IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1292

IN RE: AMENDMENTS TO RULES REGULATING THE FLORIDA BAR 5-1.1
_____/

MOTION FOR REHEARING, OR IN THE ALTERNATIVE, MOTION TO ACCEPT UNTIMELY COMMENTS AND WAIVER UNDER RULE 1-12.1, OR MOTION FOR LEAVE TO APPEAR AS AMICUS ON REHEARING

The Florida Bankers' Association ("FBA"), as proposed amicus, special movant, and interested party, moves under Florida Rules of Appellate Procedure 9.330 and 9.370 for rehearing of the Court's March 16, 2023 Opinion, *In re: Amendments to Rules Regulating the Florida Bar—Miscellaneous*, specifically amending Florida Bar Rule 5-1.1(g) governing the Interest on Trust Accounts ("2023 IOTA Amendment"). Alternatively, FBA seeks to file comments out of time or leave to appear as amicus curiae.

No party will be prejudiced by the Court's granting this Motion. Instead, the Court will benefit by having meaningful comments by an interested party whose members will be negatively, and in many cases severely, impacted by the 2023 IOTA Amendment.

I. STATEMENT OF INTEREST OF THE FBA, INTERESTED PARTY AND AMICUS.

FBA is a voluntary organization that represents the interests of banks and financial institutions in Florida. FBA has more than 300 members, including community banks (many of which are chartered in Florida) and thrifts; regional banks; and large, national financial institutions. FBA regularly represents the interests of its members before all branches of government and frequently appears as amicus curiae in the state and federal courts, including this Court, on issues of great import. Because FBA member banks participate in the IOTA program throughout Florida and will be adversely impacted by the 2023 IOTA Amendment, FBA, as a representative of its members, has a direct and articulable stake in this matter.

While participation in the IOTA program is voluntary, many FBA members are compelled to participate in the program due to the practical aspects of providing banking services and remaining competitive in their respective communities. Although the 2023 IOTA Amendment will have varying impacts depending on the type and size of the banking institution, the amendment will affect all banks and their depository law firms. And, while the 2023 IOTA Amendment

purports to further regulate which banks lawyers can choose to maintain their Trust accounts, it will in fact have a significant and negative impact on participating banks in Florida. In turn, those negative impacts will reverberate throughout Florida law firms by limiting their choice of participating banks and increasing the costs Florida law firms must pay on IOTA accounts.

The 2023 IOTA Amendment bases the interest rate for IOTA accounts on the Wall Street Journal's prime index (the "Prime Rate"). Using the Prime Rate as the index means that minimum interest rates paid on IOTA transactional accounts are *significantly* higher than any other interest rate offered by any bank on consumer or business transactional accounts. The 2023 IOTA Amendment will thus have a disproportionate negative effect by causing an abrupt and destabilizing decline in the number of participating banks, resulting in decreased choice for, and significant cost-shifting to, Florida law firms.

II. SUMMARY OF THE ARGUMENT

As stated in their Petition, The Florida Bar's goal in amending the IOTA Rule was to increase interest paid on IOTA accounts, and thereby increase funding for The Florida Bar Foundation

("Foundation"), which FBA members have supported over the years.[1] While the intent behind the 2023 IOTA Amendment is admirable—and the FBA and its members support increasing revenue to the Foundation to further its charitable programs—the Rule as amended goes far beyond its intended purpose. Indeed, at the current Prime Rate of 8.0%, the corresponding IOTA rate under the 2023 IOTA Amendment on its effective date will be 3.2%, an approximate 2,809% increase from the current average rate paid on IOTA accounts of .11%.[2] That unprecedented surge in interest rates—as applied to the approximate $6.5 billion dollars[3] in Florida IOTA accounts—will

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[1] See Florida Bar Foundation, Community Champions, https://thefloridabarfoundation.org/iota/community-champions/ (awarding numerous FBA members (including, for example, Gulf State Bank) with "Gold Community Champion" status, recognizing participating institutions that "go above and beyond the IOTA rule requirements" of the IOTA program, and those who "[p]ay[] comparable rates on IOTA balances and do[] not deduct permissible service charges and fees from interest earned.") (last accessed Mar. 29, 2023).

[2] The Florida Bar News reported in 2020 that the average interest rate paid on IOTA accounts is 11 basis points. *See* Gary Blankenship, *Foundation Hopes to Enhance IOTA Rates* (Nov. 10, 2020).

[3] In 2020, The Florida Bar News also reported that Florida IOTA accounts total an estimated $6.5 billion dollars. *See* Gary Blankenship, *Foundation Hopes to Enhance IOTA Rates* (Nov. 10, 2020).

result in *annual* revenue to the Foundation of **$208,000,000**. Certainly, FBA and its member banks understand that low interest rates have contributed to extremely depressed revenue for the Foundation, which has left it struggling to fund its much-needed programs. But increasing the annual income to the Foundation from approximately $7,150,000 to $208,000,000 in a single year is unconscionable, de-stabilizing, and, in all likelihood, significantly beyond the expectations of the Foundation when the 2023 IOTA Amendment was originally proposed.[4] Thus, the 2023 IOTA Amendment raises grave concerns, including the practical and perhaps unintended consequences the Rule will have on FBA members, law firms, and an already stressed banking industry. Simply put, the 2023 IOTA Amendment goes too far, too fast. This Court should vacate its Opinion based on the due process and constitutional violations discussed below, or, at a minimum, suspend the effective date of the amended Rule until the Court has meaningfully addressed the FBA's challenges thereto.

[4] Attached for demonstrative purposes as Exhibit "A" is a chart showing the Estimated Impact on Income to the Foundation from the 2023 IOTA Amendment at different interest rates.

III. BACKGROUND

A. The IOTA Program

This Court adopted the nation's first Interest on Trust Accounts Program (IOTA) in 1978. *In re Interest on the Trust Accounts*, 356 So. 2d 799 (Fla. 1978). "All funds generated by the IOTA program flow to The Florida Bar Foundation, Inc. ('Foundation') to 'fund programs which are designed to improve the administration of justice or expand the delivery of legal services to the poor.'" *In re: Amendments to Rule Regulating the Florida Bar 5-1.1(g)*, 320 So. 3d 671, 672 (Fla. 2021) (citing *In re Interest on Trust Accounts*, 538 So. 2d 448, 450 (Fla. 1989); R. Regulating Fla. Bar 5-1.1(g)(1)(c)). The Foundation serves as the manager and administrator of the IOTA program. *See* Fla. Bar Found. Charter, art. 2.5(c). The program became fully operational in 1981 and currently operates under the provisions of Rule 5-1.1(g). *In re: Amendments to Rule Regulating the Florida Bar 5-1.1(g)*, 320 So.3d 671, 672 (Fla. 2021).

Because federal law historically prohibited the payment of interest on available-on-demand (*i.e.*, checking) accounts, attorneys normally pooled and maintained client trust deposits in a single noninterest-bearing demand account. *Cone v. State Bar of Fla.*, 819

F.2d 1002, 1005 (11th Cir. 1987) (abrogated on other grounds) (citing Banking Act of 1933, Ch. 89 § 11(b), Pub. L. No. 66, 48 Stat. 181 (1933)). Because of these restrictions, "the original plan for Florida's IOTA program provided that client trust funds could be deposited into a pooled savings account," which would earn interest for the Foundation. *Id.*

This plan was never implemented because, in 1980, "Congress authorized the creation of Negotiable Order of Withdrawal (NOW) accounts, which for the first time permitted federally insured banks to pay interest on demand deposits." *Phillips v. Wa. Legal Found.*, 118 S. Ct. 1925, 1928 (1998); *see also* 12 U.S.C. § 1832; 12 C.F.R. §§ 217.157, 329.103, 526.1(1). "NOW accounts are permitted only for deposits that 'consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit.'" *Phillips*, 118 S. Ct. at 1928 (quoting 12 U.S.C. § 1832(a)(2)). Because the Foundation is an eligible nonprofit charitable organization, and sole recipient of the interest earned by the IOTA accounts, Florida's IOTA program is able to use NOW

accounts without running afoul of federal regulations. *See Cone*, 819 F.2d at 1006; 12 C.F.R. § 217.157.

B. The Florida Bar Rules Amendment Process

Rule 1-12.1 of the Rules Regulating the Florida Bar provides the authority and procedures to amend the Rules. Under section (a):

> The Board of Governors of The Florida Bar has the authority to amend chapters 7 and 9, as well as the standards for the individual areas of certification within chapter 6 of these Rules . . . , 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.

Bar R. 1-12.1(a). The Rule also requires that notice of the proposed changes be published in The Florida Bar News and on The Florida Bar website, identifying the rule(s) to be amended and stating in general terms the nature of the proposed amendments. *See* Bar R. 1-12.1(d). Any member of The Bar may request a copy of the proposed amendments and may file written comments, which must be filed with the executive director sufficiently in advance of the board meeting to allow for distribution to the members of the board. Bar R. 1-12(e). Section (f) requires that amendments to the Rules, other than

chapters 7 and 9, and the standards under chapter 6, must be by petition to this Court. Bar R. 1-12.1(f).

In addition, "[n]otice of intent to file a petition to amend the Rules . . . are to be published at least 30 days before the filing of the petition with the Court." Bar R. 1-12.1(g). Section (g) also dictates:

> The notice will identify the rule(s) to be amended, state in general terms the nature of the proposed amendments, state the date the petition will be filed, and state that any comments or objections must be filed within 30 days of filing the petition. The full text of the proposed amendment(s) will be published on The Florida Bar Website. A copy of all comments or objections must be served on the executive director of the Florida Bar and any persons who may have made an appearance in the matter.

Bar R. 1-12(g).

Subsection (i) provides that "[o]n good cause shown, the [C]ourt may waive any or all of the provisions of this rule." Bar R. (i) ("Waiver").

C. IOTA Rule Amendments at Issue

On October 3, 2022, The Florida Bar filed a petition to amend seventeen separate Bar Rules, including Rule 5-1.1(g). The Bar summarized, in relevant part, its proposed amendments to sections 5-1.1(g)(1)(E), (g)(5)(A), and (g)(5)(B), as follows:

> Within subdivision (g)(1)(E) and (g)(5)(A), adds business or consumer money market account or sub account, any business or consumer savings account or sub account without a maturity date. Within subdivision (g)(5)(B), adds that eligible institutions must provide a minimum interest rate for IOTA accounts and creates minimum interest rates tied to specific indexed rate points.

Petition at 8. The Bar provided the following reasons for amending the Rule:

> Regarding the definitions in (g)(1)(E), the definition is expanded to include all possible accounts that can be used as trust accounts. Regarding subdivisions and (g)(5)(A), the rule is expanded to include additional comparable accounts to ensure the highest possible interest is available for IOTA accounts. **Regarding subdivision (g)(5)(B), the requirement for IOTA accounts is changed so that eligible institutions must tie interest rates for IOTA accounts to specific indexed rate points with the hope of raising current IOTA account interest rates.** Twenty-five other states contain a benchmark provision for IOTA accounts.

Id. (emphasis added).

The Bar's proposed amendment to Rule 5-1.1 (g)(5)(B) ("Determination of Interest Rates and Dividends") read as follows (proposed provisions underlined):

> (B) . . . In determining the highest interest rate or dividend generally available from the institution to its non-IOTA accounts in compliance with subdivision (5)(A), above, eligible institutions may consider factors, in addition to the IOTA account balance, customarily considered by the institution when setting interest rates or dividends for its

> customers, provided that these factors do not discriminate between IOTA accounts and accounts of non-IOTA customers, and that these factors do not include that the account is an IOTA account. The minimum interest rate paid net of all fees and service charges ("yield") must be no less than 25 basis points (.25%). When the Wall Street Journal Prime Rate ("indexed rate") is between 325 and 499 basis points (3.25% and 4.99%), the yield must be no less than 300 basis points (3.00%) below the indexed rate in effect on the first business day of each month. When the indexed rate is 500 basis points (5.00%) or above, the yield must be no less than 40% of the indexed rate in effect on the first business day of each month.

Petition, Ex. A at 26-27.[5]

On March 16, 2023, the Court adopted The Florida Bar's proposed amendments to the IOTA Rule, "except for the proposed technical amendment to rule 5-1.1(g)(3) and the proposed amendment to rule 5-1.1(g)(5)(B) requiring a minimum net interest rate of 25 basis points." Opinion at 2.

IV. ARGUMENT

FBA respectfully requests that the Court grant this motion for rehearing and vacate its March 16, 2023 Opinion with respect to the

[5] According to the Wall Street Journal, "U.S. prime rate is the base rate on corporate loans posted by at least 70% of the 10 largest U.S. banks, and is effective 3/23/23." Wall Street Journal, Market Data, https://www.wsj.com/market-data/bonds/moneyrates (last accessed Mar. 28, 2023).

2023 IOTA Amendment because (1) FBA was not given adequate notice of the amendment to the Rule, violating FBA and its members' right to procedural due process; (2) the real world, negative impact and risk of harm to Florida's banks and law firms, militates against implementing the 2023 IOTA Amendment; (3) the 2023 IOTA Amendment is preempted by federal law; and (4) by adopting the 2023 IOTA Amendment, the judiciary has impermissibly encroached on the executive branch's authority to regulate the banking industry in Florida.

A. The FBA did not receive meaningful notice of the proposed amendment to the IOTA Rule.

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. "[P]rocedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner[.]" *Dep't of L. Enf't v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991) (citing *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)). "The fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard." *Fla. Pub. Serv.*

Comm'n v. Triple "A" Enter., Inc., 387 So.2d 940, 943 (Fla. 1980) (citation omitted). "Further, due process cannot be compromised 'on the footing of convenience or expediency.'" *Citizens of State v. Fla. Pub. Serv. Comm'n*, 146 So.3d 1143, 1154 (Fla. 2014) (citations omitted).

Here, neither FBA, nor its members, as interested and affected parties, were provided with meaningful notice and, as a result, were deprived of the opportunity to be heard before adoption of the 2023 IOTA Amendment. FBA is a banking association that, understandably, does not regularly monitor The Florida Bar News or The Florida Bar website. FBA became aware of the contents of The Florida Bar's Petition to amend the IOTA Rule only *after* release of the Court's Opinion amending the IOTA Rule. Procedural due process requires fair and meaningful notice and an opportunity to be heard. FBA was deprived of procedural due process under these circumstances.

Although regimented, the rulemaking process is a fluid one. Importantly, subsection (i) provides that "[o]n good cause shown, the [C]ourt may waive ***any or all*** of the provisions of this rule." Bar R. (i) ("Waiver") (emphasis added). The FBA, as an interested party

negatively affected by the 2023 IOTA Amendment, respectfully requests that this Court waive the timely comment requirement, and excuse FBA's inadvertent misstep in failing to promptly submit comments to the Board of Governors or the Court, or to otherwise appear in the underlying proceedings. *See Schwarz v. Kogan*, 132 F.3d 1387, 1394 n.5 (11th Cir. 1998) ("Moreover, it is possible that, had Schwarz subsequently filed a petition that complied with Rule 1–12, or at least sought a waiver of the procedural limitations of that Rule, the court might have addressed his constitutional arguments wearing its 'adjudicatory' hat as well as, or in lieu of, its 'rule-making' hat.")

Moreover, this Court has previously recognized that the Rules amendment procedure set forth in Rule 1-12.1 does not provide adequate notice to interested parties, such as financial institutions like the FBA members here. *See Amendments to Rules Regulating the Florida Bar–Rule 5-1.1(e)–IOTA*, 692 So. 2d 181, 182-83 (Fla. 1997) ("Because the rule amendment relating to the capitalization ratings of eligible financial institutions is being adopted by the Court **without prior notice to interested parties**, we hereby direct that **all interested parties** may submit comments regarding this

amendment **within thirty days from the date of this opinion**.") (emphasis added). The same is true here. FBA did not have meaningful notice of the proposed IOTA amendments, and, as a result, the Court has not had the opportunity to consider comments from interested parties, such as FBA's members.

In the interest of justice, fairness, efficiency, and the conservation of judicial and party resources, FBA respectfully requests that the Court afford it an opportunity to be heard. This Court has the authority to grant this request based on its original jurisdiction to amend the Bar Rules, and its inherent authority to waive any or all provisions of the rulemaking process. *See* art. V, § 15, Fla. Const.; *see also* R. Regulating Fla. Bar 1-12.1 (recognizing the Court's authority to act on its own motion, *sua sponte*). Specifically, the FBA respectfully asks the Court to consider its comments here,[6] and deem its motion for rehearing properly and

[6] These arguments include the significant and detrimental impact of the 2023 IOTA Amendment to FBA members participating in the IOTA program and to the State's banking and financial industry; lack of notice to the FBA and other interested parties such as federal and state banking regulatory agencies; and constitutional issues, including due process, federal preemption, and separation of powers.

timely filed, and alternatively consider its motion for leave to appear as amicus on rehearing as properly and timely filed.

Further, the 2023 IOTA Amendment is set to take effect on May 15, 2023. The current effective date fails to provide institutions participating in the IOTA program with a reasonable time period to determine whether they can feasibly comply with the Rule, if they so choose, or to otherwise divest their IOTA accounts and provide law firms with enough time and notice to seek another depository institution that can meet the significantly increased interest rate imposed by the 2023 IOTA Amendment. In past cases, institutions have been given at least six months to comply with changes to IOTA. *See, e.g.*, *Amendment to Rules Regulating the Fla. Bar-Rule 5-1.1(e)-IOTA*, 797 So. 2d 551, 552 (Fla. 2001) (amending former Rule 5-1.1(e) on petition by The Florida Bar on behalf of the Foundation; clarifying, pursuant to the FBA's request, that the intent of the Rule to ensure interest parity between IOTA accounts and non-IOTA accounts held in the same financial institution; providing that "those institutions currently holding IOTA accounts that elect to participate in IOTA under the new rule shall be provided six months to comply with the new eligibility requirements").

The impact of the 2023 IOTA Amendment here is much greater than the 2001 IOTA Amendment, which merely required interest parity between IOTA and Non-IOTA accounts. Yet there, IOTA participants were given six months to comply with the new requirements. Here, however, on June 1, 2023, banks are required to increase interest rates paid on IOTA accounts by 309 basis points, or make a strategic decision to opt out of the program all together and divest their deposits. Banks and the law firms whose client trust accounts are impacted by the 2023 IOTA Amendment have been given approximately eight weeks to consider and implement those decisions.

In addition, to the extent the Court adopted a different version of the amendments proposed by The Florida Bar (*i.e.*, declining to adopt the minimum interest rate of 25 basis points), FBA also lacked notice and the opportunity to be heard on the Court's changes to the proposed amendments.

Finally and importantly, there may be additional interested parties, both federal and state, who should receive notice, including: the federal Office of the Comptroller of the Currency; the Federal Reserve System ("FRS") (the central bank of the United States), which

sets the nation's monetary policy and is responsible for regulating the safety and soundness of the financial system; the Federal Reserve Board (membership in the FRS entails supervision by the Federal Reserve Board, see http/www.federalreserve.gov/aboutthefed); FDIC (federal law requires banks to obtain deposit insurance from the FDIC and the FDIC examines all insured institutions, 12 C.F.R. § 5.20(e)(3)); and the Florida Office of Financial Regulation, a division of Florida's Department of Financial Services and the Financial Services Commission, § 20.121(3)(a) 2, Fla. Stat.

The lack of notice to FBA and other potentially interested parties, the missed opportunity to be heard, and the abrupt, impending implementation of the proposed rule violates the very basic rights to due process. FBA thus requests that the Court grant rehearing and vacate its Opinion adopting the 2023 IOTA Amendment, or suspend the effective date, and give the FBA an opportunity to be heard and to submit comments to the Court.

In the alternative, to help minimize the disruption to the banking industry, FBA requests that the Court provide IOTA participants, including FBA members, with a reasonable time period of no less than six months to comply with the 2023 IOTA

Amendment, or devise a plan to transition from the IOTA program with minimal financial loss and disruption.

B. The real world, negative impact and risk of harm to Florida's banks and law firms militates against implementing the 2023 IOTA Amendment.

As discussed above, all interest generated by IOTA accounts flows to the Foundation, not the lawyers holding the accounts, or their clients. However, the increased interest rates are paid directly by banks. In 2020, The Florida Bar News reported there were approximately 35,000 IOTA accounts maintained by Florida lawyers at 110 banking institutions, holding over $6.5 billion in trust funds. *See* Gary Blankenship, *Foundation Hopes to Enhance IOTA Rates* (Nov. 10, 2020). Increasing IOTA rates by just 0.25 percent could have resulted in an additional $9 million in income for the Foundation in 2020,[7] and more than that each year as rates continue to rise. *Id.* That is more than half, if not more, of the Foundation's typical annual grant budget. *Id.* (reporting the Foundation awarded almost $14 million in grants in 2019-20 and $8.6 million in 2020-21).

[7] See Exhibit A.

By nature, IOTA accounts were intended to be short-term accounts where money is deposited and withdrawn frequently as law firms collect and disburse funds for various purposes consistent with their practice. Rule 5-1.1(g)(1)(a) defines an IOTA account as being an "interest or dividend-bearing trust account benefitting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons."

But, the 2023 IOTA Amendment has mandated that a savings or money market type of interest rate be paid on what is in substance a high volume transaction account. Indeed, money market and savings accounts traditionally earn slightly higher interest than transactional accounts because banks restrict the number of transactions those accounts can conduct each month. The restricted nature of these accounts ensures that banks have the deposited funds on their balance sheet for a longer period of time (which assists with liquidity and reserve requirements) and also decreases the amount of costs banks incur to process, verify, and handle the transactions.

The same is not true of checking and transactional accounts like IOTA accounts. For example, a typical IOTA account at a

community bank can have as many as 1,100 transactions per month. Those transactions include deposits, withdrawals, wires, and ACH remittance. Each transaction requires the participating bank to reconcile those transactions and transmit funds accordingly and promptly.[8] This increased effort necessarily results in increased labor and other charges paid by banks. Traditionally, banks have waived all or part of those transaction costs in recognition of the fact that the interest paid on IOTA accounts is relatively low. But, the 2023 IOTA Amendment would require a participating bank to pay 320 basis points (3.2%) on an IOTA transactional account, which is currently over 100 basis points *higher* than most participating banks' top-tier business *money market* (i.e., non-transactional) rates.

The expected consequence of a mandatory 309 basis points *increase* in rates is that, to remain profitable, banks will have to charge its law firm customers for the transaction costs associated with an IOTA account. The practical effect of those increased costs is

[8] For example, to combat wire fraud, banks and law firms have implemented verbal verification of wire instructions, which is a very labor intensive process. Both the sender and the recipient must conduct a telephone call to verify wire instructions sent via e-mail. This process is time intensive and cannot be done electronically.

unknown and cannot be properly measured without significant study of the effect of the 2023 IOTA Amendment. But, if banks cannot recoup fees to offset some of their losses caused by paying exorbitantly high interest rates on transactional accounts, it is reasonable to expect that market forces will be the determining factor behind whether they continue to participate in the program.

Indeed, regardless of the perception that banks have had a "free lunch" on IOTA accounts, which they dispute, mandating disproportionately high interest rates will naturally cause the shareholders of banks and financial institutions to seriously consider whether they should continue to accept IOTA accounts at all. A decrease in participating institutions will cause instability for Florida law firms and their clients' funds as lawyers scramble to find banks willing to hold IOTA accounts under the 2023 IOTA Amendment. Against the current national backdrop of the failure of Silicon Valley Bank (and others), the concomitant "runs" on banks in the recent weeks, and the constant reassurances to the public by the U.S. Treasury Department and the U.S. Federal Reserve Bank of the safety and soundness of the banking system (to avoid panic and further "runs"), such an occurrence could have unimaginable consequences.

While FBA acknowledges that increasing revenue to the Foundation is necessary and appropriate, a sudden, rigid, and mandatory 2,809% increase in interest rates on IOTA accounts is unsafe and unsound.

C. The 2023 IOTA Amendment conflicts with federal law and regulation of banks.

The Supremacy Clause of Article VI of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "[U]nder the Supremacy Clause . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

The National Bank Act ("NBA"), as amended in 1864, was enacted by Congress "to facilitate ... a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (cleaned up). The NBA established the Office of the Comptroller of Currency ("OCC") as a bureau of the Department

of the Treasury "which is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction." 12 U.S.C. § 1. The OCC is the federal agency charged with regulating banking through the nation. *Id.* The NBA "establishes the primacy of the federal government, through the [OCC], as the regulatory authority over national banks." *Bank of Am., N.A. v. McCann*, 444 F. Supp. 2d 1227, 1231 (N.D. Fla. 2006). The NBA also enabled the federal government to issue bank charters and introduce a "dual banking system" that is "still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10, 15 n.7 (2007) (citation omitted).

"National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States," while state banks are organized under state law. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The NBA grants national banks broad powers, functioning as "a complete system for the establishment and government of national banks." *Cook Cty. Nat'l Bank v. U.S.*, 107 U.S. 445, 448 (1883). These include certain enumerated powers as well as

"all such incidental powers as shall be necessary to carry on the business of banking." *See* 12 U.S.C. § 24 (Seventh); *see also Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y.*, 742 F.3d 37, 41 n.4 (2d Cir. 2014) (interpreting this grant as conferring the power to engage in "activities convenient and useful in connection with the performance of an express power")).

As the Supreme Court noted in *Barnett Bank*, courts have historically interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cty., N.A. v. Nelson, Fla. Ins. Comm'r*, 517 U.S. 25, 32-33 (1996) (citing, *inter alia*, *First Nat'l Bank of San Jose v. Cal.*, 262 U.S. 366, 368-69 (1923) (national banks' "power" to receive deposits pre-empts contrary state escheat law)).

In an unbroken line of cases "since *McCulloch*, the Court has made clear that the question is not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers." *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 131 (2d Cir. 2022), *petition for cert. filed*, 2022 WL 17646779 (U.S. Dec. 5, 2022) (No. 22-529) (citing *McCulloch v. Md.*, 17 U.S. 316, 431 (4

Wheat.) (1819)) (collecting cases). To determine whether a state law conflicts with the NBA, "the question is whether enforcement of the law at issue would exert control over the banking power—and thus, if taken to its extreme, threaten to 'destroy' the grant made by the federal government." *Id.* at 132 (citing *McCulloch*, 17 U.S. at 431). "Control is not a question of 'degree' of the state law's effect on national banks, but rather of the kind of intrusion on the banking powers granted by the federal government." *Id.* at 131 (citing *McCulloch*, 17 U.S. at 430-431). In other words, the question is not whether a state law's degree of interference is minimal or punitively high, but rather "whether the kind of interference at issue could, taken as a whole 'destroy' the federal government's grant of a banking power." *Id.* at 132-133 (citations and internal quotation marks omitted).

The 2023 IOTA Amendment conflicts with the federal government's regulation of national banks and is thus federally preempted under the Supremacy Clause. Imposing specific interest rates for IOTA accounts is federally preempted by the NBA and federal regulation of NOW accounts, including IOTA accounts, as discussed *supra*. By essentially dictating artificially high interest

rates banks and participating institutions must pay on IOTA accounts, the 2023 IOTA Amendment "would exert control over a banking power granted by the federal government" and would thus "impermissibly interfere with national banks' exercise of that power." *Cantero* at 126 (holding that a New York law requiring mortgage lenders to pay a minimum two percent interest rate on mortgage escrow accounts was preempted by the National Bank Act of 1864 ("NBA"), 12 U.S.C. § 21 *et seq.*, and finding that "[t]he minimum-interest requirement would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national bank's exercise of that power").

Preemption cannot be circumvented by framing the 2023 IOTA Amendment as regulating where lawyers should hold their accounts as opposed to regulating the amount of interest financial institutions holding IOTA accounts must pay. Lawyers **must** deposit client funds in an approved financial institution account so the distinction that participation is voluntary, while technically true, constitutes a distinction without a difference.

The banking powers at issue here are the power to create, fund, and pay interest on NOW accounts, including IOTA accounts, and

the power to receive deposits. Like the regulation in *Cantero*, and similar regulations discussed therein, the amended Rule "would target, curtail, and hinder a power granted to national banks by the federal government." *Cantero*, 49 F.4th at 133, 134. By requiring a bank to pay a specific interest rate on IOTA accounts "in order to exercise a banking power granted by the federal government," *i.e.* accepting deposits and maintaining a NOW/IOTA account, the amended Rule "would exert control over the banks' exercise of that power." *Id.* And if taken to a greater degree, Court's "authority to set minimum interest rates could infringe on the national banks' power to" regulate NOW accounts altogether. *Id.* As the Second Circuit noted,

> The issue is not whether this particular rate of 2% is so high that it undermines the use of such accounts, or even if it substantially impacts national banks' competitiveness. The power to set minimum rates is "the power to control," and the power to control is the "power to destroy."

Id. at 134-35 (quoting *McCulloch*, 17 U.S. at 431).

Here, the OCC is the entity charged with regulating national banks, which have the power to receive deposits and pay interest rates on IOTA/NOW accounts. The 2023 IOTA Amendment goes far

beyond merely requiring interest parity between IOTA accounts and non-IOTA accounts. Upon its effective date, the 2023 IOTA Amendment will require institutions participating in the IOTA program to tie interest rates for IOTA accounts to specific indexed rate points (with the apparent goal of raising current IOTA account interest rates), if the institutions wish to continue holding IOTA accounts. This, in essence, dictates the interest rates for national banks and is thus preempted because it seeks to control or otherwise prevent or significantly interfere with national banking powers. *Watters*, 550 U.S. at 11-12 (citation omitted). This is true even though the 2023 IOTA Amendment purports only to regulate lawyers.

That such a far-reaching intrusion into the federal regulation of national banks is enacted by state judicial decree is even more problematic, as discussed below under the doctrine of the separation of powers. "[F]ederal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 50 U.S. at 11; *see also* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) ("[The] multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national

operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes. These overlapping regulations **have the potential to impose onerous burdens on interstate commerce and to disrupt and undermine federal regulatory programs**."). The 2023 IOTA Amendment is redundantly and impermissibly duplicative of federal and state regulation, and preempted by federal banking laws and regulations.

D. The 2023 IOTA Amendment encroaches on the executive branch's powers to regulate banking and financial institutions, in violation of the separation of powers doctrine.

"The Florida Constitution generally specifies the relative powers of the three branches of government." *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 610–11 (Fla. 2008). "Article II, section 3 provides innocuously that '[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.'" *Id.* "In construing our constitution, we have 'traditionally applied a strict separation of powers doctrine.'" *Id.* (quoting *Bush v. Schiavo*, 885 So.

2d 321, 329 (Fla. 2004) (quoting *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000))).”

“The [separation of powers] doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.” *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) (citation omitted). “[T]he state constitution does not exhaustively list each branch’s powers.” *Crist*, 999 So. 2d at 611. Rather,

> the powers of the respective branches “are those so defined . . . or such as are inherent or so recognized by immemorial government usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the state and federal Constitutions.” [Each branch has] “the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution.”

Fla. Ass’n of Prof’l Lobbyists, Inc. v. Div. of Legislative Info. Servs., 7 So.3d 511, 515 (Fla. 2009) (citations omitted). “[A] branch of government is prohibited from exercising a power only when that power has been constitutionally assigned exclusively to another branch; and the separation of powers doctrine does not contemplate

that every governmental activity must be classified as belonging exclusively to a single branch." *State v. Palmer*, 791 So.2d 1181, 1183 (Fla. 1st DCA 2001).

Here, the Florida Office of Financial Regulation[9] ("OFR") is responsible for "all activities of the Financial Services Commission relating to the regulation of banks, credit unions, other financial institutions, finance companies, and the securities industry" in Florida. § 20.121(3)(a) 2., Fla. Stat. The OFR is a division of Florida's

[9] The OFR's website states: "The [OFR] provides regulatory oversight for Florida's financial services industry. The OFR was created in 2003 as the result of the Cabinet Reorganization Act of 2002. Although the OFR is a relatively new agency, its beginnings as a banking, consumer finance and securities regulator date back to the mind-1800s with the creation of the former Comptroller's Office. The OFR reports to the Financial Services Commission made up of Governor Ron DeSantis and the members of the Florida Cabinet: Chief Financial Officer Jimmy Patronis, Attorney General Ashley Moody and Agriculture Commissioner Wilton Simpson." The OFR also states that its mission is to "protect Florida's financial services consumers, promote a **safe and sound marketplace, and contribute to the growth of Florida's economy through fair, innovative, and excellent regulation of the financial industry**." Florida Office of Financial Regulation, About Our Agency, https://flofr.gov/sitePages/AboutOFR.htm (last accessed Mar. 31, 2023).

Department of Financial Services and the Financial Services Commission.[10] *Id.*

By amending the IOTA Rule to require participating banks to pay a mandated interest rate, not just that interest paid on IOTA and non-IOTA accounts be comparable, the state judicial branch has impermissibly encroached on the executive branch's power to regulate banks through the OFR, the Florida Department of Financial Services, and the Financial Services Commission. § 20.121(3)(a) 2., Fla. Stat.

This judicial action reaches well beyond the Court's constitutional mandate to "regulate the admission of persons to the practice of law and the discipline of persons admitted[,]" art. V, § 15,

[10] The Financial Services Commission is comprised of four members: the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. There are two offices within the Commission: the OFR, which regulates the banking, finance, and securities industries in Florida, and the Office of Insurance Regulation, which regulates insurance companies. "Both offices are headed by commissioners who are appointed by the Financial Services Commission. The Financial Services Commission is responsible for final approval of rules developed by each office. **All regulatory decisions are vested with the offices**." Florida Office of Financial Regulation, About Our Agency, Financial Services Commission, https://flofr.gov/sitePages/AboutOFR.htm (last accessed Mar. 31, 2023).

Fla. Const., and into regulating and setting the interest rates offered by federal and state chartered banking and financial institutions participating in the IOTA program, which interest rates are significantly divergent from those established by a free market.

While voluntary for banks, law firms must use banks and financial institutions to handle client funds. To participate in the program, banks must comply with the new interest rate requirements under the 2023 IOTA Amendment. These rates are prohibitively high, and are higher that rates for comparable non-IOTA accounts. This will likely cause some banks—perhaps even a significant number—to withdraw from the IOTA program. A large-scale withdrawal and divestment of the IOTA deposit accounts over the next few months would be "unsafe and unsound" for any bank in ***any*** banking environment, but particularly right now. In practice, the 2023 IOTA Amendment is tantamount to an effective regulatory policy that is so onerous and so drastic that it creates an unsafe and unsound banking environment, and, therefore, invades the purview of the state and federal regulators (who are charged with regulations that affect the safety and soundness of banks).

This regulatory authority is reserved for the federal government and Florida's executive branch by delegation. Moreover, Florida's statutory framework clearly indicates that the State legislature has reserved the right to regulate financial institutions for itself and the federal government. *See, e.g.*, § 655.017 (preempting local regulation of "financial or lending activities"). As Justice Couriel astutely noted in his dissenting opinion in *Fla. Bar v. TIKD Servs. LLC*,

> As this Court Noted in *Florida Bar v. Moses*, 380 So. 2d 4112, 417 (Fla. 1980), "[t]he single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."
> . . .
> Today's majority winds up protecting something else: the traditional way people find, or fail to find, satisfactory counsel for traffic tickets, and the business interests that have come to rely on the way things have generally been. The majority finds no "cases or rules authorizing a comparable bifurcation of responsibilities between lawyers and nonlawyers with respect to the provision of legal services." Majority op. at 1079. That presumes, incorrectly, that it is up to us to authorize how people ***in a free market*** bargain with lawyers and nonlawyers to address their legal problems. If we have such authority, it is not given to us by our constitution, which says merely that we "regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, § 15, Fla. Const. **That mandate cannot be read to include a plenary power to regulate the business models of**

> **lawyers or their firms,** ***to say nothing of nonlawyers and their enterprises***.

326 So. 3d 1073, 1085, 1086 (Fla. 2021) (Couriel, J., dissenting, Polston and Muñiz, JJ., concurring) (emphasis added).

While the Court is authorized under the constitution to regulate the practice of law in the State, by adopting the 2023 IOTA Amendment, the Court goes well beyond that mandate, and impermissibly encroaches on the power of the executive branch to regulate the banking industry in Florida. Because this constitutes an impermissible violation of Florida's separation of powers doctrine, the 2023 IOTA Amendment should be vacated.

V. CONCLUSION

For the foregoing reasons, the Florida Bankers Association respectfully requests that the Court deem its comments and motion for rehearing properly and timely filed, and, alternatively, consider its motion for leave to appear as amicus on rehearing as properly and timely filed; grant rehearing and vacate its Opinion adopting the 2023 IOTA Amendment, or suspend the effective date, and give the FBA an opportunity to be heard and to submit comments to the Court; or, otherwise in the alternative, provide IOTA participants, including

FBA members, with a reasonable time period of no less than six months to comply with the 2023 IOTA Amendment, or to transition from the IOTA program.

Certificate of Consultation. The undersigned contacted The Florida Bar for its position on this motion. The Florida Bar indicated it opposes the relief requested in this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 31st day of March, 2023, a true and correct copy of the foregoing was furnished by E-mail and U.S. First Class mail to:

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EXHIBIT A

Estimated Impact on Income from IOTA Rule If Adopted

*Estimated Average IOTA Deposits	$6.5 Billion
*Estimated Average Rate Paid on IOTA	0.1100%
*Estimated Income to Foundation from IOTA	$ 7,150,000

	Prime Rate	IOTA Rate	Est. Revenue	Increase
	3.25%	0.25%	$ 16,250,000	$ 9,100,000
	3.50%	0.50%	$ 32,500,000	$ 25,350,000
	3.75%	0.75%	$ 48,750,000	$ 41,600,000
	4.00%	1.00%	$ 65,000,000	$ 57,850,000
	4.25%	1.25%	$ 81,250,000	$ 74,100,000
	4.50%	1.50%	$ 97,500,000	$ 90,350,000
	4.75%	1.75%	$ 113,750,000	$ 106,600,000
	5.00%	2.00%	$ 130,000,000	$ 122,850,000
	5.25%	2.10%	$ 136,500,000	$ 129,350,000
	5.50%	2.20%	$ 143,000,000	$ 135,850,000
	5.75%	2.30%	$ 149,500,000	$ 142,350,000
	6.00%	2.40%	$ 156,000,000	$ 148,850,000
	6.25%	2.50%	$ 162,500,000	$ 155,350,000
	6.50%	2.60%	$ 169,000,000	$ 161,850,000
	6.75%	2.70%	$ 175,500,000	$ 168,350,000
	7.00%	2.80%	$ 182,000,000	$ 174,850,000
	7.25%	2.90%	$ 188,500,000	$ 181,350,000
	7.50%	3.00%	$ 195,000,000	$ 187,850,000
	7.75%	3.10%	$ 201,500,000	$ 194,350,000
Prime 3/23/2023	8.00%	3.20%	$ 208,000,000	$ 200,850,000
	8.25%	3.30%	$ 214,500,000	$ 207,350,000
	8.50%	3.40%	$ 221,000,000	$ 213,850,000
	8.75%	3.50%	$ 227,500,000	$ 220,350,000
	9.00%	3.60%	$ 234,000,000	$ 226,850,000
	9.25%	3.70%	$ 240,500,000	$ 233,350,000
	9.50%	3.80%	$ 247,000,000	$ 239,850,000
	9.75%	3.90%	$ 253,500,000	$ 246,350,000
	10.00%	4.00%	$ 260,000,000	$ 252,850,000

* Estimates are based on information from the 2020-21 fiscal year as contained in the Florida Bar News article entitled "Foundation Hopes to Enhance IOTA Rates" dated November 10, 2020 regarding potential IOTA interest income.