

No. 13-8004
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

RAMIRO HERNANDEZ, A.K.A. RAMIRO HERNANDEZ LLANAS,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL CORRECTIONS DIVISION,
Respondent.

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

**AMICI CURIAE BRIEF OF LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, AMERICAN
GATEWAYS, TEXAS APPLESEED, AND LATINO
LAW PROFESSORS IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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INTEREST OF *AMICI CURIAE*¹**League of United Latin American Citizens**

The League of United Latin American Citizens (LULAC) is the oldest and largest Hispanic membership organization in the United States. LULAC was founded in 1929 and currently has over 129,000 members who reside in virtually every state of the nation.

LULAC's mission is to advance the economic condition, educational attainment, health, political influence, and civil rights of the Hispanic population of the United States. Since its earliest days, LULAC has promoted these goals through education, the political process, and participation in litigation to advance and protect the rights of Hispanics, particularly where Hispanics are being disadvantaged on the basis of prejudice and stereotypes.

American Gateways

American Gateways is a non-profit organization founded in 1987 that provides legal and educational services to immigrants in Central Texas. A majority

¹ No counsel for any party authored this brief in whole or part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this Amici Brief.

All counsel of record received timely notice of the intent to file this amici brief under Supreme Court Rule 37.2(a). All counsel consent to the filing of this brief.

of its clients are from Mexico and Central America. Through its work, American Gateways has gotten to know thousands of immigrants. One of American Gateways' core missions is to shift public perceptions about immigrants and to dispel myths and misconceptions.

Texas Appleseed

Texas Appleseed is a non-profit organization that advocates for equal justice for persons with mental illnesses or intellectual disabilities. Texas Appleseed has developed widely used resources for attorneys and judges and has provided training and technical assistance to counties creating new programs aimed at decriminalizing the symptoms of mental illness and intellectual disability by diverting offenders away from the criminal justice system and into community-based treatment.

Latino Law Professors

Raquel Aldana, Steven W. Bender, Luis Fuentes-Rohwer, Miguel A. Mendez, Jasmine Gonzales Rose, Gerald Torres, Enid Trucios-Haynes, and Bernard Trujillo are professors of law at various universities across the United States. The appendix lists their titles and university affiliations, which are provided for identification only.

As Latino law professors, they have seen the harmful effects on all Hispanics of reliance on stereotypes, and they are particularly concerned

about any case where courts embrace such stereotypes.

INTRODUCTION

The state courts' determination that Mr. Hernandez Llanas is not mentally retarded rested heavily on the testimony of Dr. Richard Coons, who was the *only* expert to testify against a finding of mental retardation. Dr. Coons's testimony was offensively racist, which the state and federal courts blithely disregarded.

Particularly in death penalty cases, when deciding whether someone may be executed, this Court must not condone pseudo-scientific determinations that are founded on racial and ethnic stereotypes. This Court therefore should grant Mr. Hernandez Llanas's petition for a writ of certiorari and remand for redetermination of whether he is mentally retarded, uninfected by discriminatory stereotyping.

REASONS FOR GRANTING THE PETITION
FOR CERTIORARI

I. THE DEATH PENALTY MUST BE
ADMINISTERED IN A RACE-NEUTRAL
MANNER.

“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”² This Court has “engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”³

Because of the unique significance of the decision to impose the death penalty, it is especially important that racism and ethnic stereotyping not be allowed to taint the determination of who will be executed and who will be exempted from a death sentence. Race is *never* a proper consideration in capital sentencing.⁴ This Court has not hesitated to require new proceedings where evidence established that a decision to impose the death sentence was infected by racism.⁵

² *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see id.* at 564 (“[D]iscrimination on account of race in the administration of justice strikes at the core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system.”).

³ *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

⁴ *See Zant v. Stephens*, 462 U.S. 862, 855 (1983) (stating that race must be “totally irrelevant to the sentencing process”).

⁵ *See Saldano v. Texas*, 530 U.S. 1212 (2000) (granting certiorari and vacating judgment based on confession of error by

The racism of today may be more subtle than in the past, but, as this Court has stated, “it is not less real or pernicious.”⁶ Courts must not turn a blind eye to conduct that appears superficially race neutral but that in fact relies on prejudicial stereotypes based on race or ethnicity. “[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect.”⁷

If a psychiatrist had testified for the State that Mr. Hernandez Llanas is not mentally retarded because all Mexicans have above-average adaptive functioning, courts would immediately recognize that as improperly racist – and an *Atkins*⁸ determination based on such testimony would have to be set aside.⁹

the Solicitor General of Texas); *see also* *Buck v. Thaler*, 132 S. Ct. 32, 36 (2011) (Sotomayor & Kagan, JJ., dissenting from denial of certiorari) (quoting the Texas Solicitor General’s response to the petition for certiorari in *Saldano*, in which Texas admitted that the psychiatrist called by the State to testify about the defendant’s future dangerousness injected race as a factor by declaring that Hispanics are more likely to be violent than whites, and that this injection of race into the determination whether someone should receive the death penalty violated the defendant’s right to be sentenced without regard to his race or ethnicity).

⁶ *Rose*, 443 U.S. at 559.

⁷ *Fisher v. University of Texas*, 133 S. Ct. 2411, 2419 (2013) (internal quotes omitted).

⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁹ *Cf. United States v. Webster*, 162 F.3d 308, 356 (5th Cir. 1998) (“Considering the race of a defendant . . . in deciding if the death penalty should be imposed is completely at odds with

As discussed below, Dr. Coons's testimony, which formed the basis of the courts' determination that Mr. Hernandez Llanas is not mentally retarded, was equally racist, just a little more disguised.

II. THE CONCLUSION THAT MR. HERNANDEZ LLANAS IS NOT MENTALLY RETARDED WAS BASED IMPERMISSIBLY ON HIS ETHNICITY.

A. The State Selected An Expert Who Could Not Speak Spanish And Who Admitted He Knew Little About Mr. Hernandez Llanas's Culture, So He Relied On Prejudicial Stereotypes.

As its expert in this case, Texas chose Dr. Richard Coons, a man who did not speak Spanish and who purported to evaluate Mr. Hernandez Llanas with respect to his culture, although he testified that he knew very little about that culture.¹⁰ Because of the language barrier, Dr. Coons did not evaluate Mr.

th[e] concern that an individual must be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess." (quoting *McCleskey*, 481 U.S. at 336 (Brennan, J., dissenting))).

¹⁰ See EH5:73 ("[H]is cultural group is – we've heard lots of testimony about it. I don't know that I could – you can just scrape all those things together. I don't know much about it beyond that."), 106 (acknowledging he does not speak Spanish). This brief follows the conventions of the Petition for A Writ of Certiorari [hereinafter "Pet."] at 1 n.1 when citing to the record.

Hernandez Llanas in person¹¹ but relied entirely on second-hand information, and he reviewed that information through the lens of stereotypes.

Texas has no shortage of Spanish-speaking psychiatrists and psychologists whom prosecutors could have chosen as an expert.¹² Even if prosecutors had legitimate reasons for choosing a non-Spanish-speaking expert, there was no excuse for the expert's not informing himself about Mr. Hernandez Llanas's culture, so that he could professionally evaluate him in the context of his cultural group, instead of relying on stereotypes.¹³

All Mexicans and Mexican-Americans – not just Mr. Hernandez Llanas – are demeaned whenever the courts endorse reliance on stereotypes and prejudicial thinking. In Texas in particular, people of Mexican descent have suffered a long history of being treated as stupid and unfit for anything other

¹¹ See EH5:55-56.

¹² Even a quick review of a website such as the one maintained by Psychology Today reveals many Spanish-speaking professionals in Texas. See, e.g., <http://psychiatrists.psychologytoday.com/rms/state/Texas.html>.

¹³ The American Association on Intellectual and Development Disabilities ("AAIDD") directs clinicians to consider an individual's adaptive functioning with respect to his culture but makes very clear that this must be an evidence-based evaluation of the experiences, opportunities, and expectations of an individual and *not* the application of uninformed stereotypes. See AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 7, 17, 52-53 (11th ed. 2010).

than menial jobs.¹⁴ Until all people reject such stereotypes, discrimination will continue.

The Texas courts embraced and did not reject reliance on stereotypes based on culture and national origin. This Court should grant certiorari to make clear that such stereotyping has no place in the American judiciary, least of all as a critical part of determining who lives and who dies after committing a crime.

B. The Racial Discrimination Evident In Mr. Hernandez Llanas's Case Perpetuates A Dismal History Of Discrimination Against Hispanics In Texas.

Texas has a long, sordid history of discrimination against Hispanics, particularly people of Mexican descent, who comprise the largest category of Hispanics in Texas.¹⁵ For decades, the discrimination was enshrined in official government practices. For example, school systems relegated Mexican-American children to poor quality "Mexican schools."¹⁶ Such segregated education was justified in part on the belief that Mexican-American children

¹⁴ See *infra* Argument II.B.

¹⁵ See Pew Research Hispanic Trends Project, *Demographic Profile of Hispanics in Texas, 2011*, available at <http://www.pewhispanic.org/states/tx/>.

¹⁶ See *Hernandez v. Texas*, 347 U.S. 475, 479 & n.10 (1954); Jorge C. Rangel & Carlos M. Alcala, *Project report: De jure segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 311-18 (1972).

“are more greatly retarded” than white children.¹⁷ Texas school officials in 1929 called Mexicans an “inferior race.”¹⁸ Mexican-American college students were assigned to segregated dorms at the University of Texas.¹⁹ Mexican-American citizens were kept off juries.²⁰ Public accommodations, private housing, and employers all discriminated legally against dark skinned people until the civil rights legislation of the 1960s.²¹

Although federal law struck down legalized race-based discrimination, widespread discriminatory treatment against Mexicans and Mexican-Americans continued in Texas. Children of Mexican heritage were still assigned to the poorest schools in most districts.²² Prosecutors made up excuses to per-

¹⁷ *Ind. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790, 792 (Tex. Civ. App. 1930) (upholding a segregated school system justified on the ground of different educational needs).

¹⁸ Rangel & Alcala, *supra* n.16, at 307 & n.1. Similarly, Congressman Hudspeth from Texas asserted during a 1920 congressional hearing that Mexicans who come to the United States to work “are an inferior race.” Hearings before the U.S. House of Representatives, Committee on Immigration and Naturalization on H.J. Res. 271, relating to the Temporary Admission of Illiterate Mexican Laborers at 13 (Jan. 26, 1920), available by searching at books.google.com.

¹⁹ See *Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994), *rev'd in part on legal grounds without affecting the fact findings*, 78 F.3d 932 (5th Cir. 1996).

²⁰ See *Hernandez*, 347 U.S. at 480-82.

²¹ See Rangel & Alcala, *supra* n.16, at 308 & nn.5-6, 10-13.

²² See, e.g., *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142 (5th Cir. 1972); *Hopwood*, 861 F. Supp. at 554-57 (recounting history of racial and ethnic discrimination in

emptorily challenge Mexican-American prospective jurors.²³ District attorneys sought the death penalty disproportionately for Mexican-Americans who killed whites, as compared to whites who killed minorities.²⁴ Mexican-Americans remain among the least affluent citizens, shut out of opportunities to succeed as a result of decades of institutionalized racism.²⁵

Prejudicial attitudes persist in the modern era. For example, a national opinion poll in 2000 established that 73% of Americans believe that immigration is causally related to increasing crime

education in Texas at all levels from elementary through post-secondary education); *see generally* Rangel & Alcala, *supra* n.16, at 319-21, 326-33 (describing discrimination and segregation up through the time of the article in 1972).

²³ *See* Amnesty International, *USA: Death by discrimination – the continuing role of race in capital cases* at 54 (2003) (“A jury-selection treatise prepared by a senior prosecutor, circulated in Dallas County in the 1960s, instructed prosecutors: ‘Do not take . . . Mexicans . . . on a jury.’ A training manual for prosecutors written by a Dallas County Assistant District Attorney in 1969 and actively used in the county into the 1980s warned against selecting jurors from minority races[.]”), *available at* <http://www.amnesty.org/en/library/asset/AMR51/046/2003>.

²⁴ *See id.* at 5 (a nationwide study found that fewer than 4% of executions involved defendants who killed Hispanics, although, at the time of the study, Hispanics represented 12% of the U.S. population, and the recorded murder rate for Hispanics exceeded the national homicide rate), 8-9 (reviewing comparable Texas-specific statistics).

²⁵ Data from 2011 show that per capita earnings for Hispanics in Texas are sharply lower than for whites, and a greater percentage of Hispanics live in poverty. *See Demographic Profile of Hispanics in Texas, 2011*, *supra* n.15.

rates,²⁶ and many people associate Latin American immigrants in particular with drug use and the violent drug trade.²⁷

As discussed below, these prejudicial stereotypes are factually unfounded. Although individuals of Mexican descent in the United States – like individuals of all nationalities – sometimes engage in criminal behavior, Mexican-Americans as a group have demonstrated that they are intelligent, hard-working, and law-abiding. Any reliance on negative stereotypes is both prejudicial and unjustified.

Dr. Coons's prejudicial, stereotyped assumptions about Mexicans' average level of adaptive functioning perpetuate the sordid history of ethnic discrimination in Texas. The lower courts' acceptance of his testimony violates decades of decisions by this Court that make clear that racist, stereotyped assumptions can have no place in determining who is subject to the death penalty in America.

²⁶ See Ruben G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-born Men* at 3 (Immigration Policy Center, Spring 2007).

²⁷ See *id.* (describing media attention on Colombian cocaine cartels and Central American gangs involved with drugs and other crimes); Rangel & Alcalá, *supra* n.16, at 385 (describing pervasive attitude in Texas school systems that Mexicans were “lazy, dirty, and ignorant”).

C. The Determination That Mr. Hernandez Llanas Did Not Establish Significantly Subaverage Adaptive Functioning Was Based On Stereotypes About Mexicans And Mexican-Americans.

The state trial court's determination that Mr. Hernandez Llanas did not establish significantly subaverage adaptive functioning rested on the opinion of Dr. Coons:

[T]he court finds that the opinions offered by Dr. Cions [sic] as to adaptive behavior are supported by the evidence, and that the evidence relating to adaptive behavior by the Applicant does not support a finding of mental retardation.

[App. 5 at 6 ¶ 3; *see also* App. 7 at 17 ¶ 5 & Concl. ¶ 2]²⁸

Dr. Coons's opinion was stated first in an affidavit prepared for the state court. [See App. 5 at 4 ¶ 11 (referring to State's Supp. Exh. A [SHIV:581-91])] In explaining his opinion on Mr. Hernandez Llanas's level of adaptive functioning, Dr. Coons recounted the difficult circumstances in which Mr. Hernandez Llanas was raised, then observed that Mr. Hernandez Llanas had grown up to be employed in only low-level jobs and to display manipulative and criminal behavior. [SHIV:588] Dr. Coons then

²⁸ The Texas Court of Criminal Appeals adopted the findings and conclusions of the Texas trial court. [App. 8 at 1]

compared Mr. Hernandez Llanas's adult adaptive functioning to Dr. Coons's view of Mr. Hernandez Llanas's cultural group:

Mr. Hernandez's cultural group tends to have low socioeconomic status, low achievement, decreased social skills, increased substance abuse, and increased level of criminal behavior. Mr. Hernandez's adaptive behavior is in keeping with his cultural group.

[SHIV:588-89] Dr. Coons did not define precisely what he meant by Mr. Hernandez Llanas's "cultural group," but his testimony makes clear that he meant poor Mexicans. [EH5:73, 81-88]

At the evidentiary hearing, Dr. Coons characterized Mr. Hernandez Llanas's functioning as "appropriate" for his "cultural group." He specifically concluded that Mr. Hernandez Llanas's skill level with respect to each of the ten functional areas for evaluating adaptive functioning as set forth in the DSM-IV-TR (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work²⁹) was "appropriate" because it was within the very low range that Dr. Coons expected from Mr. Hernandez

²⁹ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at 49 (4th ed. Text Revision 2000) ("DSM-IV-TR"). In 2013, the APA issued the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) ("DSM-V"), but Dr. Coons's affidavit and testimony, given years earlier, referenced the earlier edition, as did the state trial court's decision. [App. 7 at 4 ¶ 1]

Llanas's cultural group. [App. 7 at 17 ¶ 5] He repeatedly described Mr. Hernandez Llanas's admittedly poor functioning as a child or an adult as "appropriate" for his cultural group.³⁰

In other words, Dr. Coons considered it "appropriate" or average (and not subaverage) functioning that, as a child, Mr. Hernandez Llanas could not learn how to sort recyclable garbage the way his siblings did, could not complete third grade due to his learning problems, and could not learn the rules of games played by other children in his neighborhood. [See App. 1 at 9-10] Dr. Coons considered it appropriate and not subaverage that, as an adult, Mr. Hernandez Llanas could not shop by himself and held only menial jobs (although his siblings had become a teacher, a commercial truck driver, and the founder of a church).³¹

Bluntly stated, Dr. Coons's opinion is that poor Mexicans tend to have low achievement and low social skills – that is, relatively poor adaptive functioning compared to other cultural groups. Because Mr. Hernandez Llanas's poor levels of

³⁰ See, e.g., EH5:81 (his communication ability "is appropriate for that group"), 85 (heavy use of drugs is "within keeping with the cultural group"), 86 (putting himself in harm's way – "that's a common thing in his cultural group"), 88 ("using and selling drugs and so forth, that's in keeping with his cultural group").

³¹ See App. 1 at 10; Pet. at 21 n.16 (citing testimony describing the successes of Mr. Hernandez Llanas's siblings); EH5:191 (Dr. Coons acknowledged that Mr. Hernandez Llanas's sister was subject to the same conditions growing up and she became a school teacher).

functioning matched Dr. Coons's perception of his cultural group, Dr. Coons concluded that Mr. Hernandez Llanas had average and not subaverage adaptive functioning and therefore could not be diagnosed as mentally retarded. [SHIV:588-89]

Rather than educate himself to understand Mr. Hernandez Llanas's culture, Dr. Coons relied on stereotypes. Moreover, his assumptions that people of Mexican descent as a class have very low achievement and poor social skills are not true. Hispanics as a group unquestionably have been the victims of decades of discriminatory treatment in this country.³² Notwithstanding that discrimination, the vast majority of Hispanics in the United States (including Mexican-Americans³³) achieve levels of functioning indistinguishable from other Americans:

- Most adult Hispanics in the United States have graduated from high school and were not thrown out of school in third grade for inability to learn, as young Ramiro Hernandez Llanas was.³⁴

³² See *supra* Argument II.B.

³³ Hispanics of Mexican descent comprise 65% of the nation's Hispanic population, and 88% of Texas's Hispanic population. See U.S. Census Bureau, *Hispanic Americans By the Numbers*, <http://www.infoplease.com/spot/hhmcensus1.html>; *Demographic Profile of Hispanics in Texas, 2011*, *supra* n.15.

³⁴ In 2010, for example, census data establish that 63% of Hispanics in the United States over the age of 25 had graduated from high school, and 14% had completed four or more years of college. See U.S. Census Bureau, *Statistical Abstract of the United States: 2011*, available at <http://www.infoplease.com/>

- Most adult Hispanics in this country are regularly employed and do not lose their jobs after only a few weeks, as Mr. Hernandez Llanas did.³⁵ Of U.S. immigrants from Mexico, fully 85% of the men aged 18-65 are employed in the civilian work force; the remaining 15% includes the disabled and those in school.³⁶
- Many Hispanics in this country hold jobs far above the menial labor jobs that were the only jobs Mr. Hernandez Llanas ever held.³⁷

ipa/A0774057.html. In 2012, Hispanics comprised 16.9% of the U.S. population and 16.5% of U.S. college students. See U.S. Census Bureau, *State and County Quick Facts*, available at <http://quickfacts.census.gov/qfd/states/00000.html>; *Hispanics largest minority in colleges: Study*, CBS online (Aug. 20, 2012), <http://www.cbsnews.com/news/hispanics-largest-minority-in-college-study/>.

³⁵ The poverty rate of Hispanics in 2011 was approximately 25%. See *Hispanic Americans By the Numbers*, *supra* n.33. Hispanics owned 20.7% of businesses in Texas in 2007. See U.S. Census Bureau, *State and County Quick Facts*, available at <http://quickfacts.census.gov/qfd/states/48000.html>. More than half the Hispanic households in Texas earn enough to own their own homes. See *Demographic Profile of Hispanics in Texas, 2011*, *supra* n.15.

³⁶ See Kate Brick et al., *Mexican and Central American Immigrants in the United States*, at 10 (Migration Policy Institute June 2011), available at <http://www.migrationpolicy.org/pubs/mexcentamimmigrants.pdf>.

³⁷ In 2011, over 19% of civilian employed Hispanics worked in management, business, science, or the arts. See *Hispanic Americans By the Numbers*, *supra* n.33. Median incomes climb among second- and third-generation Mexican immigrants. See

- Although Dr. Coons described substance use as “a common thing” for Mr. Hernandez Llanas’s cultural group [EH5:86], in fact Hispanics have *lower* rates of alcohol abuse than whites, and only a tiny percentage of Hispanics abuse illicit drugs.³⁸ One study that examined Mexican immigrants in particular found drug and alcohol abuse rates far *lower* for Mexican-born persons than persons born in the United States.³⁹

Brick, *supra* n.36, at 13 (citing U.S. Bureau of Labor Statistics from 2010).

³⁸ See Substance Abuse and Mental Health Services Administration (“SAMHSA”), Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings at Figure 3.2 (2012), available at <http://store.samhsa.gov/home>. One study estimated that only approximately 8% of Hispanics aged 12 or over required treatment for alcohol abuse, and 3.4% required treatment for illicit drug use. Of those, Hispanics born in the United States were more likely to require treatment than adult immigrants. See SAMHSA, Office of Applied Studies, The NSDUH Report: Substance Use Treatment Need and Receipt among Hispanics (July 16, 2009). Similar results are reported by Julia D. Grant et al., *Age and ethnic differences in the onset, persistence and recurrence of alcohol use disorder*, 107 ADDICTION at 756-65 (2012), available through <http://www.addiction-ssa.org>.

³⁹ See Javier I. Escobar et al., *Immigration and Mental Health: Mexican Americans in the United States*, 8 HARV. REV. OF PSYCHIATRY, No. 2 at 67 & n.14 (2000). Among U.S.-born persons, this study found rates of drug use somewhat lower for persons of Mexican descent than among U.S.-born non-Hispanics, while rates of alcohol abuse were somewhat higher for persons of Mexican descent born in the U.S. See *id.* Another study found substance abuse rates nearly identical for U.S.-born

- Most Hispanics in the United States never commit a crime.⁴⁰ For persons of Mexican descent in particular, a 2000 study showed that only 0.7% of foreign-borns were incarcerated, and only 5.9% of U.S.-born Mexican-Americans.⁴¹

Mr. Hernandez Llanas's own family provides powerful proof that his dismal living situation as a child did not determine his poor level of adaptive functioning. His siblings, raised in the same impoverished environment, offer a highly relevant "cultural group" for purposes of comparing Mr. Hernandez Llanas's level of functioning against the group's average. Unlike Mr. Hernandez Llanas, his siblings as adults achieved success in the community and function as law-abiding, responsible, contributing members of society.⁴² Mr. Hernandez Llanas's adaptive functioning before his incarceration was significantly subaverage compared to the cultural subgroup of his siblings.

non-Hispanics and U.S.-born residents of Mexican descent. *See id.* at 67 & n.20.

⁴⁰ The incarceration rate for foreign-born Hispanics in the United States ranges from 0.2 to 2.2% depending on country of origin – lower percentages than for U.S.-born whites. *See* Ruben G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men* (June 2006), available at <http://www.migrationinformation.org/feature/print.cfm?ID=403>.

⁴¹ *See* Rumbaut & Ewing, *supra* n.26, at 6-7.

⁴² *See* Pet. at 21 n.16.

Dr. Coons ignored both reputable statistics and the empirical evidence from Mr. Hernandez Llanas's family about how well poor Mexicans raised on a garbage dump can function as adults in favor of his unfounded racist assumptions about Mexicans as a cultural group. The state courts and then the federal courts accepted that testimony, becoming complicit in condemning Mr. Hernandez Llanas to death as not mentally retarded based on unfounded stereotypes about the poor level of functioning one can expect from Mr. Hernandez Llanas's cultural group.

Viewed without the lens of racism, the record evidence establishes that Mr. Hernandez Llanas has substantial deficits in *at least* three of the ten areas of adaptive functioning established by the American Psychiatric Association in the DSM-IV-TR⁴³ and in all three of the broad skill areas defined in the DSM-V.⁴⁴ Under either formulation, Mr. Hernandez Llanas's adaptive deficits are more than severe enough to compel the conclusion that he proved he meets the impaired adaptive functioning prong of the diagnosis of mental retardation.⁴⁵

⁴³ His significant deficits are manifested at least in the areas of functional academics, work, and self care. *See* DSM-IV-TR at 49.

⁴⁴ *See* Pet. at 19 & nn.13-15 (evaluating Mr. Hernandez Llanas's adaptive functioning under the skill areas of the DSM-V); DSM-V at 33-38.

⁴⁵ *See* DSM-IV-TR at 49 (deficits in functioning in two of the stated areas are sufficient to establish significantly subaverage adaptive functioning); DSM-V at 33 (deficits in adaptive functioning sufficient to diagnose mental retardation are

This Court should not tolerate the rejection of claims of mental retardation that are premised on racist assumptions about the average level of adaptive functioning of any cultural group.

D. The Courts' Treatment Of Mr. Hernandez Llanas's IQ Scores Injected Additional Cultural Bias.

The Fifth Circuit's discussion of the intellectual functioning prong of the mental retardation diagnosis emphasized the single full-scale IQ test result that was offered into evidence – on which Mr. Hernandez Llanas scored 70 using Mexican norms. [App. 1 at 7-8, 13] A score of 70 *supports* a diagnosis of mental retardation, and for that reason alone the court's use of this score to discredit the claim of mental retardation was clear error.⁴⁶

But the emphasis on the full-scale score based on Mexican norms was wrong also for reasons specifically related to Mr. Hernandez Llanas's cultural group. As explained in the Petition, the Mexican norms on the WAIS-III, the test used for Mr. Hernandez Llanas, have been demonstrated to be unreliable and to overstate IQ. [Pet. at 18]

established when adaptive deficits limit functioning in one or more activities of daily life).

⁴⁶ See DSM-IV-TR at 49 (defining the first diagnostic criterion for mental retardation as “[s]ignificantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test”).

Because the Mexican WAIS-III was *not* properly normed, its scores are “invalid and not interpretable.”⁴⁷

The judicial bias here in relying on scores based on Mexican norms may have been unintentional, a result of ignorance rather than malice, but the fact remains that the courts discredited Mr. Hernandez Llanas’s claim of mental retardation *because* he is a Mexican national.⁴⁸

The developers of the Mexican WAIS-III themselves suggest that, because of problems with the norming of this test, when testing for mental retardation, it is preferable to use U.S. norms.⁴⁹ Using U.S. norms, Mr. Hernandez Llanas achieved a full-scale IQ score of 62, a full-scale score unambiguously in the mental retardation range.

⁴⁷ See Hoi K. Suen & Stephen Greenspan, *Serious Problems with the Mexican Norms for the WAIS-III When Assessing Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 214, 215 (2009); see *id.* at 217-18 (describing the lack of a meaningful reference population of Mexicans); see also Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why U.S. Norms Should Be Used With the Mexican WAIS-III in Capital Cases*, 34 PSYCHOLOGY IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, No. 1, at 4 (Summer 2008).

⁴⁸ Ignorance is no excuse. Good faith will not forgive an impermissible consideration of race. See *Fisher*, 133 S. Ct. at 2421.

⁴⁹ See *Serious Problems with the Mexican Norms*, *supra* n.47, at 219; *Why U.S. Norms Should Be Used*, *supra* n.47, at 2.

[Pet. at 6]⁵⁰ In other words, if Mr. Hernandez Llanas had been raised in the United States, not in Mexico, his test score would have established that his IQ is well below 70, and the courts would have concluded that he meets the intellectual functioning prong for diagnosing mental retardation.

The Fifth Circuit uncritically accepted only the full-scale IQ score of 70 based on Mexican norms; it made no mention of the fact that the Mexican norms are unreliable. [App. 1 at 13] Nor did it consider that Mr. Hernandez Llanas became eligible for the death penalty *because* he is Mexican, since he would have met the IQ prong if he had achieved the same score as a long-time U.S. resident to whom U.S. norms would have been applied.

Further, the Fifth Circuit brushed aside all of the other lower IQ scores that Mr. Hernandez Llanas presented on the ground that none of the others was a full-scale score, and it criticized Mr. Hernandez Llanas for presenting only a single full-scale score. [*Id.*] This was unfair to Mr. Hernandez Llanas because the WAIS-III scored with U.S. norms is the *only* full-scale IQ test available for use with a

⁵⁰ That score is consistent with the results of one study that determined that using the Mexican norms overstates IQ by an average of 12 points. See *Why U.S. Norms Should Be Used*, *supra* n.47, at 2. Subtracting 12 from Mr. Hernandez Llanas's Mexican-normed full-scale IQ yields a full-scale IQ of 58. A score in the high 50s or low 60s is consistent with Mr. Hernandez Llanas's scores on the non-verbal IQ tests he could be administered without regard to the language barrier. [App. 1 at 7; Pet. at 5, 6]

Mexican-born, non-English speaker.⁵¹ Prosecutors never pointed to an alternative full-scale IQ test that validly could have been administered.

Finally, it is unfair to fault Mr. Hernandez Llanas for having had only one WAIS test. Repeat testing in a short time frame yields invalid results due to a practice effect.⁵² And children and young adults in the impoverished circumstances that Mr. Hernandez Llanas faced are not administered IQ tests⁵³ – young Ramiro Hernandez Llanas was not evaluated for admission into a special education program, as a child in a well-funded school system might have been; instead, he was just told to leave school because he could not learn. [Pet. at 6]

In short, the courts' treatment of Mr. Hernandez Llanas's IQ scores had the effect of improperly analyzing the evidence presented *because of* Mr. Hernandez Llanas's cultural background. The courts overstated the significance of the WAIS-III score based on Mexican norms, because the courts did not understand that this test was not properly normed on a representative population of Mexicans. And the courts discounted as not persuasive all of the other IQ scores that Mr. Hernandez Llanas presented because they were not full-scale scores, because the courts did not understand that reliable full-scale IQ scores simply do not exist for non-English-speakers raised in Mexico.

⁵¹ See Pet. at 17 n.12.

⁵² See AAIDD, *supra* n.13, at 102.

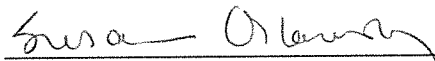
⁵³ See *id.*

Accordingly, as to the intellectual impairment prong of the definition of mental retardation as well as the adaptive functioning prong, Mr. Hernandez Llanas was improperly found to be not mentally retarded *because* he is Mexican. *Atkins's* bar on the execution of the mentally retarded must apply equally, regardless of race, culture, or nationality. This Court should not tolerate courts establishing standards for assessing intellectual impairment that are impossible for members of a cultural group to meet.

CONCLUSION

This Court should grant Mr. Hernandez Llanas's petition for writ of certiorari.

Respectfully submitted,



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CAPITAL CASE

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RAMIRO HERNANDEZ, A.K.A. RAMIRO HERNANDEZ LLANAS,
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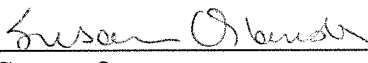
WILLIAM STEPHENS, DIRECTOR,
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INSTITUTIONAL CORRECTIONS DIVISION,
Respondent.

CERTIFICATE OF COMPLIANCE

I, Susan Orlansky, a member of the Bar of this Court, certify as required by Supreme Court Rule 33.1(h) that the *Amici Curiae* Brief of League of United Latin American Citizens, American Gateways, Texas Appleseed, and Latino Law Professors in Support of Petition for Writ of Certiorari contains 5,382 words, including all parts required to be counted under Rule 33.1(d) and therefore complies with the word limit established in Rule 33.1(g)(x).

I declare under penalty of perjury that the foregoing is true and correct.

January 23, 2014



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Respondent.

CERTIFICATE OF SERVICE

I, Susan Orlansky, a member of the Bar of this Court, certify that on January 24, 2014, three copies of the *Amici Curiae* Brief of League of United Latin American Citizens, American Gateways, Texas Applesseed, and Latino Law Professors in Support of Petition for Writ of Certiorari, and a copy of the Certificate of Compliance, were mailed via U.S. Postal Service by prepaid first class mail to:


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I certify that all persons required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

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