A. Mutamba
Denise A. Mutamba
President, FMCBA
FBN: 111727