THE BUCKEYE INSTITUTE

December 20, 2024

Submitted via email

David A. Brennen
Council Chair
Council of the ABA Section of Legal Education and Admissions to the Bar

Re: Standard 206: Access to Legal Education and the Profession (previously titled "Diversity and Inclusion")

Dear Chair Brennen,

The Buckeye Institute writes in response to the Council's request for comments on proposed changes to Standard 206 of the ABA Standards and Rules of Procedure for Approval of Law Schools. The Buckeye Institute urges the Council to reconsider the proposed changes because they violate the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (*SFFA*). The proposed rule illegally pressures schools to use group identity in admissions and hiring.

The November 18, 2024, proposed amendments change the title of the standard from "DIVERSITY AND INCLUSION" (presumably to comply with *SFFA*) to "ACCESS TO LEGAL EDUCATION AND THE PROFESSION" but the standard still insists on diversity based on group identity. The proposed standard reads:

> For purposes of promoting the legitimacy of the justice system, a law school shall demonstrate by concrete actions, a commitment to:
>
> (a) diversity, inclusion, and access to the study of law and entry into the legal profession for all persons including those with identities that historically have been disadvantaged or excluded from the legal profession due to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and/or socioeconomic background.
>
> (b) providing a supportive learning environment for all students, in part by working to achieve a faculty and staff that are diverse with respect to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and/or socioeconomic background. A supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community.

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This revised rule bows to the pressure of those that would evade, rather than comply with, *SFFA*'s holding. They would preserve the debunked concept of "diversity" using group identities.[1]

This is wrong and impermissible. "[J]ust as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown v. Board of Education*, *the alleged educational benefits of diversity cannot justify racial discrimination today*." *SFFA*, 600 U.S. at 256 (Thomas, J., concurring) (alteration in original & emphasis added) (citation omitted). Indeed, "'[c]lassifying and assigning' students based on their race 'requires more than … an amorphous end to justify it.'" *Id.* at 214 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007)). Further, not even the amici in *SFFA*—including the American Bar Association—could "point[] to any concrete and quantifiable educational benefits of racial diversity." *Id.* at 254 (Thomas, J., concurring).

And "'[w]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Id.* at 230 (citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

Contrary to the proposed rule's preamble's assertion that it is for "purposes of promoting the legitimacy of the justice system," the proposed rule does the opposite. It demands "action" to ignore—even flout—the Supreme Court: Law schools must take action to provide diversity, and it pushes schools to recognize group identities rather than *individual* characteristics. The Court's allowance for schools to consider *individuals'* demonstrated ability to overcome obstacles is not a license to ignore its overall command against group identity. The Court was clear: "[T]he touchstone of an *individual's* identity is not challenges bested, skills built, or lessons learned but the color of their skin." *Id.* at 231 (emphasis added). Rather,

> [a] benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Id. at 230–231 (emphasis in original). Focusing on group identity in admissions or hiring violates the guarantee of equal protection in the Fourteenth Amendment. "[T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* at 206 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290 (1978) (opinion of Powell, J.)). Including group identity characteristics into Standard 206 encourages law schools to focus specifically on those characteristics, to the exclusion of others. This is not a commitment to access for all persons.

[1] Many of the listed categories have not, in fact, been historically excluded from the legal profession due to invidious reasons.

Perhaps the greatest danger of the proposed rule is that a university's internal deliberations of *how* it is complying with the rule and the ABA's *adjudication* of whether the university's actions are sufficient are all done in secret. The public will not observe any aspect of this process. It took years for Students for Fair Admissions to learn the truth about Harvard's discriminatory "actions"—and that was only after extensive and expensive discovery and court proceedings. The proposed rule solves nothing; rather, it encourages more litigation. That is not good for anyone.

True "legitimacy of the justice system" as it relates to admission or hiring requires consideration of an *individual's* specific abilities and talents—not his or her immutable characteristics or group identity. Therefore, The Buckeye Institute proposes a simple formulation that focuses on the *individual* and includes *all* persons:

> **For purposes of promoting the legitimacy of the justice system:**
>
> **(a) A law school shall demonstrate by concrete actions a commitment to access to the study of law and entry into the legal profession for all persons.**
>
> **(b) A law school shall demonstrate by concrete actions a commitment to creating and maintaining a supportive learning environment for all students, in part by providing access to faculty and staff positions for all persons. A supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community.**

If a commitment to access for all is the ABA's and the law schools' goal, then the standards should reflect a commitment to true access for all, not only members of the ABA's preferred groups. The ABA and law schools can avoid further legal action by simply assuring access to the legal profession to all persons.

Therefore, the Council should reconsider the proposed changes and adopt The Buckeye Institute's proposed standard.

Respectfully,
David C. Tryon
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The Buckeye Institute