



No. 11-345

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IN THE  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL., RESPONDENTS

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

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BRIEF OF NATIONAL LATINO ORGANIZATIONS  
AS *AMICI CURIAE* IN SUPPORT  
OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are national Latino civil rights organizations and associations whose missions include serving the interests of the Latino community. These Latino organizations believe that preserving race-conscious admissions policies in education is critical to the advancement of Latinos—the nation’s fastest growing and largest minority community—which is itself critical to the advancement of the nation as a whole. Accordingly, all have an interest in these proceedings, and all urge affirmance of the decision below. A list and description of all *amici* appear in an Appendix, attached hereto.

### SUMMARY OF ARGUMENT

Respondent University of Texas at Austin (“UT”) appropriately sought to obtain the benefits of a diverse student body through narrowly tailored means that are consistent with the strict parameters of the Fourteenth Amendment. Petitioner seeks to upend the era of peace in higher education admissions and demands that this Court restrict, if not overturn, UT’s judgment to consider race as one of many factors used in its holistic, individualized review of applications. This Court should decline that invitation.

Before determining that it lacked a level of student diversity that would fulfill its mission, UT engaged in an extensive examination of its overall di-

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<sup>1</sup> No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties’ letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk’s office.

versity. Only after reviewing the findings as a whole did it decide to use race at all, and then only in a very limited way. The review included initially identifying underrepresented student groups, studying classroom demographics, surveying student attitudes on diversity, examining its race-neutral admissions plan and outreach efforts, and analyzing its role as a flagship university in producing a diverse group of leaders. Despite this broad-based approach and the Court's deference to a university's judgment in determining its compelling interest in diversity, petitioner asks this Court to substitute its judgment for that of UT and to hold that the number of Latino and African-American students admitted through the Top-Ten Percent law was sufficient and that a blended admissions plan was unnecessary.

The Fifth Circuit appropriately held that UT's limited use of race is narrowly tailored. UT uses race as one nonpredominant factor among many others in a system designed to consider each applicant as an individual. Having failed to rank in the top ten percent of her graduating class and earn automatic admission into UT, and having been denied direct admission after a holistic, individualized review of seventeen separate factors, petitioner asks this Court to focus solely on one criterion—SAT scores—and thus to substitute petitioner's preferred admissions criterion for UT's versatile approach. Nothing in the Constitution or in this Court's precedents justifies that result.

Based on UT's role as the state's flagship public university, its diversity plan helps to address institutional barriers that have historically prevented Latinos from participating fully in civic life. Indeed,

the UT plan positively influences Latinos' participation in civic affairs, in political and military leadership, and in meeting the needs of Texas businesses in today's global economy. In light of the past discrimination against Latinos in Texas and continuing institutional barriers that still unfortunately exist, it is appropriate for UT to diversify its student body in a constitutional manner by opening its doors to highly qualified Latinos, among other highly qualified students of diverse backgrounds.

## ARGUMENT

### I. UT HAS A COMPELLING GOVERNMENTAL INTEREST IN CLASSROOM DIVERSITY, AND ITS ADMISSIONS PLAN IS NARROWLY TAILORED TO FURTHER THAT LEGITIMATE END

#### A. UT Has A Compelling Interest In Achieving Diversity

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court held unequivocally that a university has “a compelling state interest in student body diversity.” *Id.* at 328; *see also id.* at 328-31. Indeed, “attaining a diverse student body is at the heart of [a university’s] proper institutional mission, and ... ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” *Id.* at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.)). Following *Grutter*, UT carefully sought to determine whether its student enrollment lacked the diversity it sought to fulfill its mission as the premier flagship university in Texas, and if so, how it might constitutionally seek to obtain that diversity.



After careful evaluation of its admissions program and the student body, UT determined, like the University of Michigan Law School (“UMLS”) in *Grutter*, that the benefits flowing from a diverse student body had not been achieved using an exclusively race-neutral admissions plan. UT’s pursuit of diversity is not equivalent to a racial quota or an attempt to have UT’s student body mirror the demographics of Texas. Rather, as in *Grutter*, UT’s admissions plan “is defined by reference to the educational benefits that diversity is designed to produce.” 539 U.S. at 330.

In particular, UT conducted a study in the wake of *Grutter* to assess whether its wholly race-neutral admissions programs—the Top-Ten Percent (“TTP”) plan—had achieved a “critical mass” of diverse students.<sup>2</sup> As part of that study, UT conducted a survey of students and found that UT minority students reported feeling isolated and a majority of UT students in general stated that there was insufficient diversi-

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<sup>2</sup> Petitioner’s argument that the race-neutral TTP law had helped restore UT’s enrollment to levels for Latino and African-American students that had been achieved prior to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and therefore foreclosed UT’s consideration of race, fails for at least two reasons. First, petitioner is wrong to assume that pre-*Hopwood* admitted classes ever included a diverse pool of students sufficient to fulfill UT’s mission. Second, petitioners ignore the fact that the increase in minority student enrollment at UT likely reflected the huge increase in Latino and African-American students enrolling in Texas public schools since the *Hopwood* decision in 1996. The two student groups comprised 97% of the total student growth. See *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, 2004 WL 5719215 (Tex. Dist. Nov. 30, 2004) (Finding of Fact 68).

ty in the classroom.<sup>3</sup> App. 125a. The survey accorded with UT's statistical study of classroom demographics, which determined that a substantial proportion of undergraduate classes contained one or zero underrepresented minority students. *Id.* The study found that "in 2002, 90 percent of classes with 5 to 24 students had one or zero African American students and 43 percent had one or zero Hispanic students." *Id.* Diversity in the classroom remained highly elusive notwithstanding the dramatic increases in Latino high school graduates and Latino applicants to UT. *See* Tex. Educ. Agency, Count of Graduates by Ethnicity, PEIMS Data, at 10, 19, Dkt. No. 94-1 ("PEIMS Data"); Univ. of Tex. Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, Demographic Analysis of Entering Freshmen Fall 2006 at 9, Dkt. No. 96-11 (Ex. A. to Lavergne Aff.).<sup>4</sup>

In addition to the survey and classroom study, UT examined its race-neutral admissions plan and

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<sup>3</sup> In these circumstances, students report that they rely on campus organizations for support. For example, one Latina student, the leader of the Longhorn League of United Latin American Citizens, explained that her organization was inspired to create on-campus annual leadership summits to recruit high school students into higher education "because of the lack of Latino and other minority students at the University." Miriam Arellano Decl. at 2, Dkt. No. 72-1 (Ex. 4 to Motion to Intervene).

<sup>4</sup> UT administrators have echoed these findings. For example, Bruce Walker, Director of Admissions at UT-Austin, testified that underrepresented minority students reported feeling isolated and that there was insufficient diversity. JA 267a-68a.

outreach,<sup>5</sup> analyzed the performance of underrepresented groups in entering the existing labor force, and reviewed its role as a flagship university in producing a diverse group of leaders that would benefit the state, the nation, and the world. SJA 1a-3a, 6a-7a, 24a.

Based on these findings, UT determined that a sufficiently diverse student body had not yet been achieved. That determination “tak[es] into account complex educational judgments in an area that lies primarily within the expertise of the university,” and, as such, is entitled to deference. *Grutter*, 539 U.S. at 328. Deference is particularly appropriate because UT’s conception of diversity is identical to the one ratified in *Grutter*.

UMLS defined “critical mass” as “a number that encourages underrepresented minority students to participate *in the classroom and not feel isolated*,” or “numbers such that underrepresented minority students do not feel *isolated or like spokespersons for their race*.” *Grutter*, 539 U.S. at 318-19 (emphases added). UT—far from establishing a pre-determined quota or percentage of minority applicants to be admitted—similarly focused its diversity study on the *classroom* and whether minority students felt isolated there. UT found in that study that a high number of UT classes included no more than one minority student, and thus reasonably determined that those students would feel “isolated” “in the classroom,” and

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<sup>5</sup> At the time UT considered adding race for underrepresented groups as a nonpredominant factor among many others, Latino students comprised only fourteen percent of the enrollment. SJA 25a.

“feel ... like spokespersons for their race.” *Id.* This determination was supported by the numerous responses of Latino and other minority students who reported feeling isolated in the classroom. Importantly, petitioner has offered no evidence to contradict UT’s finding that a critical mass was lacking in its classrooms or that Latino and African-American students felt isolated in the classroom or like spokespersons for their race.

Moreover, *Grutter* embraced the view that universities may seek increased diversity to “promote[] ‘cross-racial understanding,’ help[] to break down racial stereotypes, and ‘enable[] [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Grutter*, 539 U.S. at 330 (quoting district court opinion in *Grutter*) (fourth alteration in original). Again, UT’s uncontradicted findings support its determination that it had yet to achieve a “critical mass” of minority students, and that it needed to supplement its race-neutral admissions program in order to reap the many benefits of diversity in its classrooms. *Amici* urge this Court not to upset this delicate balance, and instead to defer to UT’s “complex educational judgments.” *Id.* at 328.

### **B. UT’s Admissions Program Is Narrowly Tailored**

Following its comprehensive study concluding that its race-neutral approaches failed to deliver fully to its student the benefits of diversity, UT closely

modeled the race-conscious portion of its admissions program on the one affirmed in *Grutter*. Accordingly, like UMLS, UT “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” *Grutter*, 539 U.S. at 337. Indeed, UT’s consideration of race in admissions is significantly more narrowly tailored than the program upheld in *Grutter*.

To begin, UT’s race-conscious, holistic program only applies to the minority of applicants who were not automatically admitted under the race-neutral TTP law.<sup>6</sup> For the non-TTP applicants, UT determines admission based on the applicant’s Academic Index/Personal Achievement Index scores. The Academic Index score predicts the applicant’s freshman GPA at UT based on factors such as high school class rank and SAT or ACT score. The Personal Achievement Index score is derived from three discrete elements, which are the applicant’s scores on each of two essays and her “personal achievement score.” The latter is based on a “holistic review” of the “applicant’s demonstrated leadership qualities, extra-curricular activities, awards and honors, work experience, service to the school or community, and special circumstances.” App. 133a.

In evaluating the applicant’s “special circumstances,” in turn, UT considers seven factors: the applicant’s socio-economic status, her school’s socio-economic status, her family responsibilities, whether

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<sup>6</sup> The TTP program is itself race-neutral, and no one disputes its constitutionality.

she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school's average score, and race. App. 159a n.13. In this way, UT's consideration of race is highly limited—it is “a factor of a factor of a factor.” *Id.* at 159a. And contrary to being a quota system, UT's plan conforms to *Grutter's* mandate that each applicant be “evaluated as an individual and not in a way that makes [the] applicant's race or ethnicity the defining feature of his or her application.” 539 U.S. at 337.

Petitioner and her supporting *amici* ignore UT's comprehensive plan and holistic consideration of seventeen factors. *Cf.* SJA 28a-29a. Indeed, petitioner asks this Court to ignore the fact that she failed to rank in the top ten percent of her graduating class (thus reducing her chances of gaining admission by eighty percent), and then failed to gain admission under the individualized, holistic review process—unlike 6,582 other white students admitted in 2008. SJA 156a. Instead, petitioner asks this Court to focus its attention on one criterion—SAT scores—which is the one factor that has a disparate impact against Latino and African-American students.<sup>7</sup> In essence, petitioner and her *amici* ask the Court to set aside an admissions plan that entails a holistic review of applicants' other talents, and replace it with a plan tailored only to her strengths. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 798 (2007) (Kennedy, J., concur-

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<sup>7</sup> See William C. Kidder & J. Rosner, *How the SAT Creates “Built-in Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131, 133 (2002).

ring in part and concurring in the judgment) (“Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”).

Additionally, unlike the UMLS plan, UT’s plan did not include monitoring on a daily or weekly basis the number of minority students admitted. See *Grutter*, 539 U.S. at 391-93 (Kennedy, J., dissenting) (stating that consultation of daily reports suggested lack of individual review and compromised finding that the admissions plan could survive strict scrutiny).<sup>8</sup> And unlike the UMLS plan, where a specific range of minority students was accepted from one year to the next, UT does not seek out any specific range. JA 131a. In fact, UT’s Latino enrollment for students admitted outside the TTP plan fluctuated in numbers and percentages between the years 2005 and 2008, ranging from 158 to 343 Latino students. See Univ. of Tex. at Austin, Research Section, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* 7 (2008).<sup>9</sup> These aspects of UT’s admissions plan demonstrate UT’s faithful commitment not to evaluate applications expressly for race or ethnicity.<sup>10</sup>

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<sup>8</sup> *But see Grutter*, 539 U.S. at 336 (finding that, “[t]o the contrary, the Law School’s admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these [daily] reports”).

<sup>9</sup> Available at <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf>.

<sup>10</sup> In fact, UT’s consideration of race is not limited to Latino and African American students, but also may be considered for other races, including white students. App. 134a.

Finally, UT's plan is consistent with *Grutter's* emphasis on "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342. UT informally reviews its admissions policies every year, and "every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results." App. 126a; *cf.* Resp. Br. 12 n.4.

For those reasons, there is no tenable argument under *Grutter* that UT's adoption of a program considering race as part of a holistic, individualized admissions assessment—and as a supplement to the race-neutral TTP program that continues to dominate its admissions plan—fails to qualify as narrowly tailored to serve the compelling interest of promoting a diverse student body.

## **II. A DIVERSE STUDENT BODY, WHICH INCLUDES LATINO STUDENTS, GREATLY BENEFITS SOCIETY**

To achieve its "goal of producing future educational, cultural, business, and sociopolitical leaders," UT understands that "the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." SJA 24a. A diverse student body not only improves educational outcomes for all students, but its benefits also extend far beyond the students' time on campus. *See Grutter*, 539 U.S. at 330-33; *see also* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Cul-*



*ture, Courts, and Law*, 117 Harv. L. Rev. 4, 60 (2003) (“[Grutter] conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”). In particular, increased diversity at UT positively influences Latinos’ participation in civic affairs, in political and military leadership, and in meeting the needs of Texas businesses in today’s global economy.

### A. Civic Participation

In *Grutter*, the Court emphasized that educational diversity is critical to securing “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation,” which is “essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332. One key metric of effective civic participation is voting registration and turnout. Although the Latino population is growing rapidly, it still lags behind other groups in voter participation. See Mark Hugo Lopez, Pew Hispanic Center, *The Latino Electorate in 2010: More Voters, More Non-Voters*, at 5-6 (2011).<sup>11</sup> The figures from the 2010

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<sup>11</sup> Available at <http://www.pewhispanic.org/files/reports/141.pdf>. Low Latino voter registration and turnout can be attributed in part to Texas’s continuing history of discrimination in voting. Nearly forty years ago in *White v. Regester*, 412 U.S. 755 (1973), this Court recognized that discrimination created barriers that made it extremely difficult for native-born Latinos in Texas to participate in the political process. *Id.* at 768. As recently as 2006, this Court concluded that Texas had discriminated against Latinos in congressional redistricting. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (Kennedy, J.) (“In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it.”). And Texas has not ceased enacting laws that create barriers to voting for Latinos. See, e.g., *Perez v. Perry*,

elections show that Texas's situation is even more severe than the national disparity. Only 36.5% of Texas's adult citizen Latinos were registered to vote—compared with 65.9% of the state's non-Latino whites. See U.S. Census Bureau, *Voting and Registration in the Election of November 2010*, tbl. 4b (2011).<sup>12</sup> Worse, only 15.8% of Latinos actually turned out to vote, compared with 43.1% of non-Latino whites. See *id.* Nationally, 31.2% of Latino adult citizens voted, compared with 48.6% of non-Latino white adult citizens. See Lopez, *supra*, at 5-6.

Comparative college attendance rates, which correlate strongly with voter participation, help to explain this disparity: “Education has long been recognized as (perhaps *the*) prime performer among the constellations of influences on turnout, and deservedly so.” Robert A. Jackson, *Differential Influences on Latino Electoral Participation*, 25 Pol. Behav. 339, 354 (2003); see also Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. Pub. Econ. 1697, 1704 (2004) (“[C]ollege attendance has a sizable influence on subsequent civic participation.”). In fact, among Latino eligible voters, 50.3% of college graduates headed to the polls in 2010, while only 25.8% of high school graduates did. See Lopez, *supra*, at 6.

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No. 11-ca-360, Dkt. 60, at 11-12 (W.D. Tex. July 19, 2011) and *Perez v. Perry*, No. 11-ca-360, Dkt. 691, at 36-39 (W.D. Tex. Mar. 19, 2012) (three-judge panel altering temporarily Texas redistricting plans in Voting Rights Act challenge by Latino voters).

<sup>12</sup> Available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html>.

Without innovative programs like UT's, given its size of enrollment, it is unlikely that these numbers will change significantly. Although a larger percentage of young Latino adults than the general public say that a college education is important for success in life, a smaller percentage of young Latino adults than the general public say that they themselves plan to get a college degree. See Mark Hugo Lopez, Pew Hispanic Center, *Latinos and Education: Explaining the Attainment Gap*, at 3 (2009).<sup>13</sup> And nearly twice as many Latinos as non-Latino whites—29% versus 15%—have not completed high school. See Pew Hispanic Center, *Fact Sheet: Latinos in the 2010 Elections: Texas*, at 2 & tbl.2 (2010).<sup>14</sup> Expanding access to the state's premier public institution can help increase Latinos' college-attendance rate, and with it, their level of civic participation.

Cultivating college-graduate role models is a powerful, targeted way to increase the chances that talented Latino youth will follow in graduates' footsteps. See Ricardo D. Stanton-Salazar & Stephanie Urso Spina, *Informal Mentors and Role Models in the Lives of Urban Mexican-Origin Adolescents*, 34 *Anthropology & Educ. Q.* 231, 244 (2003). For example, across a series of interviews with Latino adolescents, researchers found that "the theme of exemplary adult role models as sources of inspiration and pride was consistent," and the students "could artic-

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<sup>13</sup> Available at <http://www.pewhispanic.org/files/reports/115.pdf>.

<sup>14</sup> Available at <http://www.pewhispanic.org/files/2011/08/TX-eligible-voter-factsheet.pdf>.

ulate many of the functions served by role models (e.g., inspiration, guide to achieving goals and dreams).” *Id.* The limiting factor seemed to be adolescents’ “limited networks,” which “left them often perplexed as to who they could identify as models.” *Id.* In other words, role models exert a powerful influence on Latino youth, but there are simply too few of them. By seeking a critical mass of Latino students, UT’s admissions plan helps to increase the number of potential Latino role models in the community.

Moreover, as this Court has recognized, “education ... is the very foundation of good citizenship.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Meaningful representation of qualified Latino students at Texas’s flagship university lays the groundwork for increased Latino participation in and engagement with civic affairs. In this way, UT’s plan serves not just the students who attend the University, but the broader community as well.

### **B. Leadership Potential**

Universities serve as the “training ground[s]” for our nation’s leaders. *Grutter*, 539 U.S. at 332. As this Court noted in *Grutter*, this is especially true of “highly selective” schools. *Id.* As with the University of Michigan, UT is the gem of Texas’s higher education system. Its undergraduate programs consistently rank among the best in the nation. *See Univ. of Tex. at Austin, Rankings & Kudos*.<sup>15</sup> Among the nation’s leaders who count themselves as UT alumni

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<sup>15</sup> Available at <http://www.utexas.edu/about-ut/rankings-kudos>.

are Texas Senator Kay Bailey Hutchison, former Secretary of State James Baker, former First Ladies Laura Bush and Claudia “Lady Bird” Johnson, and Supreme Court Justice Tom Clark.

“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” *Grutter*, 539 U.S. at 332. UT recognizes the need for a diverse classroom environment to prepare its students adequately to assume the roles of leaders in Texas. In fact, its pursuit of diversity in admissions was explicitly adopted, among other things, to “develop the next generation of leadership, with the understanding and expectation that many of the University’s graduates will become future leaders of Texas.” JA 365a.

Latinos comprise 37.6% of the population of Texas. See U.S. Census Bureau, *The Hispanic Population: 2010*, at 6 tbl.2 (2011).<sup>16</sup> The Latino contingent of Texas’s federal congressional delegation, however, is only 17.6%. Compare Nat’l Assoc. of Latino Elected Officials (NALEO), *2011 National Directory of Latino Elected Officials*, at 134-35 (six Latino congressmen), with U.S. House of Representatives, *Directory of Representatives* (32 House seats).<sup>17</sup> Repre-

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<sup>16</sup> Available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

<sup>17</sup> Available at [http://www.house.gov/representatives/#state\\_tx](http://www.house.gov/representatives/#state_tx).

sentation at the state level is also disproportionately small: Latinos comprise 20.7% of Texas's Representatives (31 of 150) and 22.6% of its Senators (7 of 31). Compare NALEO, *supra* (Latino elected officials), with The Senate of Tex., *Texas Senators of the 82nd Legislature* (31 Senators)<sup>18</sup> and Texas House of Representatives, *About Us* (150 Representatives).<sup>19</sup> With state and local positions aggregated, Latino representation shrinks to only 7.3%. See Louis DeSipio, *Latino Voters: Lessons Learned and Misunderstood*, in *The Unfinished Agenda of the Selma-Montgomery Voting Rights March* 135, 139 (2005). A critical mass of talented Latino students at UT is necessary to ensure that Latinos are among our nation's leaders and that all leaders are exposed to the wide range of viewpoints from the communities that they serve.

### C. Military Leadership

In addition to the benefits that flow from diversity in higher education, the Court in *Grutter* recognized that a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its princip[al] mission to provide national security." 539 U.S. at 331 (quoting military brief). The Court explained that the nation's "most selective institutions must remain both diverse and selective" so that Reserve Officers Training Corps and the military

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<sup>18</sup> Available at <http://www.senate.state.tx.us/75r/Senate/Members.htm> (UT graduates comprise eleven (35%) of the state senators).

<sup>19</sup> Available at <http://www.house.state.tx.us/about-us/> (UT graduates comprise forty-one (27.3%) of the state representatives).

could continue to “train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.” *Id.*

Since 1985, the Latino population in the military has “more than doubled.” U.S. Army, *The Changing Profile of the Army: FY08*, at 9 (2008);<sup>20</sup> see also Karin De Angelis & David R. Segal, *Minorities in the Military*, in *The Oxford Handbook of Military Psychology* 325, 334 (Janice H. Laurence & Michael D. Matthews eds., 2012) (noting that “increased accession numbers of Hispanics are beginning to fill the manpower void left by the declining numbers of African Americans”). As this growth continues, Latino military leadership may well be necessary to help retain and lead the military’s significant Latino enlisted contingent. Retaining a Latino presence in the military may thus depend on increasing the officer corps, which has always been the highest educated segment of the military.<sup>21</sup> As a recent report on di-

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<sup>20</sup> Available at <http://www.armyg1.army.mil/hr/docs/demographics/changing%20profile%20report%20december%202008.pdf>.

<sup>21</sup> See, e.g., U.S. Army, *Careers & Jobs: Become an Officer*, available at <http://www.goarmy.com/careers-and-jobs/become-an-officer.html> (listing “the four paths to becoming a commissioned officer,” all of which require a college degree); see also Kizzy M. Parks et al., *Latina Perceptions of Diversity Climate in the Military* (2009), available at [http://www.deomi.org/EOEEOResources/documents/Latina\\_Perceptions\\_of\\_Diversity\\_Climate\\_in\\_the\\_Military-Parks.pdf](http://www.deomi.org/EOEEOResources/documents/Latina_Perceptions_of_Diversity_Climate_in_the_Military-Parks.pdf) (“[D]iversity climate was linked to job satisfaction and organizational commitment .... As job satisfaction and organizational commitment are strongly linked to retention and turnover for minorities—and Hispanics in particular—the military should ... build upon Latinas’ strong sense of community in recruiting and retention efforts by emphasizing that the military is a large, but close-

iversity in the military explained, “[d]uring the Vietnam War, the lack of diversity in military leadership led to problems that threatened the integrity and performance of the Nation’s military ... because servicemembers’ vision of what is possible for their career is shaped by whether they see individuals *with similar backgrounds* excelling and being recognized in their Service.” Military Leadership Diversity Comm’n, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, at 11 (Exec. Summary 2011) (emphasis added).

Despite the importance of a diverse officers corps, Latinos comprise a substantially higher percentage of enlisted active duty personnel than they do of officers. In 2006, across the entire military, Latinos accounted for 11.2% of enlisted personnel, but only 4.9% of officers. See Mady Wechsler Segal & David R. Segal, Population Reference Bureau, *Latinos Claim Larger Share of U.S. Military Personnel* (2007).<sup>22</sup> Latinos are underrepresented among officers, but, “considering their lower educational attainment and their naturalization status,” they are overrepresented among enlisted personnel. *Id.* Indeed, the Army reported that, in 2008, Latinos constituted 11.9% of enlisted active duty soldiers but only 5.5% of officers, see U.S. Army, *Army Demographics: FY08 Army Profile* (2008),<sup>23</sup> and ex-

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knit family that takes care of the individual by providing fair treatment and personal development opportunities.”).

<sup>22</sup> Available at <http://www.prb.org/Articles/2007/HispanicsUSMilitary.aspx>.

<sup>23</sup> Available at <http://www.armygl.army.mil/HR/docs/demographics/FY08%20Army%20Profile.pdf>.



plained that a “barrier for Hispanics entry in the Army is often related to lack of educational credentials,” U.S. Army, *The Changing Profile of the Army, supra*, at 9.

These figures are not improving. In the 2011 Army, the Latino contingent stood at 13% of active duty soldiers, but only 8% of warrant officers and 6% of commissioned officers. U.S. Army, *Army Demographics: FY11 Army Profile* (2011).<sup>24</sup> By contrast, 60% of the enlisted population, 62% of warrant officers, and 72% of commissioned officers were white. *Id.*

Attaining a critical mass of Latinos at UT and other selective schools is essential to ensuring that the military officer corps is diverse and meets the military’s needs. UT has already established itself as a robust training ground for our nation’s military with longstanding ROTC programs—the Naval ROTC was established at UT in 1940,<sup>25</sup> and the Army ROTC has been active on campus since 1947.<sup>26</sup> Increased Latino access to these programs will benefit all levels of the military.

#### D. Private Sector

Latinos are underrepresented in other leadership-oriented and professional careers, and in the

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<sup>24</sup> Available at [http://www.armyg1.army.mil/HR/docs/demographics/FY11\\_ARMY\\_PROFILE.pdf](http://www.armyg1.army.mil/HR/docs/demographics/FY11_ARMY_PROFILE.pdf).

<sup>25</sup> Univ. of Tex. at Austin, *Naval Reserve Officer Training Corps*, available at <http://www.utexas.edu/cola/depts/navy/marine/>.

<sup>26</sup> Univ. of Tex. at Austin, *Texas Army ROTC Longhorn Battalion*, available at <http://www.utexas.edu/cola/depts/arotcl/>.

college pipeline that leads to such opportunities. In *Grutter*, this Court emphasized that a diverse educational background prepares *all* students to enter the modern job market and to meet the needs of modern industry. “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 330-31. The Court approvingly cited the viewpoints of *amici* Fortune 500 companies, which included several of Texas’s largest and most prominent employers, such as Dow Chemical, Shell Oil, and American Airlines. *Id.* Those *amici* explained that having employees educated in a diverse environment allows companies to serve an increasingly diverse customer base, and also facilitates cross-cultural interactions with business partners. See Brief for 3M et al. as *Amici Curiae* Supporting Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056.

1. *Professional Career Paths and Diversity in the College Classroom*

An educated Latino community is particularly important for Texas and the nation. In today’s economy, a college degree continues to become increasingly important. See Barbara Schneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, in *Hispanics and the Future of America*, at 211 (Marta Tienda & Faith Mitchell, Nat’l Res. Council of the Nat’l Academies, ed. 2006).<sup>27</sup> But again, fewer Latinos attend college than whites. Consequently, in the private sector,

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<sup>27</sup> Available at <http://www.ncbi.nlm.nih.gov/books/NBK19905/pdf/TOC.pdf>.

just as in the military, Latinos occupy more low-level positions. While Latinos make up 14.3% of the total population of employed civilians over 16, they comprise only 7.3% of employees in management, professional, and related occupations. See U.S. Census Bureau, *The 2012 Statistical Abstract*, Labor Force, Employment, and Earnings, at 393 tbl. 616 (2012).<sup>28</sup>

Indeed, nationally nearly twice as many whites as Latinos per capita held management, professional, and related occupations in 2011—38.3% versus 19.5%. Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, Table 10: Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex.<sup>29</sup> And while Latinos serve as 12.6% of sales and office occupation workers, they are overrepresented as 21.3% of service workers (including 32.5% of cooks and 38.5% of dishwashers) and over 40% of laborers in a number of construction-related occupations. U.S. Census Bureau, *The 2012 Statistical Abstract*, *supra*, at 394-96 tbl. 616. At the same time, only 3.4% of lawyers are Latino. *Id.* at 396 tbl. 616.

## 2. *Science, Technology, Engineering, and Math (STEM) and the Careers of the Future*

Latino underrepresentation is particularly worrisome in the fields of science, technology, engineering, and math (STEM). These fields are widely recognized to be crucial to future American economic

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<sup>28</sup> Available at <http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf>.

<sup>29</sup> Available at <http://www.bls.gov/cps/cpsaat10.pdf>.

prosperity. See Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, *STEM*, at 12-17 (2011)<sup>30</sup>; see also Jennifer Godinez, *How Educators Can Support the High Expectations for Education that Exist in the Latino Family and Student Community*, in *White Teachers, Diverse Classrooms: Creating Inclusive Schools, Building on Students' Diversity, and Providing True Educational Equity* 256 (Julie Landsman ed. 2011) (“[E]ducation leaders agree that rigorous and equitable educational systems need to be developed within the next 10 years in order to train the human capital required to ensure the United States remains competitive in the global economy.”).

Despite their widely recognized importance, filling these jobs is no easy task. See Shelley DuBois, *America's Science Job Conundrum*, CNNMoney (July 15, 2011) (“But even as the number of jobs in the STEM sector increases, there’s a possibility that Americans could struggle to meet the demand.”).<sup>31</sup> A recent report to the President explained that the U.S. will need to produce another million STEM professionals over what it “will produce at the current rate over the next decade if the country is to retain its historical preeminence in science and technology.” President’s Council of Advisors on Science and Technology, *Report to the President: Engage to Ex-*

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<sup>30</sup> Available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/stem-complete.pdf>; see also Refugio I. Rochin & Stephen F. Mello, *Latinos in Science: Trends and Opportunities*, 6 J. Hispanic Higher Educ. 305, 310-13 (2007).

<sup>31</sup> Available at <http://management.fortune.cnn.com/2011/07/15/America-science-job-conundrum/>.

*cel: Producing One Million Additional College Graduates with Degrees in Science, Technology, Engineering, and Mathematics*, at i (2012).<sup>32</sup> Achieving this goal will require boosting “the number of students who receive undergraduate STEM degrees by about 34% annually over current rates.” *Id.* By 2018, Texas will have 22% more STEM jobs than it did in 2008—a staggering 91% of them will require postsecondary education and training, and 51% of them will require at least a bachelor’s degree. See Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, *STEM, supra*, at 47.

Latinos must be part of this critical sector of the workforce. See President’s Council of Advisors on Science and Technology, *supra*, at 5 (considering minority groups and women “an ‘underrepresented majority’ that must be part of the route to excellence”). For their part, corporations are increasingly recognizing the importance of diverse workplaces. See, e.g., Hispanic Ass’n on Corporate Responsibility, *2011 HACR Corporate Inclusion Index*, at 13 (2011) (“Of the total respondents, 72 percent reported having or supporting an internship program specifically geared toward recruiting Hispanics.”).<sup>33</sup>

The trend of fewer Latinos attending college than whites unmistakably correlates with the underrepresentation of Latinos in STEM career paths—the less access Latinos have to postsecondary education, the less access they will also have to bur-

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<sup>32</sup> Available at [http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-engage-to-excel-final\\_feb.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-engage-to-excel-final_feb.pdf).

<sup>33</sup> Available at [http://www.hacr.org/docLib/20111221\\_2011\\_HACRCII.pdf](http://www.hacr.org/docLib/20111221_2011_HACRCII.pdf).

geoning STEM career opportunities. See, e.g., Stanley Litow, *A Silent Crisis: The Underrepresentation of Latinos in STEM Careers*.<sup>34</sup>

The data nationally bear out Latinos' underrepresentation in STEM careers. "Of all workers, 6 percent of white workers and 15 percent of Asian workers are currently working in STEM-related jobs.... Comparatively, only 2 percent of Latinos and 3 percent of African Americans work in STEM fields." Nat'l Action Council on Minorities in Engineering, Inc., *Critical Issues in Engineering Education Policy*, 2 Res. & Pol'y (April 2012);<sup>35</sup> see also Nat'l Action Council on Minorities in Engineering, Inc., *2011 NACME Data Book: A Comprehensive Analysis of the "New" American Dilemma* 4-5 (2011) ("Latinos continue to lag far behind the other major race/ethnic categories in college enrollment" and underrepresented minorities "earned just 13 percent of all engineering bachelor's degrees in 2009").<sup>36</sup>

Changing these figures depends on providing Latinos better access to the education required to perform management and STEM jobs. UT has already proven itself a leader in such initiatives. For instance, its Freshman Research Initiative (FRI), which enrolls one quarter of the class in the College of Natural Sciences, provides mentoring-rich research and publication opportunities for first-year

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<sup>34</sup> Available at [http://www.edweek.org/ew/articles/2008/07/18/44litow-com\\_web.h27.html](http://www.edweek.org/ew/articles/2008/07/18/44litow-com_web.h27.html).

<sup>35</sup> Available at <http://www.nacme.org/user/docs/Engineering%20RB1V2R.pdf>.

<sup>36</sup> Available at [http://www.nacme.org/user/docs/NACME\\_DatabookReprintFinal2Post.pdf](http://www.nacme.org/user/docs/NACME_DatabookReprintFinal2Post.pdf).

students. See President's Council of Advisors on Science and Technology, *supra*, at 88 box G-1. "Early results suggest that student retention in STEM programs is 30 to 35 percent higher for students in the initiative." *Id.* Fully 40% of the 500 students participating in FRI are from underrepresented groups, and participating students demonstrate a variety of more positive educational and vocational outcomes. See Univ. of Tex. at Austin, *Freshman Research Initiative, College of Natural Sciences, Facts & Numbers*.<sup>37</sup>

Indeed, data suggest that once Latinos actually make it to college, they are as likely as other groups (excepting Asian-Americans) to major in a STEM subject. See David Beede et al., U.S. Dep't of Commerce, *Education Supports Racial and Ethnic Equality in STEM*, at 4 fig.3 (2011) (showing, *inter alia*, that of college graduates, 21% of Latinos, and 22% of non-Latino whites, majored in STEM fields).<sup>38</sup> Further, they are nearly as likely to enter STEM careers: the gap between whites and Latinos for those with STEM majors who now have STEM jobs is lower than the gap between whites and Latinos for college degrees generally (34% versus 28% for the former; 35% versus 14% for the latter). *Id.*

Thus, by attracting and seeking diversity at the college level, and, further, by ensuring rigorous STEM-based educational opportunities, UT's plan

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<sup>37</sup> Available at <http://fri.cns.utexas.edu/about-fri/facts-numbers>.

<sup>38</sup> Available at [http://www.esa.doc.gov/sites/default/files/reports/documents/educationsupportsracialandethnicequalityinstem\\_0.pdf](http://www.esa.doc.gov/sites/default/files/reports/documents/educationsupportsracialandethnicequalityinstem_0.pdf).

looks forward to the day when “the use of racial preferences will no longer be necessary to further the .... compelling interest in obtaining the educational benefits that flow from a diverse student body.” *Grutter*, 539 U.S. at 343.

### 3. *The Economic Importance of College Education for the Latino Community*

An educated Latino community is important for Texas and its economy in other ways. Both nationally and locally, the domestic consumers for Texas businesses are increasingly Latino. The Texas State Demographer predicts that the Latino population will reach parity with the non-Latino white population in Texas by 2020, and will be more than 50% larger than the white population in 2040. See The Univ. of Tex. at San Antonio, Office of the State Demographer, *2008 Methodology for Texas Population Projections* (Feb. 2009).<sup>39</sup>

As the Latino population continues to increase, so too does its buying power. Already, according to one study, “[i]f it were a standalone country, the U.S. Hispanic market buying power would make it one of the top twenty economies in the world.” Nielsen, *State of the Hispanic Consumer: The Hispanic Market Imperative* (2012).<sup>40</sup> The private sector is in great need of college graduates educated in a diverse environment who understand the needs of the Latino

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<sup>39</sup> Available at [http://txsdc.utsa.edu/tpepp/2008projections/2008\\_txpopprj\\_txtotnum.php](http://txsdc.utsa.edu/tpepp/2008projections/2008_txpopprj_txtotnum.php).

<sup>40</sup> Available at <http://www.nielsen.com/us/en/insights/reports-downloads/2012/state-of-the-hispanic-consumer-the-hispanic-market-imperative.html>.



community and who are able to connect with this important community.

At the same time, the success of Texas industry is crucially important to the United States' international trade. Texas is the state with by far the strongest trading relationship with Mexico: it exports more goods to and engages in more land trade with Mexico than any other state. In 2003, for example, Texas exported \$41.5 billion in goods and services to Mexico; the next-largest exporter was California, with \$14.9 billion in exports. See Robert W. Gilmer, Fed. Reserve Bank of Dallas, *U.S.-Mexico Trade: Are We Still Connected?*, El Paso Bus. Frontier 2-3 (2004).<sup>41</sup> The nations' economies remain tightly intertwined. See Jesus Cañas et al., Fed. Reserve Bank of Dallas, *U.S., Mexico Deepen Economic Ties*, 11 (2006) ("The U.S. is Mexico's top trading partner by far.... Americans are the biggest investors in Mexico ... The U.S. and Mexican economies have become increasingly synchronized.").<sup>42</sup> In 2011, the United States was responsible for approximately 65% of Mexico's \$700.5 billion in trade (imports and exports). See Jesus Cañas, Fed. Reserve Bank of Dallas, *Mexico Resilient in 2011 Amid Global Uncertainty and Sluggish U.S. Growth* (2012).<sup>43</sup> Having a diverse group of Latino college graduates from UT

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<sup>41</sup> Available at <http://www.dallasfed.org/assets/documents/research/busfront/bus0403a.pdf>.

<sup>42</sup> Available at <http://www.dallasfed.org/assets/documents/research/swe/2006/swe0601c.pdf>.

<sup>43</sup> Available at <http://www.dallasfed.org/assets/documents/research/swe/2012/swe1202c.pdf>.

helps ensure continuing growth in economic trade with Mexico and Latin American countries.

In short, the benefits of diversity to the Texas and national economy are “not theoretical but real.” *Grutter*, 539 U.S. at 330; *see also* Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 *Am. Soc. Rev.* 208 (Apr. 2009) (“[R]acial diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits.”). If UT is to provide its graduates the education they need to thrive in the rapidly changing Texas and national economy, the University must educate its students in a diverse classroom environment that includes a critical mass of Latino students.

### **III. TEXAS'S CONTINUING INSTITUTIONAL BARRIERS TO LATINOS CANNOT BE IGNORED**

With the Latino population ever increasing and now accounting for over fifty percent of the students enrolled in Texas public schools,<sup>44</sup> Latinos' potential for contributing substantially to society cannot be overlooked. UT recognizes this growing pool of qualified Latino applicants and how they factor into not only the current school setting, but also into the future workforce and leadership in Texas and the Nation. Nevertheless, Texas Latinos still struggle to attain the American dream. This is not surprising given the persistent institutional barriers faced by

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<sup>44</sup> Div. of Research & Analysis, Tex. Educ. Agency, *Enrollment in Texas Public Schools 2010-2011*, at ix (2011), available at [www.tea.state.tx.us/acctres/Enroll\\_2010-11.pdf](http://www.tea.state.tx.us/acctres/Enroll_2010-11.pdf).

Latinos. Although the TTP law has undoubtedly helped create access to higher education for some Latinos, the TTP plan cannot possibly account for all of the nuanced challenges that Latino youth must overcome just to apply to a university like UT. And while *amici* do not contend that UT should implement its race-conscious admissions plan as a remedy to the persistent unequal treatment of Latinos in Texas, the following history shows contextually how much further UT and Texas have to go to ensure that Texas's fastest growing group has equal opportunities to succeed and participate fully as citizens. As this Court held in *Grutter*, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332.

Latinos continue to face numerous obstacles in Texas, many of which taint their educational experience. They must overcome risk factors such as poverty, quality of health, family structures, and high dropout rates—a crisis that bears heavily on the group's ability to participate meaningfully in society and in the country's political process.<sup>45</sup> To understand how institutional barriers persist, one cannot overlook what this Court has described as Texas's "long, well-documented history of discrimination

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<sup>45</sup> See Nat'l Ctr. for Pub. Policy and Higher Educ., *Policy Alert: Income of U.S. Workforce Projected to Decline if Education Does Not Improve* (2005), available at [http://highereducation.org/reports/pa\\_decline/pa\\_decline.pdf](http://highereducation.org/reports/pa_decline/pa_decline.pdf) (Latinos are the least educated racial group but the fastest growing, and the "income of [the] U.S. workforce [is] projected to decline if education doesn't improve").

that has touched upon the rights of African Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (quotation omitted).

### A. Overcoming Past Discrimination In Texas Public Schools

As this Court recognized in *Perry*, Texas’s history of discrimination has been long and pervasive. Historical discrimination has been particularly virulent—and has had particularly significant lasting effects—in the area of education. By the 1920s, school segregation in Texas had “received endorsement not only from the Superintendent of Public Instruction and the state, but from University of Texas scholars as well.” Tijerina Expert Report at 25-26, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. 2012), Dkt. 241-2. Many school districts established “Mexican schools,” and by the 1930’s, 90% of South Texas schools were segregated. See Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307 (1972). Through the early twentieth century, districts intentionally channeled Latino students into substandard “Mexican” and “migratory” schools. See Kristi L. Bowman, *The New Face of School Desegregation*, 50 Duke L.J. 1751, 1769 (2001).

Latinos were forced to challenge the segregation and educational inequities in courts across Texas. See, e.g., *Delgado v. Bastrop Indep. Sch. Dist.*, No. 388 (W.D. Tex. June 15, 1948);<sup>46</sup> *Cortez v. Carrizo*

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<sup>46</sup> Available at <http://xa.yimg.com/kq/groups/13699726/1941412825/name/Delgado+v.+Bastrop.pdf>.

*Springs Indep. Sch. Dist.* (1955); *Salinas v. Kingsville Indep. Sch. Dist.* (1956);<sup>47</sup> *Hernandez v. Driscoll Consol. Indep. Sch. Dist.*, 1957 U.S. Dist. LEXIS 4784 (S.D. Tex. Jan. 11, 1957). Indeed, Latinos were not identified as a distinct, suspect class for equal protection purposes until *Hernandez v. Texas*, 347 U.S. 475 (1954), in which this Court cited the segregation of Latino schoolchildren as evidence that the white community considered Latinos a separate race. *See id.* at 479-80.

Despite *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hernandez*, Latinos continued to be denied equal educational opportunities in Texas. School districts often clustered African-American students with “white” Latino students, in order to claim that neither group was segregated. Indeed, not until *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), did the courts hold that *Brown* clearly prohibits the segregation of Latino students into racially isolated schools with African-American students, while leaving white students unaffected.

Even after *Cisneros*, Latino students continued to experience significant discrimination in Texas schools throughout the twentieth century and up until the present.<sup>48</sup> Indeed, several school districts

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<sup>47</sup> *See* Richard R. Valencia, *Chicano School Failure and Success: Past, Present, and Future* (Routledge 2011). The *Carrizo Springs* and *Kingsville* cases are noted in this book but are unpublished.

<sup>48</sup> *See, e.g., United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972) (Austin); *Ross v. Eckels*, 468 F.2d 649 (5th Cir. 1972) (Houston); *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975) (Dallas); *United States v. Midland Indep. Sch. Dist.*, 519

across Texas remain subject to desegregation orders today. See *United States v. Texas*, 601 F.3d 354 (5th Cir. 2010).<sup>49</sup>

And even though formal segregation is no longer legally sanctioned, many Latino students continue to attend largely *de facto* segregated districts, which have effectively replaced the old “Mexican schools.”<sup>50</sup> Nationally and across every region, a typical Latino student attends a school that is less than one-third white. See Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 44 (2003).<sup>51</sup> Seventy-six percent of Lati-

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F.2d 60 (5th Cir. 1975); *United States v. Texas Educ. Agency*, 600 F.2d 518 (5th Cir. 1979) (Lubbock); *Alvarado v. El Paso Indep. Sch. Dist.*, 426 F. Supp. 575 (W.D. Tex. 1976).

<sup>49</sup> In higher education in the 1950s and 1960s, UT had segregated Mexican-American students in separate dormitories and the students were excluded from joining university-sponsored organizations. See *Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994). The State of Texas was under investigation by the U.S. Department of Education (and its predecessor) from the 1970s through at least 1994 for denying equal educational opportunities to Latinos under Title VI of the Civil Rights Act of 1964. See *id.* at 555-57.

<sup>50</sup> Although the old “Mexican Schools” no longer exist, similar patterns of segregating Latino students on the perceived basis of language proficiency have been found even today. In Dallas, four years after being removed from a school desegregation order, a federal district court found that an elementary school principal intentionally segregated Latino students by race, using language as a proxy. See *Santamaria v. Dallas Indep. Sch. Dist.*, 2006 U.S. Dist. LEXIS 33195 (N.D. Tex. May 17, 2006).

<sup>51</sup> Available at <http://pages.pomona.edu/~vis04747/h21/readings/AreWeLosingtheDream.pdf>.

nos attend predominantly minority schools, more than any other group. *Id.* at 33. Latinos attending intensely segregated schools, defined as schools with 90 to 100 percent minority enrollment, grew from 462,000 in 1968 to 2.86 million in 2000, comprising 46.9 percent of all Latino students in Texas. *Id.* at 33, 52.

### **B. Overcoming Current Institutional Barriers In Education**

The serious educational disadvantages borne by Latinos are exacerbated by low socio-economic status. In multiple studies, the U.S. Department of Education has found that student achievement is adversely affected by poverty,<sup>52</sup> a significant problem for Latinos because of their disproportionately high poverty rates. See U.S. Census Bureau, *Poverty, Highlights* (2011) (26.6 percent of Latino families below poverty level).<sup>53</sup> In each of the Texas counties with large Latino populations, Latinos have lower educational attainment levels, lower income levels, and a higher poverty rate than non-Latinos. This is

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<sup>52</sup> For example, on the National Assessment of Educational Progress reading scale (ranging from 0 to 500), high poverty students (75-100% eligible for free or reduced-price meals) on average performed 40 points lower than low poverty student populations (0-25% eligible for the meal program). Similar patterns exist on the mathematics scale. See Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *NAEP Data Explorer: National Assessment of Educational Progress, Selected Years, 1998-2009, Reading & Mathematics Assessments*, available at <http://nces.ed.gov/nationsreportcard/naepdata/>.

<sup>53</sup> Available at <http://www.census.gov/hhes/www/poverty/about/overview/index.html>.

true even when controlling for various demographic differences. See Chapa Expert Report at 4, *Perez v. Perry*, No. 11-cv-360, Dkt. 128-5 (W.D. Tex. Aug. 8, 2011; see also *id.* at Dkt. 128-10, tbls. 4-6. Additionally, the educational system has been largely unresponsive to the needs of Latino students, leading to high Latino attrition and dropout rates. See Intercultural Dev. Research Ass'n, *Attrition and Dropout Rates in Texas*.<sup>54</sup>

And although *amici* do not posit that standardized college entrance exams should be excluded for admission purposes, a rigid use of these tests for admissions, as petitioner requests, will eliminate academically promising minority and low-income students who apply with strong academic records, as well as other talents that contribute to the academic environment, but relatively low SAT scores.<sup>55</sup> This is especially true for Latinos, who have lower performance rates on college-readiness tests than do white students.<sup>56</sup>

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<sup>54</sup> Available at <http://www.idra.org/Research/Attrition> (in 2010-2011, 110,804 Texas high school students were lost to attrition. The racial gap between Latino and white students was 23%).

<sup>55</sup> Over 800 colleges limit the consideration of SAT and ACT test for admission purposes. See Charles Rooney, Nat'l Ctr. for Fair & Open Testing, *Test Scores Do Not Equal Merit: Enhancing Equity & Excellence in College Admissions by Deemphasizing SAT and ACT Results*, at 14, 26 (1998), available at <http://www.fairtest.org/sites/default/files/optrept.pdf>.

<sup>56</sup> See Div. of Research & Analysis, Tex. Educ. Agency, *College Admissions Testing of Graduating Seniors in Texas High Schools Class of 2010* (2011), available at [http://www.tea.state.tx.us/acctres/sat\\_act\\_index.html](http://www.tea.state.tx.us/acctres/sat_act_index.html). For



Despite the past discrimination and institutional barriers confronting Latinos in education, they are persevering and becoming qualified candidates for college in large part because universities like UT have begun to open their doors. It is not only important for their future but also for that of greater Texas and the nation. As the former Texas State Demographer predicts, if existing gaps between whites and minorities in educational attainment levels and household income persist, Texas will:

have a population that would be poorer, less well educated, and more in need of numerous forms of State services than its present population but would be less able to support such services. It would have a population that is likely to be less competitive in the increasingly international labor and other markets of the world.... [But] if socioeconomic differentials between demographic groups were to be reduced through increased education and other means, Texas population growth could be a source of increased private- and public-sector resource growth.

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example, the average SAT and ACT scores decreased as the percentage of Latino students making up the student body increased: when between 20 and 30 percent, average scores were 1034 (SAT) and 22.1 (ACT); but when over 50 percent, the averages were 920 (SAT) and 18.6 (ACT). Moreover, Latino students had a 38.4% participation rate for the SAT, while white students had a rate of 53.6%, and Latino students had a 26.6% participation rate for the ACT, while white students had a rate of 37.7%.

Steve H. Murdock et al., *The Texas Challenge in the Twenty-First Century: Implications of Population Change for the Future of Texas*, at 398 (2002).<sup>57</sup>

While much progress has been made by Latinos, there is still a long way to go. As Justice Kennedy noted in *Parents Involved*, the “enduring hope is that race should not matter; the reality is that too often it does.” 551 U.S. at 787 (Kennedy J., concurring). Texas is no different. UT’s narrow use of race in a holistic, individualized manner to fulfill its compelling interest in diversity is an appropriate response.

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<sup>57</sup> Available at <http://txsdc.utsa.edu/reports/2002/texaschallenge/TxChall2002.pdf>

**CONCLUSION**

The judgment below should be affirmed.

Respectfully submitted,

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## **APPENDIX**

## **APPENDIX: LIST AND DESCRIPTION OF *AMICI CURIAE***

**ASPIRA.** ASPIRA is the only national organization dedicated exclusively to the education of Latino youth. Its mission is to promote the development of the Latino community through advocacy and the education and leadership development of its youth. ASPIRA has ASPIRA Associates and Affiliates in seven states (DE, IL, FL, MA, NJ, NY, PA) and Puerto Rico, as well as formal partnerships with over 30 regional and local organizations across the country. Founded in 1961, ASPIRA serves over 45,000 students each year in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs geared at reducing the exceedingly high Latino drop-out rate and motivating and assisting students to enter higher education. It also reaches over 5,000 parents and young adults with a host of programs, including GED, parental engagement, and financial literacy programs. Through its signature program, the ASPIRA Leadership Development Clubs in schools, ASPIRA reaches young Latinos in over 200 high schools in low-income inner-city schools in 76 communities around the country. ASPIRA operates thirteen charter schools in Delaware, Florida, Illinois, and Pennsylvania with over 10,000 elementary, middle, and high school students. Over 95% of Aspirantes (ASPIRA youth) complete high school and 90% go on to college, and it has an alumni base of over 500,000 Latinos.

**Cuban American National Council, Inc. (CNC).** CNC is the largest U.S. non-profit Hispanic organization developing affordable housing for low-income seniors, and is a pioneer in providing charter school education. Other Council programs include daycare and developmental services for infants/toddlers of adolescent mothers, and employment and training services for unskilled, undereducated recent immigrants, and individuals who face an English language barrier.

**Dominican American National Roundtable (DANR)/National Dominican American Council (NDAC).** The Dominican American National Roundtable (DANR) is a non-profit, charitable, members organization which brings together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. It aims to ensure for U.S. Dominicans the full exercise of the rights and freedoms guaranteed by the Constitution of the United States of America. The National Dominican American Council (NDAC) is the national civic-engagement/community relations organ of the Dominican American National Roundtable. It oversees 120 local councils in 85 cities across the United States. With its membership, which includes local councils, grassroots community organizations, educational, legal, health and civic organizations, DANR has evolved into a powerful research and advocacy organization on issues affecting the immigrant community.

**For People of Color, Inc. (FPOC).** For People of Color, Inc. (FPOC) assists law school applicants of color in gaining admission to the country's elite law schools.

**Hispanic Association of Colleges & Universities (HACU).** The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; to improve access to and the quality of postsecondary educational opportunities for Hispanic students; and to meet the needs of business, industry and government through the development and sharing of resources, information, and expertise.

**Hispanic Federation.** The Hispanic Federation provides grants to a broad network of Latino non-profit agencies serving the most vulnerable members of the Hispanic community and advocates nationally with respect to the vital issues of education, health, immigration, economic empowerment, civic engagement, and the environment.

**Labor Council for Latin American Advancement (LCLAA).** The Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 2.2 million Latino trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

**LatinoJustice PRLDEF.** LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. In its first lawsuit, *Aspira v. New York City Board of Education*, LatinoJustice PRLDEF helped establish bilingual education in New York, and it has since combated the forced segregation of Latino children in Connecticut, Delaware, Pennsylvania and Massachusetts. In addition to creating pathways for success for Spanish-speaking children in public schools, it has thirty years of experience of increasing the cadre of Latino/a law students and attorneys in the country with the pre-law counseling, LSAT test preparation, and mentoring efforts.

**League of United Latin American Citizens (LULAC).** The League of United Latin American Citizens is the largest and oldest Hispanic membership organization in the United States. With over 132,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 83 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling, and strong affirmative action programs.

**Legal Aid Society-Employment Law Center (LAS-ELC).** Legal Aid Society-Employment Law



Center ("LAS-ELC") is a San Francisco-based non-profit public interest law firm which for decades has specialized in litigation on behalf of historically subordinated and underrepresented worker communities, notably including Latinos and other persons of color. LAS-ELC has long been concerned with securing full equality of opportunity in employment and education.

**MANA.** MANA, a National Latina Organization, is a nonprofit, advocacy organization established in 1974 whose mission is to empower Latinas through leadership development, community service, and advocacy. MANA fulfills its mission through programs designed to develop the leadership skills of Latinas, promote community service by Latinas, and provide Latinas with advocacy opportunities.

**Mexican American Legal Defense and Educational Fund (MALDEF).** The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States.

**National Association of Hispanic Publications (NAHP).** The National Association of Hispanic Publications, Inc. (NAHP) is a non-partisan trade advocacy organization, founded in 1982, representing the leading Spanish language publications serving 41 markets in 39 states, the District of Columbia and Puerto Rico, with a combined circulation of over 23 million readers.

**National Association of Latino Elected and Appointed Officials (NALEO) Education Fund.** The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Its constituents include more than 6,000 Latino elected and appointed officials nationwide who serve at every level of government, including positions with local and state education jurisdictions; counties, municipalities and special districts; state governance bodies; and the U.S. Congress. The NALEO Educational Fund is committed to strengthening the vitality and responsiveness of our democracy by ensuring that all of our nation's residents can become active contributors to our civic life.

**National Conference of Puerto Rican Women (NACOPRW).** NACOPRW as a non-profit/non-partisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, and political life of the United States.

**National Council of La Raza (NCLR).** The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity-building assistance to support and strengthen His-

panic CBOs—especially those that serve low-income and disadvantaged Latinos; and (2) applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably serve Hispanics.

**National Hispanic Media Coalition (NHMC).** The National Hispanic Media Coalition is a non-partisan, non-profit, media advocacy and civil rights organization established in 1986 in Los Angeles, California. Its mission is to improve the image of American Latinos as portrayed by the media, increase the number of American Latinos employed in all facets of the media and telecommunications industries, and advocate for media and telecommunication policies that benefit Latinos and other people of color.

**National Latina Institute for Reproductive Health (NLIRH).** NLIRH works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization, and policy advocacy.

**National Organization for Mexican American Rights (NOMAR), Inc.** NOMAR, Inc. is a national non-profit organization with the mission to protect the civil rights of Hispanic Americans and to promote equal opportunity for Hispanic Americans in employment and education.

**National Puerto Rican Coalition, Inc. (NPRC).** NPRC is a national non-profit organization representing the interests of over 8 million Puerto Rican U.S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political, and

economic wellbeing of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

**SER – National, Inc.** SER is a national non-profit 501c(3) corporation serving the needs of Hispanic Americans. SER was organized in 1964 by the League of United Latin American Citizens and the American GI Forum to help Hispanics prepare for and find jobs. SER now operates charter schools, daycare centers, one stop centers, and programs for the elderly, teaches financial literacy courses, and provides many other services that help individuals become productive members of society. SER is made up of 30 affiliate organizations across the country operating in over 200 cities and serving over 1.3 million individuals a year. It is recognized by the U.S. Department of Labor as the “premier community based organization serving the employment needs of the Hispanic community.”

**United States Hispanic Chamber of Commerce (USHCC).** The United States Hispanic Chamber of Commerce (USHCC) advocates, promotes, and facilitates the success of Hispanic businesses throughout the United States and Puerto Rico.

**United States Hispanic Leadership Institute (USHLI).** The United States Hispanic Leadership Institute (USHLI) is a national, non-profit organization that promotes education, civic participation, and leadership development for Latinos and other similarly disenfranchised groups. USHLI has been recognized by the American Association for Hispanics in Higher Education for its impact in promoting and

facilitating access to higher education for Latino students, and was honored at the White House by then-President Bill Clinton for "the performance of exemplary deeds of service for the nation in promoting leadership and civic participation." USHLI's mission is to fulfill the promises and principles of democracy by empowering minorities and similarly disenfranchised groups and by maximizing civic awareness and participation in the electoral process.