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The Civil Rights Project



Proyecto Derechos Civiles

Statement on the Development of the Brief of American Social Science Researchers in *Fisher v. University of Texas*

American social scientists from all parts of the country are today presenting a summary of research findings to the Supreme Court as it prepares to hear a key case on the future of integration in America's colleges this October. When there is an issue before our highest court that could affect every selective college in the U.S., change their student bodies, and influence the future of racial equality in the U.S., the Civil Rights Project believes that scholars who carry out and know the research issues best should have a voice. Although lawsuits often involve expert witnesses chosen by the parties to bolster their arguments, these courtroom battles are nothing like the much richer process by which research develops: through an exchange of ideas and perspectives among researchers, with repeated criticism and improvement, all under the control of independent researchers.

Sometimes the Court is criticized for relying on research, but the only alternative -- in reaching conclusions about the conditions of educational opportunity and the impact of various policies on racial equity -- is to rely on impressions and material that happened to be inserted in the record in a particular case. It is true, of course, that there are always debates within the research community but there is also a strong preponderance of evidence reflected in the extraordinary range of scholars agreeing with these research-based conclusions, about opportunity and race in a complex multiracial society with widely varying conditions and institutions.

The Civil Rights Project (CRP) was created 16 years ago to provide a channel for and give voice to leading researchers on civil rights, and inform the national discussion about legal and policy issues directly related to equal opportunity for racial and ethnic minorities in American society. We held a series of conferences and published studies by a number of scholars before the Supreme Court's 2003 decision in the *Grutter* case. That Court relied on a number of those studies and other scholarly work in reaching some of its key factual conclusions in upholding affirmative action, within strict limits. When the Supreme Court again decided to consider the issue of affirmative action this year in *Fisher v. University of Texas*, we decided to work with leading researchers, in order to represent the best available research on the issues before the Court.

The creation of this Brief of American Social Science Researchers was a truly collaborative effort among scholars from around the country, who are experts in the field of affirmative action and college access. The day after the University of Texas case was

accepted by the United States Supreme Court, I sent an email to a number of expert researchers and asked them if they would be willing to collaborate in preparing a brief. One of the people who responded positively was Liliana Garces,¹ who had been the counsel of record for a friend-of-the-court brief of U.S. researchers on the *Parents Involved* voluntary school desegregation case in 2006. She agreed to become the counsel of record for this Texas friend-of-the-court brief and we received a tremendously positive response from researchers around the country. Almost immediately, we began exchanging ideas.

I sent out a first memo and many people joined the discussion with their own ideas. Beginning six months ago, we scheduled a conference call every Friday morning where people would collaborate, go over drafts that had been prepared, suggest issues that ought to be raised, and debate research questions and relevant data. In a way, these weekly calls became an ongoing peer review in which ideas and language were challenged and improved, and a wider and wider array of research from a number of disciplines was considered. Liliana Garces worked hard to sharpen the drafting and link it with the key questions of fact and law before the Court.

As we developed a first rough draft of the brief, we convened an all-day meeting of scholars at UCLA to intensely review the ideas and the research. After the draft was prepared, we then circulated it to scholars across the country and they sent it on to other colleagues. We asked people to read it, to comment if something was inaccurate or could be improved, and to sign it if they agreed. We were very pleased by the active discussion that ensued and wide support for the brief.

The process of creating the brief also involved collaboration with other lawyers and experts preparing other briefs. We were, for example, actively involved in discussions with scholars for the preparation of a brief directed by the American Educational Research Association, under the leadership of Angelo Ancheta and Executive Director Felice Levine. That forthcoming brief, which will be submitted by several of the nation's leading associations of researchers, will address key issues concerning the evidence on the impact of diversity on the educational process. So, in effect, the creation of these briefs actually gave voice to researchers across the country by bringing the best of relevant research together in documents, and communicating it effectively in terms of the legal issues pending before the court.

Unfortunately, because *Fisher v. University of Texas* was not a class action case but just the case of a single student at the University of Texas at Austin, a rich factual record wasn't developed. The University had argued strongly against Supreme Court action, on the basis of significant procedural problems with the case. So there was serious risk that we would have a decision based on a record created to support the claim of *one* undergraduate student, in *one* public university, in *one* state. One of the central goals of

¹ Liliana Garces is assistant professor of higher education at George Washington University and a remarkable young scholar, who combines experience in law with a doctorate from Harvard University in education.

our brief was to show that the facts are so different among the states, and among the universities within a given state, that to reach a decision affecting the entire country, on the basis of a very narrow set of facts from a single university, could produce unworkable policies for many public institutions as well as for graduate and professional programs and for private universities.

We hope that this brief will be of use to other parties participating in all American colleges (we've already heard from some of them), and to the justices and the clerks themselves. Hundreds of experts have participated in this important effort to communicate what is known about the obstacles to and the conditions for achieving successfully diverse campuses that can best prepare young Americans to live and work in an extremely multiracial future. Making decisions that will shape the future of America's universities – the central institutions for economic and social mobility in this country -- without drawing on the best research evidence from independent scholars would be deeply unfortunate.

In addition to Professor Garces, who condensed and communicated the results of this process as well as possible within the Court's limitation of 9,000 words, we relied heavily on the scholars who participated in the weekly conference calls and the UCLA session, and on several dedicated student volunteers² (see committee below). We limited signers to regular faculty of four-year colleges and universities and to researchers at research centers. We were sorry not to include many others, including some scholars from other countries who wished to sign, but we wanted this to be very clearly a voice for established American scholars on an issue very important to the future of the nation. Those who signed include a number of well-known experts in the field as well as those who have a great deal of specific information about individual institutions and locales. We were very pleased by the wide support for the brief, with ultimately 444 scholars, from 172 institutions, in 42 states, signing the brief going to the Supreme Court.

For me, it was deeply impressive to see the energy, commitment and knowledge of many colleagues who put other work aside to forge this document; it was the academic world at its best. We hope that this will be of use to the Court and to the ongoing discussion in our university communities and in the nation.

Gary Orfield
August 9, 2012

²I would like to express my special appreciation to Lisa Weissnar for the work she did to keep the many and varied details of this process organized. She is a truly outstanding undergraduate at UCLA who gave richly of her time and worked with other student volunteers to check the institutional affiliations of all who signed the brief.

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