

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF  
SAN FRANCISCO,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, President of the  
United States; et al.,

Defendants-Appellants.

No. 17-17478

D.C. No. 3:17-cv-00485-WHO  
Northern District of California,  
San Francisco

COUNTY OF SANTA CLARA,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, President of the  
United States; et al.,

Defendants-Appellants.

No. 17-17480

D.C. No. 3:17-cv-00574-WHO

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**BRIEF AMICUS CURIAE OF PROFESSORS,  
INSTITUTIONS OF HIGHER EDUCATION, AND  
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS**

---

Robin B. Johansen, State Bar No. 79084  
Kathleen J. Purcell, State Bar No. 84992  
REMCHO, JOHANSEN & PURCELL, LLP  
1901 Harrison Street, Suite 1550  
Oakland, CA 94612  
Phone: (510) 346-6200  
Fax: (510) 346-6201  
Email: rj@rjp.com

Risa Lieberwitz  
Aaron Nisenson  
Nancy Long  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS  
1133 Nineteenth Street NW, Suite 200  
Washington, DC 20036  
Phone: (202) 737-5900  
Email: rlieberwitz@aaup.org  
anisenson@aaup.org  
nlong@aaup.org

Attorneys for Proposed Amicus Curiae  
Professors, Institutions of Higher Education,  
and American Association of University Professors

*(The names of the individual and institutional amici appear on the following page.)*

**PROPOSED AMICI:  
PROFESSORS AND INSTITUTIONS OF HIGHER EDUCATION**

**Institutional Amici:**

California Community Colleges Chancellor and Board of Governors  
Contra Costa Community College District  
San Francisco Community College District  
De Anza College  
Foothill-De Anza Community College District  
Santa Barbara City College

**Individual Amici:**

*University and College designations are for purposes of identification only.*

Leisy Abrego, Ph.D.  
Associate Professor, Chicana/o Studies  
University of California, Los Angeles

Cynthia Alcantar  
Visiting Professor of Sociology  
Pitzer College

Dawn Archey, Ph.D.  
Associate Professor of Mathematics  
University of Detroit Mercy

Barbara Babcock  
Crown Professor of Law, Emerita  
Stanford Law School

David Baltimore  
President Emeritus  
Professor of Biology  
California Institute of Technology

Robert J. Birgeneau  
Chancellor Emeritus  
Professor, Department of Physics  
University of California, Berkeley

Edelina M. Burciaga  
Assistant Professor, Department of Sociology  
University of Colorado, Denver

Bruce Cain, Ph.D.  
Professor of Political Science  
Stanford University

Louis Caldera  
Former President  
University of New Mexico  
Former Secretary of the Army

Albert M. Camarillo  
Professor of History (and by courtesy Graduate School of Education) and  
Leon Sloss Jr. Memorial Professor/Haas Centennial Professor of Public  
Service, Emeritus  
Department of History  
Stanford University

Dr. Aurora Chang  
Assistant Professor, School of Education  
Loyola University

Dr. Aurora Chang  
Assistant Professor, School of Education  
Loyola University

Erwin Chemerinsky  
Dean and Jesse H. Choper Distinguished Professor of Law  
Berkeley Law School  
University of California, Berkeley

Kathleen M. Coll, Ph.D.  
Associate Professor, Politics Department  
University of San Francisco

Frances Contreras, Ph.D.  
Associate Professor, Education Studies  
Department of Education Studies  
University of California, San Diego

Thomas M. Crea, Ph.D.  
Associate Professor, School of Social Work  
Boston College

Laura E. Enriquez  
Assistant Professor of Chicano/Latino Studies  
University of California, Irvine

Miriam Feldblum  
Executive Director  
President's Alliance on Higher Education and Immigration  
and  
Vice President for Student Affairs/Dean of Students  
Professor of Politics  
Pomona College

Estelle B. Freedman, Ph.D.  
Edgar E. Robinson Professor in U.S. History  
Stanford University

Dr. Kevin Funk  
Assistant Professor, Department of Political Science & Law  
Director, International Studies  
Spring Hill College

Edward McGlynn Gaffney  
Professor of Constitutional Law Emeritus  
Valparaiso University School of Law

Gina A. Garcia  
Assistant Professor, Department of Administrative and Policy Studies  
University of Pittsburgh

Cecilia Gonzalez-Andrieu, Ph.D.  
Associate Professor of Theology  
Loyola Marymount University

Ann E. Green, Ph.D.  
Professor of English  
Saint Joseph's University

Thomas Grey  
Sweitzer Professor of Law, Emeritus  
Stanford Law School

Evelynn Hammonds, Ph.D.  
Former Dean, Harvard College  
Professor of the History of Science and Professor of African and African  
American Studies  
Harvard University

Evelyn Y. Ho, Ph.D.  
Professor, Communication Studies  
Asian Pacific American Studies  
Critical Diversity Studies  
University of San Francisco

Brett C. Hoover, Ph.D.  
Assistant Professor of Pastoral and Practical Theology  
Director of Graduate Education  
Department of Theological Studies  
Loyola Marymount University, Los Angeles

Lindsay Pérez Huber, Ph.D.  
Associate Professor  
Social and Cultural Analysis of Education  
College of Education  
California State University, Long Beach

Dalal Katsiaficas, Ph.D.  
Assistant Professor, Department of Educational Psychology  
College of Education  
University of Illinois at Chicago

Tatyana Kleyn, Ed.D.  
Associate Professor  
The City College of New York, CUNY

Gerdenio Manuel, S.J.  
Professor and Chair, Psychology Department  
Director, St. Ignatius Institute  
University of San Francisco

Valerie J. Matsumoto, Ph.D.  
Professor, Department of History /  
Department of Asian American Studies  
University of California, Los Angeles

Susana M. Muñoz  
Assistant Professor, Co-director of the Higher Education Leadership  
Program  
Colorado State University, Fort Collins

Venkatesh Narayanamurti  
Former Dean of Engineering, Harvard University  
Dean of Engineering Emeritus, University of California Santa Barbara  
Benjamin Peirce Research Professor of Technology and Public Policy  
Harvard University

Genevieve Negrón-Gonzales, Ph.D.  
Assistant Professor, School of Education  
University of San Francisco

Patricia A. Pérez, Ph.D.  
Professor, Department of Chicana and Chicano Studies  
California State University, Fullerton

William Pérez, Ph.D.  
Professor of Education  
School of Educational Studies  
Claremont Graduate University

Clarisa Perez-Armendariz, Ph.D.  
Assistant Professor, Political Science  
Santa Clara University

Cecilia Rios-Aguilar, Ph.D.  
Associate Professor & HERI Director  
Higher Education and Organizational Change Division  
University of California, Los Angeles

Nancy M. Rourke, Ph.D.  
Associate Professor, Department of Religious Studies and Theology  
Canisius College, Buffalo, NY

Margaret Russell  
Associate Professor of Law  
Santa Clara University Law School

Debra Satz  
Marta Sutton Weeks Professor of Ethics in Society  
Professor of Philosophy and, by courtesy, Political Science  
J. Frederick and Elisabeth Brewer Weintz University Fellow in  
Undergraduate Education  
Stanford University

Daniel G. Solorzano  
Professor of Social Science and Comparative Education  
University of California, Los Angeles

Marc Stein, Ph.D.  
Jamie and Phyllis Pasker Professor of History  
San Francisco State University

Carola Suárez-Orozco  
Professor of Human Development and Psychology  
University of California, Los Angeles

Marcelo M. Suárez-Orozco  
UCLA Wasserman Dean & Distinguished Professor of Education  
Graduate School of Education & Information Studies  
University of California, Los Angeles

William G. Tierney  
Wilbur Kieffer Professor of Higher Education  
University Professor & Co-director,  
Pullias Center for Higher Education  
University of Southern California

Shirley M. Tilghman  
President Emerita and Professor of Molecular Biology and Public Affairs  
Princeton University

Mary Pat Treuthart  
Professor of Law (Constitutional Law and International Human Rights)  
Gonzaga University School of Law

Professor Roberto G. Varea  
Director, Latin American Studies Program  
University of San Francisco, California

Felisha Herrera Villarreal, Ph.D.  
Assistant Professor, Postsecondary Education  
Director, Research & Equity Scholarship Institute  
San Diego State University

Rosalind H. Williams  
Dibner Professor of the History of Science and Technology  
Dean of Students and Undergraduate Education, Emeritus  
Massachusetts Institute of Technology

Judy Tzu-Chun Wu  
Professor and Chair  
Department of Asian American Studies  
University of California, Irvine

Charles E. Young  
Chancellor Emeritus, University of California, Los Angeles  
President Emeritus, University of Florida



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### **INTEREST OF AMICI**

The outcome of this case could allow the federal government to condition funding for colleges and universities on cooperation with immigration enforcement. Amici strongly believe that such forced collaboration would profoundly harm our academic institutions.

The fifty-five individual amici are teachers, researchers, and administrators who come from across the nation, all types of colleges and universities, and a wide spectrum of disciplines. They are dedicated to maintaining an academic environment that assures the safety of all students and fosters diversity and open discourse.

The American Association of University Professors (AAUP) is a nonprofit organization representing the interests of over 40,000 faculty, librarians, graduate students, and academic professionals at institutions of higher education across the country. The AAUP is committed to advancing academic freedom, the free exchange of ideas, and higher education's contribution to the common good.

California's Community College System is the largest post-secondary institution in the United States. Each of the community college amici is dedicated to providing access to quality higher education for all of California's diverse population.<sup>1</sup>

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<sup>1</sup> Amici certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amici and their counsel contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this amicus brief.



## **INTRODUCTION**

Across the United States, colleges and universities include undocumented individuals within their student bodies. The majority of these students have lived in the United States for most of their lives and attended high school here. They are part of a diverse mix of students, faculty, and staff who come together to create vibrant and productive educational communities.

The executive order at issue here has already injected into these college and university communities new fears, including students' concerns for their own safety and that of their families and friends. As the evidence presented by plaintiffs below demonstrates, such fears undermine public safety, law enforcement, educational achievement and social advancement.

Beyond this immediate impact lies the fact that Executive Order 13768, if upheld, will become a precedent for the proposition that the President may unilaterally use the threat of withdrawing federal funding in a broad and punitive manner as part of an effort to coerce institutional participation in federal immigration enforcement. Immigration enforcement has no nexus to higher education, does not serve the goals of higher education, and would restrict rather than expand access to higher education.

The harm that overturning the lower court's injunction would pose for higher education is both immediate and long term. An unfavorable outcome in this case would set precedent affecting individual students, professors, and staff as well as the institutions as a whole. For public institutions of higher education – state colleges and universities – the constitutional harm includes all the Tenth Amendment concerns raised below. Many of plaintiffs' other arguments, such as due process and separation of powers would apply to all institutions of higher education,

public and private alike. In addition, institutions of higher education, and all those who are part of the community of higher education, have unique and very concrete interests at stake. They face both immediate fears and chilling effects from the executive order and, on the longer term, a threat to central, constitutionally grounded, institutional values if these policies are turned on them.

We do not intend here to argue these separate constitutional issues. Rather, in the brief that follows we address the constitutional considerations as part of the harm that would flow from a precedent enabling the federal administration to impose the policies embedded in the executive order on higher education. These particular harms include the following:

- Undermining the unique role that colleges and universities play in our society and the critical interest that our society has in the education of all its residents regardless of immigration status.
- Threatening higher education's constitutional interest in educational independence and autonomy to create the sort of diverse student body that is critical to the intellectual and academic life of the community.
- The fact that withdrawal of federal research funding for failure to participate in federal immigration enforcement would devastate university research that has been the backbone of scientific, medical, technological and social advances.
- The fact that punitive withdrawal of federal student scholarship funding would not touch undocumented students, who are already ineligible for such funding, but

would close the doors of higher education to millions of low income students – most if not all of them U.S. citizens – who cannot afford the cost.

These harms would extend far beyond the institutions themselves to affect the local, state, and national welfare as a whole.

We urge the Court to consider all of these ramifications when it reviews the District Court’s injunction and to conclude not only that “the public interest would not be disserved by a permanent injunction,” but that the injunction is vital to our local, state, and national welfare. *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 141 (2010).

### **BACKGROUND**

The threat that the administration may extend its executive order to institutions of higher education is not merely speculative. Not long ago, the President’s displeasure with events at the University of California, Berkeley, led him to threaten withdrawal of funds.<sup>2</sup> And although immigration authorities have historically eschewed enforcement actions in “sensitive locations” such as schools, hospitals, churches, and other religious institutions,<sup>3</sup> recent months have seen a series of immigration arrests that are inconsistent with the spirit, if not the technical letter of that

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<sup>2</sup> See Susan Svrluga, *Trump threatens UC-Berkeley’s funding after violent protests shut down a speaker*, WASH. POST (Feb. 2, 2017), [https://www.washingtonpost.com/local/education/trump-threatens-uc-berkeley-s-funding-after-violent-protests-shut-down-a-speaker/2017/02/02/2a13198a-e984-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.73b3abb50a53](https://www.washingtonpost.com/local/education/trump-threatens-uc-berkeley-s-funding-after-violent-protests-shut-down-a-speaker/2017/02/02/2a13198a-e984-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.73b3abb50a53).

<sup>3</sup> See U.S. IMMIGRATION AND CUSTOMS ENF’T, Memorandum from John Morton, Director (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

policy. For example, in the Los Angeles area, a father was arrested between stops as he was dropping his daughters off at two Lincoln Heights schools.<sup>4</sup> Last fall, immigration agents at a Texas interior check point stopped and then followed an ambulance carrying a 10-year old to the hospital for emergency surgery and arrested her at the hospital shortly after the surgery was over.<sup>5</sup>

Although precise figures of the number of undocumented students in higher education are not available, a survey conducted by the Migration Policy Institute and based on U.S. Census Bureau data from 2014 estimates that 408,000 of the unauthorized population in the United States between the ages of 18 and 24 are enrolled in school.<sup>6</sup>

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<sup>4</sup> Andrea Castillo, *Immigrant arrested by ICE after dropping daughter off at school, sending shockwaves through neighborhood*, L.A. TIMES (Mar. 3, 2017), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>.

<sup>5</sup> Marwa Eltagouri, *A 10-year-old immigrant was rushed to the hospital in an ambulance. She was detained on the way*, WASH. POST (Oct. 27, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/10/26/a-10-year-old-immigrant-was-rushed-to-the-hospital-in-an-ambulance-she-was-detained-on-the-way/?utm\\_term=.d721b38350b4](https://www.washingtonpost.com/news/post-nation/wp/2017/10/26/a-10-year-old-immigrant-was-rushed-to-the-hospital-in-an-ambulance-she-was-detained-on-the-way/?utm_term=.d721b38350b4); Vivian Yee & Caitlin Dickerson, *10-year-old immigrant is detained after agents stop her on way to surgery*, THE BOSTON GLOBE (Oct. 26, 2017), <http://www.bostonglobe.com/news/nation/2017/10/26/year-old-immigrant-detained-after-agents-stop-her-way-surgery/oazLxagPGsAT15oQpUYMfK/story.html?event=event25>.

<sup>6</sup> MIGRATION POLICY INST., *Analysis of U.S. Census Bureau Data 2010-2014, Profile of the Unauthorized Population: United States*, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>. While many of these students are from Latin America, data show that of the unauthorized population in the United States, approximately 13% are from Asia, and hundreds of thousands come from Europe and Africa. *Id.*

Undocumented students are not the only members of the community likely to feel intimidated, however. International students, students of color, faculty and staff are predictable collateral targets.<sup>7</sup> Since local collaborations with federal immigration enforcement began in the 1990s, they have frequently been marked by racial profiling, particularly the targeting of Latinos; this has included not only undocumented individuals but also U.S. citizens, permanent residents, and others who are lawfully in the United States.<sup>8</sup> The detriment that such an atmosphere causes to universities and colleges is palpable and affects our society as a whole.

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<sup>7</sup> See Natalie Masuoka & Jane Junn, *The Politics of Belonging: Race, Public Opinion and Immigration* (2013); Maureen Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, *Journal of Criminal Law and Criminology*, Vol. 104, Issue 2, 226, 230-34, 247, 255, 262-65 (Spring 2014).

<sup>8</sup> See Trevor Gardner II & Aarti Kholi, *The C.A.P. effect: Racial profiling in the ICE Criminal Alien Program*, UNIV. OF CAL., BERKELEY, LAW SCHOOL, [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf); Hannah Gladstein, et al., *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004*, MIGRATION POLICY INSTITUTE (2005); Sweeney, *supra* at 249-51.

## **ARGUMENT**

### **I.**

#### **THE POLICIES REPRESENTED BY THE EXECUTIVE ORDER THREATEN HIGHER EDUCATION'S PIVOTAL ROLE IN OUR SOCIETY**

##### **A. Colleges and Universities Are Fundamental to the National Welfare**

Colleges and universities – both public and private – play a pivotal role in our society.<sup>9</sup> Dedicated to teaching and research, they have also been critical centers of democracy and service to the advancement and improvement of the individual, the public, and society.

The United States Supreme Court has “long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Core values that enable institutions of higher education to fulfill this role include independence, diversity, and community. Indeed, “[a] university is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness.’”

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<sup>9</sup> Throughout this brief, the use of terms like “colleges and universities” includes both four-year institutions and community colleges, which play a vital role in higher education, especially for students of color and for those of limited economic means.

*Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. \_\_\_, 136 S. Ct. 2198, 2214 (2016) (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). These include student body diversity, which the Supreme Court has described as central to a university’s educational mission. *Id.*

**B. Our Society Has a Critical Interest in the Education of All Residents Regardless of Their Immigration Status**

In *Plyler v. Doe*, 457 U.S. 202 (1981), the Supreme Court held that a Texas statute withholding funds from local school districts to educate children not legally admitted into the United States and authorizing districts to deny such children access to a free public education violated the equal protection clause. Although the Court found that education was not a “fundamental right” under the federal Constitution<sup>10</sup> and that undocumented children did not constitute a “suspect class” for purposes of equal protection analysis, it emphasized the centrality of education for the child and for our society: “Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.” *Plyler*, 457 U.S. at 221 (citation omitted).

Quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), the Court noted that “education prepares individuals to be self-reliant and self-sufficient participants in society.” *Plyler*, 457 U.S. at 222. Further,

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<sup>10</sup> Public education is explicitly protected in many state constitutions and in some states has been recognized as a fundamental right. *See, e.g., Serrano v. Priest*, 5 Cal. 3d 584, 606-09 (1971).

education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Plyler*, 457 U.S. at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

As Justice Blackmun argued in his concurrence, “Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group – through the State’s action – will have been converted into a discrete underclass.” *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). Significantly, the Fifth and Fourteenth Amendments’ promise of equal protection and due process is not limited to U.S. citizens but rather applies to “any person.”

The costs of denying education to undocumented youth fall not only on the individual but on the nation as well. *Id.* at 223-24. In 1981, when *Plyler* was decided, a high school degree was sufficient to open doors of opportunity and stability. Today, a college degree is what a high school



degree was in 1981.<sup>11</sup> The United States has more jobs that require a college education than there are U.S. citizens and permanent residents to fill them, and that gap is growing.<sup>12</sup> Increased rates of college graduation are associated with lower public assistance, fewer public health problems, reduced criminal justice system expenditure and greater tax revenue.<sup>13</sup> Not educating our undocumented youth means “adding to the problems and costs of unemployment, welfare, and crime.” *Plyler*, 457 U.S. at 230. A college education also assures a broader social understanding of civics, government, democracy and U.S. history, courses often required for all students, regardless of their particular area of study.

Some may argue that there is a paradox in educating young people who may not then be eligible for lawful employment in the United States, but the answer provided in *Plyler* is as true now as it was then: The

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<sup>11</sup> See PEW RESEARCH CTR. *The Rising Cost of Not Going to College*, (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>; Burning Glass Technologies, *Moving the Goalposts: How Demand for a Bachelor’s Degree is Reshaping the Workforce* (Sep. 2014), [http://burning-glass.com/wp-content/uploads/Moving\\_the\\_Goalposts.pdf](http://burning-glass.com/wp-content/uploads/Moving_the_Goalposts.pdf); Sandy Baum, et al., *Education Pays 2013: The Benefits of Higher Education for Individuals and Society*, THE COLL. BD., <https://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf>.

<sup>12</sup> See Anthony P. Carnevale, et al., *Projections of Jobs and Education Requirements through 2018*, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE (June 2010), <https://georgetown.app.box.com/s/ursjbxaym2np1v8mgrv7>.

<sup>13</sup> See Henry Levin & Emma Garcia, *Benefit-Cost Analysis of Accelerated Study in Associate Programs (ASAP) of the City University of New York (CUNY)*, *Journal of Higher Education* (May 2013).

fact is that many of these young people will remain in the United States, some will acquire documented status, and some will become U.S. citizens. Given the changeability and discretionary decision making that mark our immigration system, “the illegal alien of today may well be the legal alien of tomorrow.” *Id.* at 207 (quoting district court). *See also id.* at 230 (“the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become residents or citizens of the United States.”); *see also id.* at 239 (Powell, J., concurring) (“A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.”).

Recent history validates both the wisdom of *Plyler* and the continuing validity of its analysis. Thus, in the past few years, we have seen considerable changes in immigration policies that affect undocumented youth, and the potential for more. These include not only Deferred Action for Childhood Arrivals (DACA),<sup>14</sup> but also several other bills currently before Congress,<sup>15</sup> as well as numerous discretionary programs to permit

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<sup>14</sup> *See, e.g.*, U.S. SENATE JUDICIARY COMM., S.1615 – 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1617>; U.S. DEPT. OF HOMELAND SECURITY, Memorandum from Janet Napolitano (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>15</sup> *See* Jeanne Batalova, et al., *Differing DREAMs: Estimating the Unauthorized Populations that Could Benefit under Different Legalization Bills*, MIGRATION POLICY INST. (Oct. 2017), <https://www.migrationpolicy.org/research/differing-dreams-estimating-unauthorized-populations-could-benefit-under-different>.

large groups of otherwise unauthorized immigrants to remain in this country lawfully.<sup>16</sup> Further, individual immigration enforcement officials are encouraged to exercise considerable discretion regarding whether to detain or deport an unauthorized immigrant.<sup>17</sup> Indeed, the executive order at issue here establishes enforcement priorities and encourages discretionary action in accordance with those priorities.<sup>18</sup>

Finally, in considering the significance of access to higher education, it is important to factor in the intangibles. We live in what is now inescapably a very closely connected world. Within this global community, all are served when individuals can attend college and carry those experiences of learning and personal growth wherever they go.

## II.

### **THE EXECUTIVE ORDER THREATENS HIGHER EDUCATION'S CONSTITUTIONAL INTEREST IN ACADEMIC INDEPENDENCE AND STUDENT DIVERSITY**

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The crux of the executive order at issue here is to force institutions to choose between losing their essential federal funding on the one hand and coerced collaboration on the other. Forcing that choice would

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<sup>16</sup> See, e.g., MIGRATION POLICY INST., *Temporary Protected Status in the United States: A Grant of Humanitarian Relief that Is Less than Permanent* (July 2, 2014), <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

<sup>17</sup> See, e.g., U.S. IMMIGRATION AND CUSTOMS ENF'T, Memorandum from John Morton, Director (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>18</sup> Exec. Order No. 13768, 82 Fed. Reg. 18 (Jan. 30, 2017).

gravely infringe upon colleges' and universities' compelling interest in student diversity and their constitutionally protected autonomy to create an educational environment that enhances diversity.

These critical values are “at the heart” of colleges' and universities' “proper institutional mission.” *Grutter*, 539 U.S. at 329. Colleges and universities' autonomy has “long been viewed as a special concern of the First Amendment,”<sup>19</sup> and their interest in the educational benefits associated with student diversity has been recognized as “compelling.”<sup>20</sup>

**A. Colleges and Universities Have Special First Amendment Protection to Foster Open Discourse and Academic Independence**

Colleges and universities in the United States have traditionally been characterized by their independence from the national government, despite the considerable financial support that they receive. This independence is foundational and, historically, has set them apart from their counterparts in many other countries. In the United States, public institutions of higher education are state colleges and universities with a mission to serve and extend education and knowledge to and for the population and society, not the national government. John C. Scott, *The Mission of the University: Medieval to Postmodern Transformations* at 4, 15 (2006). This public mission extends to private and nonprofit colleges and universities as well. In the United States, colleges and universities explicitly

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<sup>19</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

<sup>20</sup> *Grutter*, 539 U.S. at 330-32; *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013), 133 S. Ct. 2411, 2418 (2013); *Fisher II*, 579 U.S. \_\_\_\_ (2016), 136 S. Ct. 2198, 2210 (2016).

see themselves as “conducted for the common good.” AM. ASSOC. OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

The Supreme Court has drawn a direct link between the First Amendment and the autonomy of higher education, “recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy.” *Gutter*, 539 U.S. at 329 (reviewing Supreme Court cases); *see also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues [rather] than through any kind of authoritative selection.’”; *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

Sixty years ago, Justice Frankfurter quoted approvingly from a speech that identified the four essential freedoms of a university:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

In *Bakke*, Justice Powell noted that “[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment.” *Bakke*, 438 U.S. at 312. Justice Powell concluded, “Thus, in arguing that its universities must be accorded the right to select those students who will

contribute the most to the ‘robust exchange of ideas,’ petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.” *Id.* at 313. *See also Grutter*, 539 U.S. at 330 (Student diversity is “‘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.’” (quoting from the district court decision)).

Due to these First Amendment concerns, “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.” *Fisher II*, 136 S. Ct. at 2214; *see also Fisher I*, 133 S. Ct. at 2419 (“the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”). Thus, once “a university gives ‘a reasoned principled explanation’ for its decision, deference must be given ‘to the University’s conclusion, based on its experience and expertise.’” *Fisher II*, 136 S. Ct. at 2208 (quoting from *Fisher I*, 133 S. Ct. at 2419).

**B. Higher Education Has a Compelling Interest in Student Body Diversity and the Benefits that Diversity Brings**

In *Grutter*, the Supreme Court granted certiorari “to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.” *Grutter*, 539 U.S. at 322. The Court held that diversity was, indeed, a compelling interest. *Id.* at 325; *see also Fisher II*, 136 S. Ct.

at 2210; *Fisher I*, 133 S. Ct. at 2419; *Smith v. Univ. of Wash.*, 392 F.3d 367, 369, 371 (9th Cir. 2004); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197-1201 (9th Cir. 2000). The *Grutter* Court continued, “attaining a diverse student body is at the heart of the Law School’s proper institutional mission.” *Grutter*, 539 U.S. at 329.

The compelling interest in diversity recognized by the Supreme Court is not limited to race, but includes “all factors that may contribute to student body diversity.” *Grutter*, 539 U.S. at 337; *Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). The Court looked to what the law school in *Grutter* identified as its diversity factors, including “admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.” *Grutter*, 539 U.S. at 338.

Creating a diverse student body has long been an important part of public colleges’ mission of “democratization.” Scott, *supra*, at 15-17. For example, at the California Community Colleges, the largest system of higher education in the nation with 114 colleges and over 2 million students each year, more than 40% of the students are in the first generation of their families to attend college, and over 50% are economically disadvantaged. FOUND. FOR CAL. CMTY. COLLS., *About the Colleges*, <http://foundationccc.org/About-Us/About-the-Colleges>.

Private colleges and universities also focus on diversity as an essential element of excellence in education. Private nonprofit colleges as a group enroll lower income students at the same rate as public universities,

especially once consideration moves beyond the elite colleges.<sup>21</sup> Indeed, colleges and universities are reviewed and ranked, *inter alia*, on the extent to which they offer their students a diverse community.<sup>22</sup>

The Supreme Court has identified numerous benefits that flow from diversity in higher education. Thus, Justice Powell in *Bakke* noted, “An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.” *Bakke*, 438 U.S. at 314. A diverse student body breaks down stereotypes, “promotes learning outcomes,” and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Grutter*, 539 U.S. at 330. (quoting from amicus brief); *Fisher II*, 136 S. Ct. at 2210. Diversity contributes to a robust exchange of ideas, exposure to different cultures and the acquisition of competencies necessary in our increasingly diverse society and closely connected world. *Id.* at 2211.

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<sup>21</sup> Matthew Chingos, *Don't forget private, non-profit colleges*, ECON. STUD. AT BROOKINGS, EVIDENCE SPEAKS REP., Vol. 2 No. 9 (Feb. 16, 2017), at 3-5, [https://www.brookings.edu/wp-content/uploads/2017/02/es\\_20170216\\_chingos\\_evidence\\_speaks.pdf](https://www.brookings.edu/wp-content/uploads/2017/02/es_20170216_chingos_evidence_speaks.pdf).

<sup>22</sup> See, e.g., U.S. NEWS & WORLD REP., *Campus Ethnic Diversity: National Universities (2016-2017)*, <https://www.usnews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity>; U.S. NEWS & WORLD REP., *Economic Diversity Among the Top 25 National Universities (2016-2017)*, <https://www.usnews.com/best-colleges/rankings/national-universities/economic-diversity-among-top-ranked-schools>.



**C. Undocumented Students Are an Important Part of the Discourse and Diversity that Are at the Heart of Higher Education**

Undocumented students bring a wealth of talent, experience and insight to the colleges and universities that they attend. Consider the story of Jacqueline, who was brought to the United States at age two. Jacqueline has no memories of Mexico, where she was born. Her mother is a permanent resident, but Jacqueline is undocumented. Her father has a sixth-grade education and her mother has a G.E.D. (high school graduate equivalency degree). During her K-12 years, Jacqueline excelled at the public schools she attended, received numerous awards and was enrolled in GATE (Gifted and Talented Education) and honors classes. She graduated in the top 15% of her high school class. During her first year in college she achieved a 4.0 GPA, was a student leader, and volunteered at a local elementary school.<sup>23</sup>

Or consider Luis Gutierrez, a UC Berkeley student:

“Luis comes from an economically disadvantaged background but has not let this hold him back from exploring different opportunities to improve himself. His family of six is financially supported by his father and they all live in a one-room studio apartment in Oakland. Neither of his parents have a college education; only his father finished high school. Despite family hardships, Luis continues to nurture his aspiration to use higher education as a means of overcoming his current personal

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<sup>23</sup> William Perez, *Extending Our Investments: Higher Education Access for Undocumented Students*, AACU, DIVERSITY AND DEMOCRACY, Winter 2010, Vol. 13, No. 1, at 1, [www.aacu.org/publications-research/periodicals/extending-our-investments-higher-education-access-undocumented](http://www.aacu.org/publications-research/periodicals/extending-our-investments-higher-education-access-undocumented).

circumstances. He has excellent work habits and self-discipline. He is attracted to challenging opportunities that rigorous college life will present.”

Dr. Judith Ned, Executive Director of Stanford Medical Youth Science Program, quoted in Catherine Eusebio and Fermin Mendoza, *The Case for Undocumented Students in Higher Education*, EDUCATORS FOR FAIR CONSIDERATION (2015), [http://www.e4fc.org/images/E4FC\\_TheCase.pdf](http://www.e4fc.org/images/E4FC_TheCase.pdf).

Jacqueline and Luis are students who colleges know will both take advantage of educational opportunities and enrich the experience of their peers in myriad tangible and intangible ways. They are not alone.<sup>24</sup>

Approximately 65,000 undocumented students graduate from high school in the United States each year.<sup>25</sup> Those who pursue a college degree “constitute a small group of extremely talented and motivated youth

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<sup>24</sup> See, e.g., William Perez, *We ARE Americans: Undocumented Students Pursuing the American Dream* (2009); Robert T. Teranishi, *In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of Immigration Reform*, THE UNDOCUSCHOLARS PROJECT, THE INST. FOR IMMIGRATION, GLOBALIZATION, & EDUC., UNIV. OF CAL., LOS ANGELES (2015); Carola Suarez-Orozco, et al., *Undocumented Undergraduates on College Campuses: Understanding Their Challenges and Assets and What It Takes to Make an Undocufriendly Campus*, HARVARD EDUC. REVIEW, Vol. 85 No. 3 (Fall 2015) at 431, 432, 443, 444.

<sup>25</sup> U.S. DEP’T OF EDUC., *Resource Guide: Supporting Undocumented Youth*, (Oct. 20, 2015) at 3; Zenen Jaimes Perez, *Removing Barriers to Higher Education for Undocumented Students*, CTR. FOR AM. PROGRESS (2014); Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC RESEARCH CTR. (2005), <http://pewhispanic.org/files/reports/46.pdf>.

who have already overcome multiple, unique obstacles.”<sup>26</sup> They are “some of our best and brightest homegrown talents.”<sup>27</sup>

Undocumented students are simultaneously “one of the most vulnerable groups served by U.S. schools” and a group that demonstrates “high levels of resilience, leadership, and civic engagement.” U.S. Dept. of Educ. Res. Guide, *supra*, at 3, 4. Research indicates that “as a group, college-eligible undocumented students demonstrated academic achievement, leadership, and civic engagement patterns that often exceeded those of their U.S.-citizen counterparts.”<sup>28</sup> Research published in 2010 found that “[o]ver 90 percent reported volunteer and community-service participation, and 95 percent had participated in extracurricular activities. In those activities, 78 percent held a leadership position such as president of a club or captain of a sports team.” *Id.* These school-based and civic activities are often in addition to home responsibilities such as caring for younger siblings and working to help support their families. *Id.* at 3-4.

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<sup>26</sup> Eusebio, *supra*. While the majority of these students come from Latin American countries, many also come from other countries around the world. Chan, Beleza, *Not Just a Latino Issue, Undocumented Students in Higher Education*, JOURNAL OF COLL. ADMISSION (Winter 2010); MIGRATION POLICY INST., *Profile of the Unauthorized Population: United States Analysis of U.S. Census Bureau Data 2010-2014*, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>; Teranishi, *supra*, at 5-6.

<sup>27</sup> Katharine Gin, *Why these Students?*, JOURNAL OF COLL. ADMISSION (Winter 2010) at 44.

<sup>28</sup> Perez, *Extending Our Investments: Higher Education Access for Undocumented Students*, *supra*.

As then-Chancellor of UC Berkeley Robert J. Birgeneau said in 2010, “[W]e must take advantage of the extraordinary talents of these exceptional young people, many of whom have overcome incredible challenges to gain admission to great universities like UC Berkeley.” Univ. of California, Berkeley, *Chancellor Birgeneau urges Congress to pass the DREAM Act*, BERKELEY NEWS (July 21, 2010), <http://news.berkeley.edu/2010/07/21/dreamact/>.

There can be no question that the presence of undocumented students contributes to First Amendment protected discourse and the ability of higher education to fulfill its mission.<sup>29</sup> Their contributions occur in the classroom and the dining hall, in formal dialogue and casual conversation.<sup>30</sup> Their contributions extend into every area of study.<sup>31</sup> One need only think of the literature class that considers novels, stories, and poems by undocumented people; the history class that emphasizes that virtually

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<sup>29</sup> There is no federal law prohibiting colleges and universities from enrolling undocumented students.

<sup>30</sup> “[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.” *Bakke*, 348 U.S. at 312 n.48 (quoting the president of Princeton University).

<sup>31</sup> Notably, in an era when the United States is in tremendous need of graduates in the STEM areas (Science, Technology, Engineering and Math), almost one-third (28.2%) of the participants in a UCLA nationwide study reported pursuing studies in STEM fields. Teranishi, *supra*, at 8.

everyone in the United States was “undocumented” before the emergence of modern immigration controls in the late nineteenth and early twentieth centuries; the law class that considers the Fourteenth Amendment’s references to “persons” rather than “citizens;” the political science class that debates policy options for the undocumented. Undocumented students offer their peers and teachers windows into understanding what it means to have access and to lack access, to assert power and to be powerless over dynamics beyond your control, to overcome financial and emotional obstacles, to deal with hardships, to create change. *See* Teranishi, *supra*, at 5-8, 17-18. Their unique insights and personal stories can enrich every aspect of academic and social discourse.

What is at stake here, then, is both the well-being of individuals and the well-being of our colleges and universities and, as a corollary, of our society itself. To know that their college is under pressure to join in federal immigration enforcement can only cause emotional distress and trauma to individual students. That these students are particularly vulnerable to feelings of fear, anxiety, isolation, and depression is well-established. *See* Teranishi, *supra*, at 6-7, 11-12; *Resource Guide: Supporting Undocumented Youth, supra*, at 4. Surely, we do not want to undermine our colleges’ and universities’ ability to provide information, resources, and support to a discrete and insular segment of their student population.<sup>32</sup>

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<sup>32</sup> The U.S. Department of Education, in its 2015 Guide recommended exactly the opposite, suggesting that institutions of higher education actively seek to “create open and welcoming environments,” “provide services and resources to help guide undocumented students,” and “communicate and demonstrate support for undocumented youth.” U.S. DEPT. OF EDUC., *Resource Guide: Supporting Undocumented Youth, supra*, at 17-19.

When students feel marginalized, they do not speak up in class, they do not step out and seek opportunities such as internships, they avoid social interactions with their peers. If students do not feel safe, they cannot engage in the kind of robust, open discussion that is essential to learning; indeed, they may not come to classes at all.<sup>33</sup>

Universities are already struggling with the rise of hate groups on their campuses.<sup>34</sup> A federal effort to conscript higher education into immigration enforcement will simply fuel these fires. As the majority wrote in *Sweezy*, “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy*, 354 U.S. at 250.

Additionally, there is a very real threat to campus safety if students and university employees become unwilling to report crimes for

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<sup>33</sup> They may go so far as to drop out or not go to college at all. See Jeffrey Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC RESEARCH CTR. (Apr. 14, 2009) (among unauthorized youths under age twenty-four who have graduated from high school, 49% are in college or have attended college compared to 71% for residents born in the United States.).

<sup>34</sup> See ANTI-DEFAMATION LEAGUE, *Report: White Supremacist Propaganda Surges on Campus* (Jan. 2018), <https://www.adl.org/education/resources/reports/white-supremacist-propaganda-surges-on-campus>; Sophia Tulp, *White supremacists are recruiting like crazy on college campuses*, USA TODAY COLL. (Mar. 6, 2017) <http://college.usatoday.com/2017/03/06/white-supremacists-are-recruiting-like-crazy-on-college-campuses/>; Scott Jascihk, *Supremacists on Campus*, INSIDE HIGHER ED (Aug. 14, 2017), <https://www.insidehighered.com/news/2017/08/14/white-supremacy-turning-campus-speeches-and-leaflets>.

fear that they or their families could be deported. The plaintiffs have described and documented this issue in the community at large, but it carries additional consequences on our college campuses, which experience disproportionately higher rates of sexual assault and other crimes given the age of their populations.<sup>35</sup>

Colleges and universities already have a problem with students' willingness to report sexual assault. That problem would be much greater if undocumented students feared to come forward because they might be turned over to immigration authorities. Further, if students who have been victimized seek assistance from faculty mentors, those faculty members would be placed in the untenable position of having to choose between their responsibility to report harassment and assault on the one hand and the jeopardy to an undocumented student that could result from such reporting on the other.

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<sup>35</sup> See, e.g., Sofi Sinozich & Lynn Langton, Ph.D., *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>. To the extent a college's or university's law enforcement works with outside law enforcement agencies to deal with criminal activity such as alcohol and drug abuse, theft, and assault, the stance adopted by the federal administration here would threaten the viability of the whole network and place long-evolved habits of shared responsibility at risk.

### III.

#### **FEDERAL FUNDING FOR UNIVERSITIES, WHICH THE POLICIES REPRESENTED BY THIS EXECUTIVE ORDER WOULD THREATEN TO WITHDRAW, IS CRITICAL TO THE NATIONAL WELL-BEING**

Weighted against the interests described above is the potential loss of federal funding, which plays a critical role in the fiscal health of our institutions of higher education. In 2013, for example, federal spending on higher education outpaced state higher education spending. Federal spending totaled \$75.6 billion, of which \$51 billion went for direct student support and \$24.6 billion was used to fund research.<sup>36</sup> Forcing institutions of higher education to choose between their historical, constitutionally protected commitments to diversity and inclusion and federal funding for research and student aid will gravely affect our national interest.

#### **A. Federally Funded University Research Drives Innovation And Saves Lives**

Academic research has been the source of some of the most important inventions and discoveries in our country's history. Much of that research was made possible by federal funding. A February 2014, report by

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<sup>36</sup> See, generally, PEW CHARITABLE TRUSTS *Federal and State Funding of Higher Education*, (June 11, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education>. Federal funding is also available for other university services, such as healthcare and campus security. See, e.g., UNIV. OF CAL., *Budget for Current Operations, 2015-16* at 58-59, [http://www.ucop.edu/operating-budget/\\_files/rbudget/2015-16budgetforcurrentoperations.pdf](http://www.ucop.edu/operating-budget/_files/rbudget/2015-16budgetforcurrentoperations.pdf); U.S. DEPT. OF EDUC., *Emergency Management for Higher Education*, <https://www2.ed.gov/programs/emergencyhighed/index.html>.



the Information Technology and Innovation Foundation lists twenty-two examples of major advances in technology that stem from federal research support.<sup>37</sup> Important innovations include creation of the internet search engine Google by Stanford students, work on artificial intelligence and speech recognition at MIT and Carnegie Mellon; work on the precursor to the internet known as the ARPANET at various universities in California and Michigan; National Science Foundation investments at Stanford, Columbia, and Harvard that helped develop Magnetic Resonance Imaging (MRI); and a grant from the Department of Veterans Affairs to scientists at Brown University and MIT to produce an advanced prosthetic ankle and foot that mimics natural motion. *Id.* at 13-16, 20-22.

Data from the National Science Foundation show federal funding for basic research in science and engineering at universities and colleges for 2017 of more than \$16 billion.<sup>38</sup> The amount for applied research is more than \$11 billion.<sup>39</sup> This basic research often leads to important applications in the private sector. A 2016 report by the National Science Foundation states that “[a]cademic institutions conduct just under

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<sup>37</sup> Peter L. Singer, *Federally Supported Innovations: 22 Examples of Major Technology Advances That Stem From Federal Research Support*, THE INFO. TECH. & INNOVATION FOUND. at 10-11 (Feb. 2014), <http://www2.itif.org/2014-federally-supported-innovations.pdf>.

<sup>38</sup> NAT’L SCI. FOUND., *Survey of Federal Funds for Research and Development, Fiscal Years 2015-17, Table 76*, [https://ncesdata.nsf.gov/fedfunds/2015/html/FFS2015\\_DST\\_076.html](https://ncesdata.nsf.gov/fedfunds/2015/html/FFS2015_DST_076.html).

<sup>39</sup> *Id.*, Table 87, [https://ncesdata.nsf.gov/fedfunds/2015/html/FFS2015\\_DST\\_087.html](https://ncesdata.nsf.gov/fedfunds/2015/html/FFS2015_DST_087.html).

half of the nation's basic research and, importantly, train young researchers in the process.”<sup>40</sup>

Federal funding for research far outstrips the amounts supplied by other sources. In 2016, federal academic research funding for academic research constituted almost 60% of the total, while state and local government supplied less than 10%. The remainder came from business, the academic institutions themselves, and other sources such as nonprofit organizations.<sup>41</sup> Clearly, this kind of funding cannot easily be replaced.

**B. Federal Student Aid Is Essential to Academic Diversity and Educational Opportunity for Lower Income Students**

Another critical category of federal funding that would be under threat if the injunction is not affirmed is federal scholarship and loan aid to the millions of citizens and permanent residents who rely on this financial support to attend college.<sup>42</sup> These funds are at risk, because in order for students to access federal student aid, the particular institution must have a Program Participation Agreement signed by the school's President or Chief

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<sup>40</sup> NAT'L SCI. FOUND., *Science and Engineering Indicators 2018, Expenditures and Funding for Academic R&D*, <https://www.nsf.gov/statistics/2018/nsb20181/report/sections/academic-research-and-development/expenditures-and-funding-for-academic-r-d>.

<sup>41</sup> NAT'L SCI. FOUND., *supra*.

<sup>42</sup> Pell Grants are not available to undocumented students. <https://bigfuture.collegeboard.org/get-started/for-undocumented-students/questions-and-answers-about-paying-for-college>.

Executive Officer and an authorized representative of the Secretary of Education.<sup>43</sup>

In 2017 the federal government appropriated more than \$30 billion for student aid; over 93% consisted of Pell Grants, based on individual need.<sup>44</sup> Approximately 41% of college students today are Pell Grant recipients, and the most recent data available show that they are more likely to be older, a member of a racial or ethnic minority group, and a first-generation college student than non-recipients of Pell Grants.<sup>45</sup> These are precisely the students who bring diversity of background and thought to a campus, enriching the entire community and all aspects of college learning.

More than seven million students received Pell Grants in 2016-17, and more than 1.5 million received Federal Supplemental Educational

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<sup>43</sup> U.S. DEP'T OF EDUC., *2016-2017 Federal Student Aid Handbook*, at 2-14, <https://ifap.ed.gov/fsa/handbook/attachments/1617FSAHbkVol2.pdf>. Similarly, the Federal Supplemental Educational Opportunity Grant (FSEOG) program awards funds to academic institutions, which in turn make the funds available to their students based on need. The government provides 75% of each grant, and the school provides the rest. *See* <http://www.fseog.com>.

<sup>44</sup> U.S. DEP'T OF EDUC., *Student Financial Assistance, Fiscal Year 2018 Budget Request*, <https://www2.ed.gov/about/overview/budget/budget18/justifications/o-sfa.pdf>.

<sup>45</sup> U.S. DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, *Trends in Pell Grant Receipt and the Characteristics of Pell Grant Recipients: Selected Years, 1999-2000 to 2011-12*, (Sept. 2015), Tables 1.1 and 2.1, <https://nces.ed.gov/pubs2015/2015601.pdf>.

Opportunity Grants in that year.<sup>46</sup> If the executive can hold these funds hostage as leverage against colleges and universities that refuse to be conscripted into enforcing federal immigration policy, institutions would face an impossible choice between losing federal funding for their neediest students and providing an open and secure educational environment.

### **CONCLUSION**

As the plaintiffs/appellees have demonstrated, the executive order at issue here is plainly unconstitutional. The ramifications to the public interest were the federal administration allowed to coerce local institutions to participate in immigration enforcement go far beyond the particulars of this case. The potential harm to higher education is both profound and very tangible. It subverts the most fundamental precepts on which our institutions of higher education are founded and strikes at their ability to create open and robust communities of learning. Amici respectfully request that this Court call a halt and affirm the injunction entered by the District Court.

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<sup>46</sup> THE COLL. BD., *Federal Aid per Recipient by Program over Time in Current and Constant Dollars*, <https://trends.collegeboard.org/student-aid/figures-tables/federal-aid-recipient-program-over-time-current-constant-dollars>.

Dated: February 12, 2018

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS

By: s/ Kathleen J. Purcell

s/ Robin B. Johansen

Attorneys for Proposed Amicus Curiae  
Professors and Institutions of Higher  
Education

**CERTIFICATE OF COMPLIANCE TO  
FED. R. APP. P. 32(a)(7)(C) AND  
CIRCUIT RULE 32-1 FOR CASE NUMBERS 17-17478 AND 17-17480**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,981 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: February 12, 2018

s/ Kathleen J. Purcell \_\_\_\_\_

**Ninth Circuit Case No. 17-17478  
Consolidated with Ninth Circuit Case No. 17-17480**

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 12, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kathleen J. Purcell

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