

Prof. Leo Martinez  
Council Chair  
ABA Section of Legal Education and Admissions to the Bar American Bar Association  
321 North Clark Street  
Chicago, IL 60654

c/o William E. Adams, Jr. | Managing Director, Accreditation and Legal Education  
ABA Section of Legal Education and Admissions to the Bar

Dear Prof. Martinez:

I write in response to your notice and request for comments regarding proposed amendments to the American Bar Association's diversity standards with the following observations and suggestions:

1) The definition of "underrepresented groups" would almost certainly exclude Jewish Americans, as well as other groups that have been limited by a history of discrimination but have nonetheless achieved a higher-than-proportionate degree of success in admissions or employment. To address this problem, I would suggest amending the definition of "underrepresented groups" in the Interpretation of 206-1: *Underrepresented groups are groups related to race, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status that are underrepresented in the legal profession in the United States when compared to their representation in the general population of the United States OR THAT HAVE EXPERIENCED A HISTORY OF DISCRIMINATION THAT HAS LIMITED PARTICIPATION RELATIVE TO WHAT THEY WOULD OTHERWISE HAVE ACHIEVED.*

2) I would note that the 206-1 Interpretation (and other language in the proposal) may create other forms of liability for compliant institutions. For example, the emphasis on statistical representation could be construed to favor the sort of racial balancing that the Court has consistently found to violate the Equal Protection Clause.

3) Aside from this specific language, other problems remain. For example, to the extent that any institution should adopt or increase racial preferences in compliance with this policy, rather than on the basis of their independent academic judgment, they may be unable to avail themselves of academic freedom arguments that the Court has found convincing in the past.

I hope that this is helpful.

Sincerely,

Kenneth L. Marcus  
Former Assistant U.S. Secretary of Education for Civil Rights  
Chairman, The Louis D. Brandeis Center for Human Rights Under Law  
Distinguished Senior Fellow, Center for Liberty & Law, Scalia Law School,  
George Mason University