IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE REGULATING THE FLORIDA BAR RULE 6-10.3(d)

Case No.: SC21-284

COMMENTS OF ZACK SMITH, LEGAL FELLOW, THE HERITAGE FOUNDATION[1]

When George Starke stepped onto the University of Florida's campus on September 15, 1958, to enroll as the school's first black law student, he sat alone in a crowded auditorium, wiping sweat from his brow while under the watchful gaze of undercover Florida State Troopers who sat close by, ready to protect him from physical harm. He faced serious threats to his safety simply because he wanted to attend the state's flagship law school, a privilege that until that day had shamefully been reserved only for white students.[2]

What's shocking today is that some members of the bar in the name of increased diversity are making some of the same arguments

[1] Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

[2] *See* Stewart Moore, *'I Didn't Know What to Expect': UF's First Black Student Reflects on Life as a Civil Rights Trailblazer,* WESH.COM (Updated 6:23 PM, Feb. 1, 2021), https://www.wesh.com/article/george-starke-florida-law-school/35381190.

(no matter how unintentionally or well-intentioned) made more than sixty years ago to prevent Starke and his predecessors from attending the University of Florida's College of Law.[3]

[3] *See, e.g., Virgil D. Hawkins Story*, UF LAW, https://www.law.ufl.edu/areas-of-study/experiential-learning/clinics/virgil-d-hawkins-story (last visited Jul. 14, 2021); *Cf.* Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59, 66 (1984)(stating that "the Board [of Control, which oversaw higher education in Florida at the time] expressed fear of declining revenue in cafeterias and a decline in alumni contributions because of integration"), *with* COMMENTS OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR at 4 (filed Jul. 13, 2021) (stating that "For Florida and the Section to continue to attract businesses to this state, they must continue to demonstrate their commitment to diversity manifest in programs offered"); *Cf.* COMMENTS OF THE BUSINESS LAW SECTION at 6–7 (stating that "Diverse CLE faculty is important both to the professional development of those presenting, and to those attending the classes. The path to partnership and achieving higher level success as an attorney often includes attorneys being able to position themselves as experts through serving as CLE faculty") and COMMENTS OF CARLTON FIELDS, P.A. (filed May 18, 2021) (stating "We have every reason to believe that this Policy will operate to expand professional growth opportunities to both program panelists and participants and to enrich CLE offerings in every important way"), *with Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 322–23 (Thomas, J. concurring) (stating that "It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today . . . The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares students to become leaders in a diverse society . . . The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. . ."); *Cf.* COMMENTS OF THE BUSINESS LAW SECTION at 4 (stating that "To continue working with those clients who drive business, lawyers representing business clients—the Section members—must follow the clients' admonitions . . .The CLE Diversity Policy the Section adopted, in effect, reflects what businesses are requiring: Ensuring diversity in everything we do"), *with Fisher*, 570 U.S. at 325 (Thomas, J. concurring) (stating that while "the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society . . . Yet against, the University echoes the hollow justifications advanced by the segregationists").

"The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[4] In fact, classification based solely on any of the characteristics at issue here demeans us all too.

Accordingly, the Court correctly directed The Florida Bar, "effective immediately," to "withhold its approval from continuing legal education programs that are tainted by such discrimination."[5] This Court took the correct action. To that end, I respectfully submit three points for this Court's consideration:

1) Because the Court enacted this policy in its supervisory capacity, rather than in its adjudicative capacity, it is free to take this action for any appropriate reason. It need not definitively resolve the constitutional questions because the Court is free to take this action if it believes accepting CLE credits from organizations with quota or

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[4] *Grutter v. Bollinger,* 539 U.S. 306, 353 (Thomas, J. concurring in part and dissenting in part).

[5] *In Re: Amendment to Rule Regulating The Florida Bar 6-10.3,* No. SC21-284 (Fla. Apr. 15, 2021) [hereinafter "Order"].

quota-like diversity policies is constitutionally questionable or is simply bad policy.

2) The Court should not allow The Florida Bar to accept CLE credits from organizations with quota or quota-like diversity policies because that would allow the state's imprimatur to be imposed on those bad policies. As the Court made clear in its order, significant constitutional questions can arise from The Florida Bar's acceptance of CLE credits from organizations with these policies, and The Florida Bar may be faced with significant litigation risks if it accepts or advocates for acceptance of such CLE credits.

3) To the extent practical problems exist with The Florida Bar's implementation of this Court's order, the Court could adopt a variety of approaches, such as making clear the extent of the rule's prospective application, directing The Florida Bar to grant undue hardship waivers in appropriate circumstances, or directing The Florida Bar to publish providers from whom CLE credit has been denied on the basis of a prohibited policy.

I. Because the Court ordered the rule change in its supervisory capacity, it is free to act for any appropriate reason. It need not definitively resolve the constitutional questions.

This Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."[6] When it "acts in its administrative capacity [it acts] as chief policy maker, regulating the administration of the court system and supervising all persons who are engaged in rendering legal advice to members of the public."[7] Acting in this capacity, the Court has required members of The Florida Bar to earn a certain number of continuing legal education credits within a set amount of time to remain in good standing.[8] Currently, each "member must complete a minimum of 33 hours of approved continuing legal education activity every 3 years."[9]

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[6] FLA. CONST. art. V, § 15.

[7] *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

[8] *The Florida Bar Re: Amendment to Rules Regulating the Florida Bar (Continuing Legal Education)*, 510 So. 2d 583, 584–85 (Fla. 1987) ("This Court, in establishing an integrated bar, created a representative governing body to assist in supervising Florida's legal profession and to develop programs that benefit the public and the profession through improving the administration of justice.")

[9] Rules Regulating the Florida Bar, Rule 6-10.3(b). This rule further provides that "at least 5 of the 33 credit hours must be in approved legal ethics,

Members can complete these 33 hours of CLE by taking pre-approved courses, or they can self-submit for approval after completing a course if preapproval has not been granted.

In addition, there are at least 11 other ways, such as teaching, writing legal articles, or participating in certain community service activities, by which members can receive CLE credits without taking CLE courses.[10] Plus, the Florida Bar must make at least 10 CLE credits per year available free of charge.[11] And, members may seek an exemption from these requirements for six reasons, including if meeting them poses an "undue hardship."[12]

The Court has delegated to The Florida Bar the responsibility for assisting with certain of its administrative functions, including the implementation and administration of awarding appropriate CLE

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professionalism, bias elimination, substance abuse, or mental illness awareness programs . . ." *Id.*

[10] Standing Policies of the Board of Legal Specialization and Education, The Florida Bar, Policy 5.10.

[11] Standing Policies of the Board of Legal Specialization and Education, The Florida Bar, Policy 5.12.

[12] Rules Regulating the Florida Bar, Rule 6-10.3(c).

credit to its members.[13] Since the Florida Supreme Court, acting through The Florida Bar, functions here in an administrative capacity, it is not bound by many of the same requirements it faces when acting in its adjudicative capacity.[14]

While the Court cannot violate existing laws or constitutional requirements acting in this capacity, it is free to enact appropriate policies. It can take or prohibit certain actions because it wants to avoid problematic constitutional questions from being raised, because it wants to avoid unnecessary litigation related to its policies, or because it simply believes a given policy is poorly drafted or promotes unsound ideas. Any of these reasons provides a sufficient basis for the Court to take action. Indeed, the fact that a policy poses

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[13] *Petition of Florida State Bar Ass'n et al.*, 40 So. 2d 902 (1949) (order creating an integrated, or unified, Florida Bar); *see also Frequently Asked Questions, What is The Florida Bar's Official Governmental Status?*, THE FLORIDA BAR, https://www.floridabar.org/about/faq/ (last visited Jul. 14, 2021) (stating that the Florida Supreme Court performs its supervisory functions through two separate arms, one of which is The Florida Bar, which has "investigative and prosecutorial authority in the lawyer regulatory process").

[14] *Brumbaugh*, 355 So. 2d at 1189 (stating that "in cases such as this, the Florida Supreme Court is not confined to act solely in its judicial capacity. In addition, it acts in its administrative capacity as chief policy maker, regulating the administration of the court system and supervising all persons who are engaged in rendering legal advice to members of the public").

difficult constitutional questions should signal to the Court that it should take action.

II. The Court should not allow The Florida Bar to accept CLE credits from organizations with quota or quota-like diversity policies because that would allow the state's imprimatur to be imposed on those bad policies.

A. The Policy

In September 2020, the Business Law Section of the Florida Bar implemented a CLE Diversity Policy requiring certain CLE panels sponsored by the Section to have a "diverse" faculty based on certain defined characteristics such as "race, ethnicity, gender, sexual orientation, gender identity, disability[,] and multiculturalism."[15] According to the Section, its "CLE Diversity Policy is consistent with the CLE policies from other organizations like the American Bar Association."[16]

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[15] EXHIBIT B, APPENDIX TO COMMENTS OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR TO AMENDMENT TO RULE 6-10.3(D), RULES REGULATING THE FLORIDA BAR, "BLS DIVERSITY & INCLUSION CLE SPEAKER PANEL POLICY ("CLE DIVERSITY POLICY") (SEPT. 1, 2020). The Section provided no definition for any of these.

[16] COMMENTS OF THE BUSINESS LAW SECTION at 4; *see also* ABA DIVERSITY & INCLUSION CLE POLICY, *available at* https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/cle_policy_adopted_by_bog_june10_16.pdf.

B. Defenses Fall Short

In defending its policy, the Business Law Section says, "To the extent The Florida Bar's approval of a CLE course proposal is government action, it is not imposing or ratifying the CLE Diversity Policy."[17] The argument being that because no state action exists, the Court should not concern itself with the diversity policies of voluntary, private organizations like the Business Law Section or the ABA.[18] But that's not the whole story. It can't be.

The Section says, "'the fifth [and fourteenth] amendments erect no shield against merely private conduct."[19] And it cites to a D.C. Circuit Court of Appeals case that quotes the U.S. Supreme Court case of *Shelly v. Kraemer*. It even appends a parenthetical to its *Shelly* citation. The parenthetical says, "covenants between private individuals prohibiting minorities from purchasing property 'cannot be regarded as a violation of any rights guaranteed . . .by the Fourteenth Amendment.'"[20] That misses the point of the *Shelly* case.

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[17] COMMENTS OF THE BUSINESS LAW SECTION at 16.

[18] *Id.* at 14 (stating that "the Section is a voluntary, self-funded association").

[19] *Id.* at 13 (citations and quotations omitted).

[20] *Id.* (citing *Shelly v. Kraemer*, 334 U.S. 1, 13 (1948)).

True, a private entity enacting certain policies or requirements typically does not constitute state action, meaning the Constitution provides no shield against those actions no matter how distasteful. In fact, the Constitution, especially in the First Amendment context, might affirmatively provide protection to those actions.

But, as the Business Law Section alluded to, state action would be present when The Florida Bar, carrying out its mandate from the Florida Supreme Court, approves the CLE credit. And that's the important part.

Courts have found state action and have refused to enforce policies that are constitutionally problematic. Think restrictive housing covenants.[21] In fact, in *Shelly v. Kraemer*, the U.S. Supreme Court specifically recognized that if a court issues a judgment to

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[21] *Restrictive Covenants, Conditions, or Agreements in Respect of Real Property Discriminating Against Persons on Account of Race, Color, or Religion*, 3 A.L.R.2d 466 (stating "Efforts to defeat the restrictions continued, however, and the attack upon them eventually was concentrated around the theory that, even though such antiracial covenants might be valid private agreements, judicial enforcement thereof by a state court amounts to state action and denies a thereby excluded person of the affected race the equal protection of the laws, in violation of his constitutional rights under the Fourteenth Amendment").

enforce a racially or ethnically restrictive housing covenant, state action has occurred,[22] and such enforcement is impermissible.

The U.S. Supreme Court stated, "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials."[23] Because the "restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance,"[24] the U.S. Supreme Court found it irrelevant that the "pattern of discrimination" was "defined initially by the terms of a private agreement."[25] Bottom line: It couldn't be enforced by the judicial branch of government consistent with the Constitution.

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[22] *Shelley,* 335 U.S. at 14—23; *see also Harris v. Sunset Islands Property Owners, Inc.*, 116 So. 2d 622 (Fla. 1959).

[23] *Shelley,* 335 U.S. at 18.

[24] *Id.* at 12.

[25] *Id.* at 20.

This Court is rightly concerned that the same problems could exist when The Florida Bar uses the power of the state to accept and to enforce certain CLE requirements. When the state is being asked to enforce or to ratify an action that would "deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of [courts] to enforce the constitutional commands" rather than to enforce or to ratify the constitutionally questionable actions.[26] And this Court's April 15, 2021 Order seeks to do just that.

C. Diversity quotas or quota-like policies promote bad policy.

But do these policies actually require or make use of a quota? The Business Law Section and others who support the policies argue that they do not.[27] Because the Court ordered The Florida Bar "not to approve any course submitted by a sponsor, including a section of The Florida Bar, that uses quotas . . ." a brief discussion of quotas and the Court's policy is necessary.

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[26] *Id.* at 20 (also noting that "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms").

[27] *See, e.g.,* COMMENTS OF THE BUSINESS LAW SECTION at 13 (stating "[T]he CLE Diversity Policy did not use a quota").

The Business Law Section says that because the "policy considers diversity as a plus factor while still evaluating each potential speaker as an individual without race or ethnicity being the defining feature of his or her credentials," because the policy "does not set aside any number of speaker spots, programs, or even time, for diverse speakers," and because the "Section may waive the CLE Diversity Policy or make an exception to it," it is not a quota.[28] Others make essentially the same argument adding that because of the unique nature of CLE programs and the way they are conducted, no hard caps—and thus no quotas—exist.

But that can't be completely true. At a minimum, some of the Policy's requirements would likely constitute a quota.

The U.S. Supreme said in *Grutter v. Bollinger*, "Properly understood, a quota is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the

[28] COMMENTS OF THE BUSINESS LAW SECTION at 20.

individual from comparison with all other candidates for available seats."[29]

With that understanding, consider the BLS Policy. It specifically provides that "individual programs with faculty of three or four panel participants, including the moderator, will require at least 1 diverse member," that "individual programs with faculty of five to eight panel participants, including the moderator, will require at least 2 diverse members," and that "individual programs with faculty of nine or more panel participants, including the moderator, will require at least 3 diverse members."[30] Standing alone, those certainly sound like quotas.

Do certain carveouts and exemptions provide enough flexibility for those to avoid qualifying as prohibited quotas under *Grutter* or *Bakke*? Are the educational opportunities and benefits provided by CLE courses sufficiently dissimilar to the educational opportunities and benefits provided by higher education courses so that *Grutter* and *Bakke* do not control? What level of scrutiny is appropriate for

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[29] *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (quotations and citations omitted).

[30] CLE DIVERSITY POLICY, *supra* note15; *see also* ABA DIVERSITY & INCLUSION CLE POLICY, *supra* note 16.

mixed-class cases such as the ones here? These are close, difficult legal questions that would take extensive briefing and litigation to definitively resolve. But again, there's no need.

The very fact that these are difficult legal questions supports the Court's decision to prohibit The Florida Bar from granting CLE credit to programs sponsored by organizations with such policies. To avoid additional litigation or confusion, though, the Court should consider adding language clarifying its usage of the term quota, making clear that policies like those of the Business Law Section and of the ABA, which place an overriding emphasis on certain "diverse" factors, are prohibited by the Court's order because they are constitutionally questionable and promote bad policy.[31]

[31] While this Court cited U.S. Supreme Court precedent in its Order, it is always free to interpret the Florida Constitution or Florida state law in a different, more protective way too, so long as this interpretation does not run afoul of the U.S. Constitution. *Rigterink v. State*, 66 So. 3d 866, 888 (Fla. 2011) (citations and quotations omitted) (stating that "state courts are absolutely free to interpret state constitutional provisions to accord *greater protection* to individual rights than do similar provisions of the United States Constitution").

1. The ABA's quota or quota-like policy is in-line with, and builds on, its other ill-advised, constitutionally questionable policies.

It's also important to place this particular policy within the broader context of problematic policies being advocated in the name of diversity by organizations such as the ABA, especially since the Business Law Section based its Policy on the ABA's. As one commenter noted, "As we understand it, the Florida Bar adopted an approach to diversity on panels in continuing legal education programs based on the policy and extensive work that the American Bar Association (ABA) has done on the subject,"[32] stating that the "ABA adopted [its] approach after extensive research and deliberation."[33]

a. ABA Model Rule 8.4(g)

But what of that research and deliberation? As another commenter noted, "The Business Law Section of The Florida Bar, the ABA, the New York City Bar Association, and many other CLE program sponsors adopted policies to include representatives of

[32] COMMENT BY THE LEGAL SERVICES CORPORATION at 3.

[33] *Id.*

underrepresented groups within the legal profession on faculty of those programs in a good faith effort to comply with both [the] text and principles of ABA Model Rule 8.4(g) or its analog adopted in the respective states, including among others Florida Rule 8.4(d)."[34]

This alone should give the Court pause. Authorities have long pointed out the constitutional questions surrounding ABA Model Rule 8.4(g). Many individuals and scholars raised these questions before the ABA even adopted it. In fact, out of the 481 comments filed with the ABA regarding Model Rule 8.4(g), 470 opposed the Rule, many on constitutional grounds. Included among these were Professor Eugene Volokh and former U.S. Attorney General Edwin Meese III.[35] In fact, Attorney General Meese wrote that the ABA's Model Rule 8.4(g) constitutes "a clear and extraordinary threat to free

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[34] COMMENTS OF KAREN J. ORLIN at 2. Florida has not adopted ABA Model Rule 8.4(g) but has in place a very broad pre-existing rule similar in some respects to the ABA's Model Rule. *See ABA Provision Makes Harassment and Discrimination 'Professional Misconduct,'* FLORIDA BAR NEWS (Oct. 1, 2016), *available at* https://www.floridabar.org/the-florida-bar-news/aba-provision-makes-harassment-and-discrimination-professional-misconduct/.

[35] *See* Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" WASH. POST (Aug. 10, 2016); *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

speech and religious liberty" and "an unprecedented violation of the First Amendment" if adopted by states.[36]

Unfortunately, the ABA ignored these concerns and forged ahead. So, it should be no surprise that the only court to have considered whether these constitutional infirmities in fact exist, found that they do and that a state's professional rule, based largely on the ABA's Model Rule, unconstitutionally violated the U.S. Constitution's First Amendment.[37]

b. Diversity Requirement for Accreditation

But the ABA's problematic policies, especially those regarding diversity, don't stop there. There is also a problematic push to require certain diversity metrics in order for law schools to receive accreditation, as many of them must, from the ABA. A diverse group of law professors and organizations have raised concerns about these proposed policy changes.[38] One law professor even believes that if

[36] Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

[37] *Greenberg v. Haggerty*, 491 F.Supp.3d 12 (E.D. Penn. 2020).

[38] Kenneth L. Marcus, *Legal Scholars Castigate the American Bar Association's Proposed Diversity Standards*, FEDSOC BLOG (Jul. 1, 2021),

schools are forced to adopt the ABA's policies in order to be accredited, the schools could be forced to violate the law. Professor David Bernstein said:

> I would add that under the *Grutter* opinion, law schools may only engage in racial and ethnic preferences if the law school faculty and others involved in the school's academic mission have determined that such preferences would add diversity to the school in a way that would be educationally beneficial. By seeming to mandate such preferences, the ABA would be taking the decision out of the hands of the individual schools, and instead making it a requirement for accreditation. If a particular law school disagreed with the ABA's views on diversity, the ABA would nevertheless require that school to act illegally lest its accreditation be threatened.[39]

Again, these are very difficult and troubling questions. And while the ABA and other private organizations are certainly free to adopt them, these difficult questions cannot be ignored by this Court when the state's power must be brought to bear to approve or to acquiesce in them.

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https://fedsoc.org/commentary/fedsoc-blog/legal-scholars-castigate-the-american-bar-association-s-proposed-diversity-standards.

[39]COMMENTS OF DAVID E. BERNSTEIN ON PROPOSED CHANGES TO ABA LAW SCHOOL STANDARDS PERTAINING TO "NON-DISCRIMINATION AND EQUAL OPPORTUNITY" AND "CURRICULUM" (JUN. 3, 2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-bernstein-and-leiter.pdf.

III. The Court should not let the parade of horribles influence its decision making. Administrative convenience does not excuse the continuation or support of constitutionally questionable/bad policies.

Finally, many of the commenters have raised practical concerns regarding the Court's implementation of the Order. Some are well-founded. Members of The Florida Bar completed CLE courses, but had not yet submitted them for credit or had not yet received credit for them and were denied. Some members planned and prepared upcoming seminars before the Court's Order, but they can no longer receive credit for those courses because the sponsoring organization mandates constitutionally problematic policies. These might be circumstances where the Court should recommend or require The Florida Bar to grant undue hardship exemptions to those attorneys.

Some have also raised concerns that "lawyers do not necessarily know how an entity that offers a CLE program chooses its speakers. They may therefore take courses anticipating, as they always have, that they can apply for and receive CLE credit, only to find out that the entity chose speakers in a manner that made the course

ineligible."[40] But Florida Bar members have always had some responsibility to make sure certain course requirements are met to receive credit and that credit is earned in certain specified categories. If members attend pre-approved courses, this should not be a problem. If members take courses and then seek approval, this burden is not likely to be significantly onerous, especially if The Florida Bar issues guidance or maintains records of programs that have previously been denied credit.

Other concerns such as whether certain organizations will continue to host events in Florida should not be considered by this Court. The Court has appropriately made clear that no matter how noble the perceived goal, constitutionally problematic means cannot be used to achieve it.

One final note: Some have encouraged the Court to take a program-by-program approach to determine whether a quota or quota-like policy impermissibly infected each individual CLE panel regardless of the policies of the sponsoring organization. While I am sympathetic to the goals of these suggestions—that the Court should

[40] COMMENTS OF THE FLORIDA BAR PUBLIC INTEREST LAW SECTION at 12–13.

only ban those programs that actually used an impermissible quota—that suggestion seems unworkable and problematic. After all, if an organization has a policy, it only makes sense that programs sponsored by that organization will comply with its policy. To adopt this program-by-program approach would invite the Court to only give the appearance of taking action while in reality little would change.

To be clear, we all want our legal system to be open and accessible to everyone—regardless of any specific characteristics—to all who come before it. As Justice John Marshall Harlan said in his lone dissent in *Plessy v. Ferguson* over 125 years ago, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[41] The Court with its Order has taken steps to make sure that remains true. It took a long time—too long—for Justice Harlan's views to be vindicated. But vindicated they were. Even if slight further clarification or refinement is needed, this Court should not significantly change course now.

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[41] *Plessy v. Ferguson*, 1*63* U.S. 537, 559 (Harlan, J. dissenting).

CERTIFICATE OF SERVICE

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

/s/ Zack Smith
Zack Smith
Florida Bar No. 107218

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 the undersigned certifies that the foregoing complies with the applicable font requirements because it is written in 14-point Bookman Old Style. It contains 4,487 words, excluding those parts exempted by Rule 9.045(e).

/s/ Zack Smith
Zack Smith
Florida Bar No. 107218