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IN THE SUPREME COURT OF FLORIDA
No. SC21-284

IN RE: AMENDMENT TO RULE REGULATING THE FLORIDA BAR 6-10.3.
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COMMENT OF THE VIRGIL HAWKINS FLORIDA CHAPTER NATIONAL BAR ASSOCIATION, INC. IN OPPOSITION

INTRODUCTION

The Virgil Hawkins Florida Chapter National Bar Association, Inc. ("VHFCNBA") (formerly the Florida Chapter of the National Bar Association) originated in the 1950s through the efforts of a group of active Black lawyers who tirelessly fought against injustice in Florida. The VHFCNBA's core objective is to promote the administration of justice, preserve the independence of the judiciary, uphold the honor and integrity of the legal profession, and protect the civil and political rights of the citizens of the United States of America as guaranteed by the Constitutions of the United States and the State of Florida. *Virgil Hawkins Fla. Chapter Nat'l Bar Ass'n By-Laws*, Mission Statement (2018).

Today, the VHFCNBA consists of a network of nearly 1,000 attorneys throughout the State of Florida and serves as the umbrella

organization for several affiliate local chapters in the State. Local affiliate chapters include the Caribbean Bar Association, Daniel Webster Perkins Bar Association, F. Malcolm Cunningham, Sr. Bar Association, George Edgecomb Bar Association, Haitian Lawyers Association, National Bar Association Southwest Florida Chapter, Paul C. Perkins Bar Association, Gwen S. Cherry Black Women Lawyers Association, Tallahassee Barristers Association, T.J. Reddick Bar Association, Virgil Hawkins Bar Association, and Wilkie D. Ferguson, Jr. Bar Association.

SUMMARY OF COMMENT

The change to Rule 6-10.3 has enormous impact on the work done by the VHFCNBA and its efforts to promote the equality of all people in our system of civil life and government. Accordingly, to promote an understanding of the potential impact of the rule proposal, the VHFCNBA submits this comment asking for withdrawal of the Order.

Our comment presents two arguments. First, the Supreme Court's authority under Rule 1-12.1 of the Rules Regulating The Florida Bar to amend Rule 6-10.3(d) requires the initiation of a

petition invoking the Court's Article V, Section 15 subject matter jurisdiction over attorney discipline. Second, given the complex legal, professional, and ethical issues involved in the determination of whether a particular classification runs afoul of the federal Equal Protection Clause, the Court should save the question of the legality of the Business Law Section's continuing legal education (CLE) policy for a *bona fide* case or controversy. Alternatively, this Court should direct The Florida Bar to utilize its rulemaking authority to evaluate the issue and submit its proposal to the Court.

In the course of presenting its comments, the VHFCNBA presents a brief history of Black lawyers before and since the founding of The Florida Bar.

BACKGROUND[1]

Florida's history of systematic exclusion of Blacks from lawyering is not an exaggeration. In 2009, the VHFCNBA published *Florida's First Black Lawyers: 1869-1979* (2009), which provides a documented history of Black lawyers in the State of Florida as well

[1] Senator Arthenia L. Joyner, Harley Herman, and Delano Stewart assisted in compiling this background information on the history of Florida's black lawyers during the early years of the creation of a mandatory bar in Florida.

as their struggles. Racial discrimination had and still has a profound impact on The Florida Bar and the role of organized lawyers in promoting equality and equity in the profession. The "bar," although originally implemented to separate spectators to a medieval English court proceedings from the proceedings' participants, has been a literal bar to Black lawyers aspiring to practice law.

For many, this Court's creation of a unified mandatory bar system in the late 1940s created more opportunities for lawyers to practice in the State of Florida. Yet, for Blacks, the creation of The Florida Bar did just the opposite. At the time of The Florida Bar's formation, the staunchly pro-segregationist state bar association membership gained statewide control over the Bar and all persons authorized to practice law in Florida, injecting segregationist ideals into the very origination of The Florida Bar. Gary Blankenship provided a historical and bone-chilling glimpse of The Florida Bar's order of business during its first convention in 1950:

> That first convention featured a debate on keeping the association intact for a year in case the Bar failed to work out (the motion failed) and an oblique reference to the attempt by African-American Virgil Hawkins to win admission to the University of Florida law school.

Gary Blankenship, *The Story of The Florida Bar*, 74 Fla. Bar Journal 4, 18.

Bernice Gaines, Florida's first Black female lawyer, personally witnessed the unvarnished bigotry promoted at 1950s meetings of The Florida Bar, making its annual conventions a hostile environment for the few Blacks practicing law and aspiring to practice law in Florida. Ironically, many of the early Bar meetings were held at Florida Agricultural and Mechanical University's law school ("FAMU"), *created by the State Legislature to enforce segregation* after Virgil Hawkins was denied admission into the University of Florida School of Law. Ms. Gaines, a 1958 graduate from FAMU Law School, attended these early meetings. Full justice to Ms. Gaines' experience can be drawn from her own words in her 2018 interview, quoted here in full:

> It's probably worth saying that there was some tension between the races when I was at FAMU. FAMU was located in Tallahassee and was the only law school in the state's capital. When the pro-segregation Florida state bar association met, they would meet at FAMU because they liked the layout of the law school.
>
> I remember hearing a number of speeches by the bar association that were offensive. One of the more offensive

> talks was by a white lawyer who gave a speech about the law and the future of "the cracker crop", meaning their white children. His speech was all about what white Floridians had to do to preserve the status quo for themselves and their kids. While I don't remember all of the details, I do recall that it was a pretty pointed discussion about the need to maintain white supremacy for their "crop" in spite of the *Brown* decision.
>
> I thought it was disgusting that the Florida Bar Association was sponsoring a discussion about the importance of segregation and Jim Crow laws at the law school that racism had created, in front of the very people they were discriminating against. This was pretty typical of the time. I tried to walk out of the talk but one of my professors insisted that I stay put since I made the choice to attend the speech, and we were pretty much outnumbered.

Angela Dorn, *On Being The First: An Interview With Bernice Gaines*, #BLACKHER (Jan. 4, 2018).[2]

Black lawyers received similar treatment in voluntary bar associations throughout the State of Florida at the time, as local bar leaders parroted The Florida Bar's discriminatory ideals. Delano Stewart is one glaring example. After graduating from Howard University School of Law and being admitted into The Florida Bar in

[2] (available at https://blackher.us/on-being-the-first-an-interview-with-bernice-gaines/?fbclid=IwAR3-7QhcL4fBBbpMWCwD-ax-9Y2dzqLpkIQ-LVnmaESDcHzcvj3UcpYk5jo).

1965, Mr. Stewart returned home to a Tampa legal community that excluded him solely because of the color of his skin. Notwithstanding the Civil Rights Act of 1964, the Hillsborough County Bar Association's charter continued to exclude Black lawyers. Mr. Stewart forced his way into HCBA membership, using the threat of litigation to convince these lawyers to comply with the law. HCBA only amended its charter in 1972 to allow Blacks entry to membership.

Today, Blacks continue to be underrepresented in the legal profession. According to the American Bar Association's 2020 Profile of the Legal Profession, Black attorneys represent just 5% of all attorneys in America, even though 13.4% of the U.S. population is Black. *See* American Bar Association, *ABA Profile of the Legal Profession 2020*, at 37 (July 2020).[3] Even worse, this percentage has remained stagnant for the past ten years. In 2010, 5% percent of all attorneys in America were Black. *Id.*

The Business Law Section's (BLS) policy on CLE faculty

[3] (available at https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf).

provides a roadmap for today's efforts to promote and maintain a vibrant professional society that mirrors the population of the United States of America and the State of Florida. Encouraging our state and local bar associations to eliminate bias, increase diversity, and implement actions aimed at educating, recruiting, and retaining high quality lawyers is a worthy goal. The BLS's inclusion of an educational goal that accompanies CLE accreditation is the most specialized mechanism for achieving the benefit of diverse perspectives from CLE panelists and materials.

The policy is not unlike Florida's Judicial Nominating Commission statutory mandate that requires the Governor to appoint JNC members *who reflect the diversity of the jurisdiction* in which the JNC convenes, § 43.291(4), Fla. Stat.:

> (4) In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit.

This expression of legislative public policy is equally applicable and

sensible as a statement of judicial administrative policy in the authorization and supervision of the practice of law in the State.

COMMENT

I. The Court Lacked Authority to Amend The Rules Regulating The Florida Bar in the Absence of an Invocation of The Court's Article V, Section 15 Subject Matter Jurisdiction.

A. Under Rule 1-12.1 of the Rules Regulating The Florida Bar, the Court's subject matter jurisdiction is invoked by a petition to amend filed in the Supreme Court.

Article V, Section 15 of the Florida Constitution sets forth the Court's exclusive jurisdiction over the subject matter of attorney discipline. It provides that the Court shall have "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, § 15, Fla. Const. In compliance therewith, the Court adopted rules and regulations concerning the discipline of persons admitted to The Florida Bar, including Rule 1-12.1 of the Rules Regulating The Florida Bar, which controls the process for amending the Bar Rules.

Pursuant to Rule 1-12.1(f), the applicable amendment procedure, any amendment to Rule 6-10.3(d) "must be by petition to the Supreme Court of Florida." Furthermore, Rule 1-12.1(g)

unambiguously provides *who* may file a petition to amend: The Florida Bar Board of Governors or fifty members of The Florida Bar in good standing. After notice and an opportunity for comments and objections, this Court's procedural role is to review the proposed amendment and decide whether to issue an order approving the amendment. R. Regulating Fla. Bar 1-12.1(h). Rule 1-12.1, unlike Rule 2.140(d) of the Florida Rules of General Practice and Judicial Administration, contains no procedural mechanism for Court-initiated amendments.

The VHFCNBA's threshold concern is the Court's authority to amend Rule 6-10.3(d) in the absence of an invocation of the Court's subject matter jurisdiction by the filing of a Rule 1-12.1(f) petition to amend. Under Florida law, a court's subject matter jurisdiction is a separate and distinct concept from its power to exercise that jurisdiction. *Roberts v. Seaboard Sur. Co.*, 158 Fla. 686, 698-99, 29 So. 2d 743, 749 (1947). To be sure, a circuit court judge who learns of an ongoing dispute that falls within the court's subject matter and territorial jurisdiction cannot, on the court's own motion, issue an order resolving the dispute when no one has invoked the court's

jurisdiction by filing a complaint. *Coffrin v. Sayles*, 128 Fla. 622, 630-31, 175 So. 236, 239-40 (Fla. 1937)

This Court's jurisprudence has long forbidden the exercise of jurisdiction "on its own initiative," requiring Florida courts to wait for jurisdiction to "first be lawfully invoked and called into action by the party or parties." *State ex rel. Associated Utils. Corp. v. Chillingworth*, 132 Fla. 587, 589-90, 181 So. 346, 348 (Fla. 1938). *See Lovett v. Lovett*, 93 Fla. 611, 629-30, 112 So. 768, 775-76 (1927) ("before this potential jurisdiction of the subject matter . . . can be exercised, it must be lawfully invoked and called into action"). *Roberts*, 158 Fla. at 698-99 ("There must be some appropriate application invoking the judicial power of the court in respect to the matter sought to be litigated; such as the filing of a petition, complaint or other proper pleading, for it is in this manner that the court's power over the subject matter is invoked.").

Applying these principles, district courts have conceptualized subject matter jurisdiction as having two distinct aspects: 1) whether the court has power to address a class of cases; and 2) whether jurisdiction was lawfully invoked by the filing of a proper pleading.

Lucky Nation, LLC v. Al-Maghazchi, 186 So. 3d 12, 14-15 (Fla. 4th DCA 2016) ("Subject matter jurisdiction has two components: (1) 'the power of the trial court to deal with the class of cases to which a particular case belongs' and (2) lawfully invoking the court's jurisdiction 'by the filing of a proper pleading.'" (quoting *Garcia v. Stewart*, 906 So. 2d 1117, 1122 (Fla. 4th DCA 2005)). *See Phenion Dev. Grp., Inc. v. Love*, 940 So. 2d 1179, 1182 (Fla. 5th DCA 2006); 12A *Fla Jur Courts and Judges* § 82.

Importantly, this Court acknowledged the distinction between its subject matter jurisdiction over lawyer discipline and a lawful invocation of the Court's subject matter jurisdiction. *In re Amendments to the Rules Regulating The Fla. Bar*, 718 So. 2d 1179, 1179 (Fla. 1998) ("This matter is before the Court on the petition of The Florida Bar for amendments to the Rules Regulating The Florida Bar. The petition is brought on the authority of the Board of Governors of The Florida Bar and **invokes** this Court's exclusive jurisdiction of the discipline of persons admitted to the practice of law under article V, section 15 of the Florida Constitution." (emphasis added)); *Fla. Bar v. Hale*, 762 So. 2d 515, 516 (Fla. 2000) (explaining

that petition for disciplinary resignation **"invoked"** the Court's jurisdiction under article V, section 15 of the Florida Constitution).

Applied here, the clearly established procedure for invoking the Court's jurisdiction to amend Rule 6-10.3(d) is set forth in Rule 1-12.1(f). It is not ambiguous. A textual analysis of the rule confirms it does not authorize, much less contemplate, an amendment to Rule 6-10.3(d) on the Court's own motion, as Rule 2.140(d) of the Florida Rules of General Practice and Judicial Administration does. Thus, in the absence of a Rule 1-12.1(f) petition to amend that invokes the Court's jurisdiction, the Court may not amend Rule 6-10.3(d) *sua sponte*.

B. There is no sound precedent justifying an amendment to the Rules Regulating The Florida Bar on the Court's own motion.

Consistent with *Lovett*, this Court has rarely amended the Bar Rules in the absence of a Rule 1-12.1 petition to amend invoking its jurisdiction.[4] The few instances in which the Court has appeared to

[4] In other instances, the Court has added its own amendments to the Bar Rules after reviewing and adopting amendment submitted by The Florida Bar in a properly filed petition to amend. *In re Amendments to the Rules Regulating the*

rewrite the rules is a recent phenomenon, with the first such order issued in 2015. Even so, a review of these orders provides no clarity as to the jurisdictional ground for *sua sponte* amendments to the Bar Rules. Each order cites a different jurisdictional ground, without offering any legal analysis or guidance.

For example, in *In re Amendments to Rule Regulating the Fla. Bar10-9*, 176 So. 3d 1273 (Fla. 2015), the Court merely cited Article V, Section 15 of the Florida Constitution as the jurisdictional ground for amending Rule 10-9.1 (Procedures for Issuance of Advisory Opinions on the Unlicensed Practice of Law) on its own motion. As explained *supra*, the Court's subject matter jurisdiction must be

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Fla. Bar (Biennial Petition), 167 So. 3d 412, 413 (Fla. 2015) ("Additionally, the Court, on its own motion, amends Bar Rule 3-7.9 (Consent Judgment."); *In re Amendments to Rules Regulating the Fla. Bar re Ch. 11 T.F.*, 964 So. 2d 690, 691 (Fla. 2007) (on petition to amend, adopting proposed amendments to Law School Practice Program and *sua sponte* amending "another subdivision to the same rule so that graduates of Florida and out-of-state law schools would be treated equally"); *Fla. Bar Re Amendments to Rules Regulating the Fla. Bar*, 644 So. 2d 282, 283 (Fla. 1994) ("In addition to the Bar's proposals, this Court, on its own motion, amends rule 3-7.10 to include a new subdivision that specifies the costs that are taxable in reinstatement and readmission proceedings."); *In re Amendment to Rules Regulating Fla. Bar*, 605 So. 2d 252, 254 (Fla. 1992) ("In addition to the bar's proposals, this Court, on its own motion, makes the following rule changes . . . .).

Whether this process is authorized is a question for another day, particularly given that when such an amendment is made by the Court on its own motion, the order did not provide for comments on the *sua sponte* amendment.

properly invoked under *Lovett*.

During the COVID-19 pandemic five years later, the Court cited two jurisdictional grounds—Article V, Section 15 of the Florida Constitution as well as Rule 1-12.1(a)—for amending Rule 1-12.1(j) on its own motion. *In re Covid-19 Emergency Measures Relating to the Rules Regulating the Fla. Bar & Amendment to Rule Regulating the Fla. Bar 1-12*, 292 So. 3d 1144 (Fla. 2020). However, a textual analysis of Rule 1-12.1(a) reveals no procedural basis for *sua sponte* amending the Bar Rules. It merely defines who has authority to amend the rules. The subrule grants the Board of Governors of The Florida Bar authority to amend chapters 7 and 9, as well as standards for the individual areas of certification within chapter 6, and then provides that all other amendments to the Bar Rules must be by the Supreme Court:

> **(a) Authority to Amend**. The Board of Governors of The Florida Bar has the authority to amend chapters 7 and 9, as well as standards for the individual areas of certification within chapter 6 of these Rules Regulating The Florida Bar, consistent with the notice, publication, and comments requirements provided below. **Only the Supreme Court of Florida has the authority to amend all other chapters of these Rules Regulating The Florida Bar**.

Fla. Bar. R. 1-12.1(a) (emphasis added). Subrules 1-12.1(b)-(e) dictate the process for Board of Governor-authorized amendments to the Bar Rules. Subrules 1-12.1(f)-(h) dictate the process for amending the remaining Bar Rules, which must be by petition to amend filed with the Court. Corroborating the absence of authority to *sua sponte* amend the Bar Rules, Rule 1-12.1 contains no Court amendment procedure.

Finally, in the Order to which this Comment is directed, the Court cited Rule 2.140(d) of the Florida Rules of General Practice and Judicial Administration as well as Article V, Section 15 of the Florida Constitution as its jurisdictional basis. *In re Amendment to Rule Regulating the Fla. Bar 6-10*, 46 Fla. L. Weekly S73 (Fla. April 15, 2021). Rule 2.140(d)'s amendment procedure provides no jurisdictional ground. Rule 2.110 expressly limits the scope of the Florida Rules of General Practice and Judicial Administration to "administrative matters in all courts to which the rules are applicable by their terms." Fla. R. Jud. Admin. P. 2.110. The Bar Rules do not address administrative matters in the courts. Furthermore, Rule 2.140(d)'s Court amendment procedure merely confirms the

constitutional mandate that the Court "adopt rules for the practice and procedure in all courts." Fla. Const. Art. V, § 2(a).

In sum, the Court's *sua sponte* amendment to Rule 6-10.3(d) remains unprecedented and unsupported by a sound jurisdictional basis.

For many lawyers, including members of the VHFCNBA, the procedural anomaly surrounding the Court's action is alarming, because no member of the Court is a member of the VHFCNBA or one of its affiliates. Nor is any member of the Court a Black lawyer. Yet, the Court's rule change has a particular impact, nearly an exclusive impact, on Black lawyers and lawyers of color, whose leadership and participation in diversity and equity issues have been profound and beneficial to society and the profession. As the Florida Legislature declared as a matter of public policy when constituting the membership of the Judicial Nominating Commissions, *diversity* remains a core value of our judicial system.

Legislating on matters of diversity that particularly and directly impact Black lawyers without lawyers and the entire organized bar first discussing, evaluating, and proposing the means to incorporate

diversity into the profession is contrary to public policy and the legislative prescription for our judicial system. Black lawyers, who historically have been excluded from Florida law schools, the judiciary, and Bar participation solely because of the color of their skin, should have a real and meaningful opportunity to do more than comment on a *sua sponte* rule change that is already the law in Florida without any prior notice or an opportunity to be heard.

Even more, the Court's rule change comes in the absence of a case or controversy challenging the constitutionality (or advisability) of the Business Law Section's studied policy and in the absence of a proper invocation of the Court's rule-making authority. Given the scarcity of cases in which this Court has *sua sponte* amended Bar rules, one can reasonably ask: Is this the policy that should define the Court's jurisdictional limits in matters of bar rules? VHFCNBA urges the Court to exercise judicial restraint and to follow the established amendment procedure.

As former Justice Luck once admonished in a dissent, "once we codified the process of how we change our procedural rules, we have to stick to it or update the process . . . . But we can't ignore the

process altogether and do whatever we want, whenever we want to do it." *In re Amendments to the Fla. Evidence Code*, 278 So. 3d 551, 565 (Fla. 2019) (dissenting, J. Luck).

If the Court finds a rule change necessary, it should invite the representative public servants comprising The Florida Bar Board of Governors[5] to consider the issue, craft a proposal, and present its properly-filed petition to amend. Until then, Rule 1-12.1(f) should be strictly construed and strictly followed.

II. Whether the Business Law Section's CLE Policy Violates the Equal Protection Clause of the U.S. Constitution Should Be Resolved in a *Bona Fide* Case or Controversy.

A second and equally pressing concern of the VHFCNBA is the Court's *sua sponte* conclusion regarding the applicability of the Equal Protection clause to the BLS's policy, in the absence of a case or controversy and without the briefing and legal analysis that ordinarily helps inform the Court on issues under consideration. The contours of the federal Equal Protection Clause are far too complex to be adjudicated in a vacuum, outside the normal litigation posture.

[5] Black lawyers and other lawyers of color are represented on the Board of Governors of The Florida Bar.

For example, this Court has divided statutory challenges into two categories: facial challenges and as-applied challenges. "For a statute to be held facially unconstitutional, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) (citing *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)). On review, the Court "consider[s] only the text of the statute, not its specific application to a particular set of circumstances." *FOP v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018).

Serious and reasonably understood doubts exist as to whether the BLS policy is unconstitutional in any or all of its applications. The BLS policy broadly defines "diverse members" as "members of diverse groups based upon race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism." This is little different from the Legislature's community "diversity" mandate in § 43.291(4), Fla. Stat., a law that has existed in Florida without any determination that it violates the Equal Protection Clause.

The BLS policy is not without flexibility, in keeping with a policy

of promoting diversity. It sets goals for the number of diverse members who should be included on a CLE program faculty. But the policy does not apply if, after a diligent search and inquiry, the proponents of the CLE have affirmed they have been unable to obtain the participation of the aspirational diverse membership of the CLE panel.

Applying the plain text of the policy, it is not difficult to construct a CLE panel that complies with both the BLS policy as well as *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). For example, a four-panel-member CLE with one member of the disability community would comply with the BLS policy and be consistent with federal law. It is well-settled under federal law that disabled classifications are non-suspect and therefore subject to rational basis review. *See Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 2643 (1993) (mentally retarded statutory classification subject to rational-basis review), *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249 (1985) (applying rational basis to disabled persons).

Likewise, the catchall term "multicultural" is a neutral

classification not subject to any heightened review or strict scrutiny. *Villanueva v. Carere*, 85 F.3d 481, 488 (10th Cir. 1996) (finding that a classification based on "culture" did not trigger strict scrutiny, where policy required open enrollment and prohibited discrimination).

In the absence of a facial challenge, the policy could only be challenged on an as-applied basis, requiring a determination of whether the policy as applied to a challenger violates the Equal Protection Clause. Such an analysis, however, would require a complainant and a specific application of the policy to a specific factual situation. The VHFCNBA urges that any determination regarding the constitutionality of the BLS policy follow a due process proceeding initiated by a party with a *bona fide* case or controversy.

CONCLUSION

VHFCNBA respectfully requests that the Court withdraw the order amending Rule 6-10.3(d) on the Court's own motion and declaring the Business Law Section's CLE policy violative of the federal Equal Protection Clause. To the extent the Court determines that amendment is necessary, it should invite The Florida Bar to

consider the issue and file any petition to amend it deems necessary. VHFCNBA stands ready to assist this Court, The Florida Bar, the legal profession, and the State of Florida in ensuring that Florida and all its institutions welcome the participation of a vibrant, diverse, and inclusive community that is reflective of the best the State of Florida and the United States of America has to offer.

Respectfully submitted,

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