STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
("MALDEF")

By

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PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN OPPOSITION TO THE
CONFIRMATION OF CLARENCE THOMAS
AS AN ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

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STATEMENT OF ANTONIA HERNANDEZ

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of Clarence Thomas as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the background of MALDEF's position on Clarence Thomas; (2) Judge Thomas' writings and speeches antagonistic to civil rights laws and constitutional provisions which protect the rights of Hispanics; and (3) Judge Thomas' testimony before this Committee.

I. The Background of MALDEF's Position on Judge Thomas

Because of our nation's history of invidious discrimination against Hispanics, and because of the United States Supreme Court's unique role for more than thirty years (1954-1988) in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights.

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the mid-Nineteenth Century to date,[1] has been similar to

[1] This nation's discrimination against Hispanics dates back at least to the period following the 1848 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican igin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their

that experienced by African Americans. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied the opportunity to serve on juries. We have been, and still are, denied employment, and often treated badly when employed. And we have even been, and still are, denied the most fundamental of rights, the right to vote for representatives of our choice.

But we Hispanics, like African Americans in our country, were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously decided that Mexican Americans were protected by the Fourteenth Amendment, and unanimously held that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

This fight to establish our basic civil and constitutional rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San

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liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the multimember district diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single-member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the 1980s -- we faced a divided Supreme Court, a Court which in fact often was very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a free public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justices Thurgood Marshall and Lewis Powell joining the majority decision written by Justice William Brennan.

Following the resignation of Justice Powell and his replacement by Justice Anthony Kennedy, the Supreme Court -- within a matter of weeks in June, 1989 -- rendered, usually on five-to-four votes, a series of decisions devastating to the rights of Hispanics, other minorities, and women to a discrimination-free workplace. These

decisions[2] are, of course, well known to the United States Senate given the vast amount of time that the Senate had to expend last year to try to restore prior law through the Civil Rights Act of 1990 (S. 2104), legislation passed by the Senate on a lopsided vote,[3] only to be vetoed by the President, and with the Senate thereafter falling only one vote short of a veto override. In the meantime, the effect upon Hispanics of these recent Supreme Court decisions has been particularly devastating in view of increased discrimination against Hispanics, which was revealed by a recent government study showing that as many as 19% of all employers are now engaging in discrimination against "foreign-looking" or "foreign-sounding" employees and job applicants.[4]

Whether the Supreme Court's decisions in 1989 hostile to the civil and constitutional rights of Hispanics actually signal a Supreme Court retrenchment or turning-back-of-the-clock on civil rights, I have little doubt that the next person confirmed

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[2] These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (reallocating burdens of proof and redefining business necessity, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S. Ct. 2732, 105 L.Ed.2d 639 (1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to litigate for years against an intervening defendant's attack on their back pay and seniority remedies); cf. Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA).

[3] Virtually identical legislation, H.R. 4000, was passed by the House by a similarly lopsided vote of 272-154.

[4] United States General Accounting Office, GAO Report to the Congress: Employer Sanctions and the Question of Discrimination, 5-7, 37-79 (March, 1990).

as an Associate Justice on the Supreme Court will in fact have a major impact upon the future course of Supreme Court adjudication: either at least occasionally respecting and vindicating the civil and constitutional rights of Hispanics, or denying our rights altogether.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will be replacing Justice Thurgood Marshall, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

With Justice Marshall no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the legal philosophy of the person nominated to succeed Justice Marshall.

II. Judge Thomas' Writings and Speeches Antagonistic to Civil and Constitutional Rights

MALDEF has historically and consistently sought (quite successfully) to protect and to advance the civil and constitutional rights of Hispanics through litigation and advocacy: (a) by winning voluntarily-adopted and court-ordered goals and timetables and other forms of affirmative action in employment; (b) by defending set-aside programs in government contracting for minority business enterprises; (c) by urging increased inclusion of Hispanics in higher education through effective affirmative action programs; (d) by obtaining and now maintaining effective school desegregation remedies; (e) by making the Fourteenth Amendment's equal protection clause meaningful for noncitizens

and particularly for undocumented children; and (f) by trying to hold on to (especially for economically disadvantaged Latinas) the constitutional right to reproductive choice and indeed to privacy itself.

Through his lengthy paper trail of extrajudicial writings and speeches on civil and constitutional rights, Judge Clarence Thomas has revealed an ideological conservatism which differs little from that of Judge Robert Bork,[5] and, of great importance to us, solid philosophical positions in virtually all six of the foregoing areas. And in virtually all such areas of great concern to Hispanics, Judge Thomas' positions are diametrically opposed (or, possibly in the latter two instances, only potentially diametrically opposed) to the positions which have been and continue to be advanced by MALDEF on behalf of the civil and constitutional rights of Hispanics.

A. Affirmative Action in Employment

One of the most frequently-repeated themes in Clarence Thomas' writings and speeches is his steadfast opposition to affirmative action in virtually all forms, including affirmative action ordered by the courts to remedy proven past discrimination.

Clarence Thomas' opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind:

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[5] Judge Thomas' ideological conservatism, as is explored more thoroughly infra at 6-24, has frequently been compared with that of Judge Robert Bork particularly with regard to their mutual opposition to Twentieth Century jurisprudence on affirmative action, on school desegregation, and on the Ninth Amendment right to privacy. Given their mutual views, it may not be surprising that Judge Thomas beleives to be "disgraceful" the fact "that Judge Bork is not now Justice Bork." Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, 391,392 (Cato Institute, 1988) (cited hereafter as Assessing the Years).

> "I *firmly insist* that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem."[6]

Judge Thomas' views of affirmative action under Title VII of the Civil Rights Act of 1964, and of employment discrimination law in general, are the same as his view of a colorblind Constitution:

> "I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals -- both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries."[7]

Stated otherwise, in Judge Thomas' view, Title VII in fact makes affirmative action unlawful. Although Title VII bars "employers from discriminating on the basis of race,

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[6] Thomas, Letter to the Editor, Wall Street Journal, 23 (Feb. 20, 1987). See also, e.g., Thomas, "The Black Experience: Rage and Reality," Wall Street Journal (Oct. 12, 1987). "Much of the current thinking on civil rights has been crippled by the confusion between a 'colorblind society' and a 'colorblind Constitution.' The Constitution, by protecting the rights of individuals, is colorblind."

[7] Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!," 5 Yale Law & Policy Review 402, 403 n. 3 (1987) (emphasis added) (cited hereafter as Yale Policy Review).

color, sex, religion, or national origin,"

> "Unfortunately, this commitment to nondiscrimination soon gave way to a system of group preferences.
>
> "The government encouraged and required employers to institute the very practices that sponsors of the civil rights law had observed 'are themselves discriminatory.'"[8]

Accordingly, "group preferences" in any form "conflict with the law."[9]

Given Judge Thomas' personal opposition to affirmative action, as well as his above-illustrated legal views, it may not come as a surprise that he has formally criticized as wrongly decided most of the Supreme Court's decisions approving various forms of affirmative action. The most "egregious example," according to Judge Thomas, is the Supreme Court's Weber decision in 1979 approving voluntary affirmative action.[10] Also worthy of his "personal disagreement with the Court" are four decisions on affirmative action rendered in 1986 and 1987.[11]

Because all of these five decisions were rendered by the Supreme Court usually on

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[8] Thomas, "Abandon the Rules; They Cause Injustice," USA Today (Sept. 15, 1982).

[9] Id. In a subsequent commentary, Clarence Thomas argued that the Supreme Court's contrary view of the law, as set forth in its decisions upholding various forms of affirmative action as lawful under Title VII, reflected the "politicization" of the Court:

> "Let us look once more at the Civil Rights Act of 1964 as an example of the way this process has worked. We note that Congress passed a general law in relatively clear language. Subsequently, though, as in the case of Title VII of the act, the law was interpreted in a very different way."

Thomas, Assessing the Years, 395.

[10] Thomas, Assessing the Years, 395.

[11] Thomas, Yale Policy Review, 403 & 402 n. 2.

very close votes, and because Judge Thomas' vote (in place of Justice Thurgood Marshall's vote) would have caused a contrary result in several of the cases and could in the future cause a reversal of all of the cases, we briefly summarize below the five decisions with which Clarence Thomas has to date voiced his personal disagreement:

>> United Steelworkers of America v. Weber, 443 U.S. 193 (1979). On a 5-3 vote, the Court upheld as lawful under Title VII a private employer's hiring and training program which reserved half of the skilled-craft jobs for Blacks. The Court specifically noted that the program was designed to remedy the severe underrepresentation of Blacks in the employer's workforce in a manner that is consistent with the objectives of Title VII, and that the program was temporary and did not unnecessarily trammel the interests of white employees.

>> Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986). On a 5-4 vote, the Court upheld as appropriate relief under Title VII -- in order to remedy "egregious" and longstanding past discrimination by the defendant trade union -- a 29% minority membership and employment goal to be achieved by 1987 or soon thereafter. In reaching this decision, the Court expressly rejected the argument made by the federal government[12] that Title VII remedies could benefit only identifiable victims of the

[12] Despite the title of this case -- seemingly the EEOC (and the Justice Department) against a discriminatory construction trade union -- neither the EEOC nor the Justice Department supported the numerical remedy in this case. As is set forth in their Brief for the United States in this case, the EEOC (then chaired by Clarence Thomas) and the Justice Department in fact opposed the numerical remedy. Support for the numerical remedy was provided instead by two other plaintiffs in the case (the State of New York and the City of New York) and by a host of civil rights organizations.

longstanding past discrimination.

>> Local 93, Firefighters v. Cleveland, 478 U.S. 501 (1986). On a 6-3 vote, the Court upheld as lawful under Title VII a consent decree (per usual not containing an admission of past discrimination) requiring specified promotions of minority employees to remedy historical underrepresentation. This, the Court observed, is consistent with Congress' strong preference for voluntary settlements of Title VII claims.

>> United States v. Paradise, 480 U.S. 149 (1987). On a 5-4 vote, the Court upheld as constitutional under the Fourteenth Amendment's equal protection clause a court order requiring one-for-one (one Black for every white) promotions for state troopers to remedy pervasive past discrimination by the defendant law enforcement agency.

>> Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987). On a 6-3 vote, the Court upheld as lawful under Title VII a voluntary affirmative action plan pursuant to which a female was given a preference for promotion over an equally qualified male so as to desegregate a job classification historically filled only by males. As in Weber, the Court again noted that this plan was consistent with Congress' objectives in enacting Title VII.

The continued viability of each of these decisions, among others, as well as the future of affirmative action in general, hang in the balance today.

B. Set-Aside Programs in Government Contracting

Similar to his disagreement with the Supreme Court's decisions approving affirmative action in employment is Clarence Thomas' criticism of the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court upheld as constitutional a federal public works program which set aside 10% of the federal contracts for minority business enterprises (MBEs). Disagreeing with this decision, Judge Thomas claimed that the Supreme Court "reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."[13]

Nevertheless aware that Congress not only contemplated the MBE set-aside program but in fact enacted it, Judge Thomas aimed his criticism at Congress as well. In the same commentary quoted from above, Judge Thomas, after lambasting the Supreme Court, stated:

> "Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick?"[14]

Unfortunately -- from the perspective of MALDEF and of other civil rights organizations -- the constitutionality of federal MBE programs, now a matter of settled law, may be revisited by a newly configured Supreme Court. Fullilove, a 1980 decision, was decided on a 6-3 vote. A decade later, in Metro Broadcasting, Inc. v. FCC, 497 U.S.

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[13] Thomas, Assessing the Years, 396 (brackets added).

[14] Id.

___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court upheld as constitutional the FCC's minority preference policies in granting new broadcast licenses and in distress sales of broadcast licenses, but this decision was rendered on a narrow 5-4 vote.[15]

A new Justice personally and philosophically opposed to affirmative action, such as Clarence Thomas, could very well tip the balance to form a new Supreme Court majority not only willing to strike down future federal programs but also willing to overrule cases such as Fullilove and Metro Broadcasting.

C. Inclusion and Diversity in Higher Education

In the Supreme Court's seminal decision on the legality and constitutionality of race-conscious affirmative action, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a case involving the Davis Medical School's policy of reserving 16 of its 100 admission slots for minority students, the Court ruled 5-4 that the rigid reservation of 16 seats was impermissible without a showing that the school was remedying its own past discrimination, but that reliance on race or ethnic origin as an important factor in the admissions process was legally and constitutionally permissible in view of the interest of institutions of higher education in attaining diverse student bodies.

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[15] One year earlier, a 6-3 majority of the Supreme Court in City of Richmond v. Croson, 488 U.S. 469 (1989), struck down Richmond's MBE set-aside program as unconstitutional under the Fourteenth Amendment. The majority reached this result by applying the rigorous strict-scrutiny standard of review to the set-aside program, by ruling that state and local governments could enact such programs only if they are narrowly tailored to remedying identifiable past discrimination, and by distinguishing Fullilove based on the greater deference given by the Court to Congress.

In Metro Broadcasting, the four dissenters -- Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy -- argued that the same strict-scrutiny standard of review should be applied to Congress' enactments, and that Congress' approval of the FCC minority preference policies thereby should be struck down as unconstitutional.

Although Clarence Thomas has not widely criticized the Supreme Court's majority decision in Bakke -- at least possibly because he was a beneficiary of the race-conscious admissions program at Yale Law School[16] -- the Bakke ruling does not fit within his legal philosophy compelling the Constitution to be colorblind. Although not widely, Judge Thomas thus necessarily has criticized the Court's ruling in Bakke.

In Judge Thomas' commentary quoted from frequently above, in which he initially noted that it "is easy enough to blame the Court for 'voodoo jurisprudence,'"[17] Judge Thomas essentially argued that -- at least since Brown v. Board of Education, 347 U.S. 483 (1954), if not also in Brown itself -- the Supreme Court and then the lower courts wrongfully moved from their intended judicial role of statutory and constitutional interpretation to an improper role of political and social policymaking; and Judge Thomas then sought to illustrate this alleged move into policymaking through reference to four decisions with which he disagreed: Bakke and three other affirmative action

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[16] As described in the opening paragraphs of a recent article in The New York Times, 1 (July 14, 1991):

> "Judge Clarence Thomas, who came to prominence as a fierce black critic of racial preference programs, was admitted to Yale Law School under an explicit affirmative action plan with the goal of having blacks and other minority members make up about 10 percent of the entering class, university officials said.
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> "Under the program, which was adopted in 1971, the year Judge Thomas applied, blacks and some Hispanic applicants were evaluated differently than whites, the officials said. Nonetheless, they were not admitted unless they met standards devised to predict they could succeed at the highly competitive school."

This apparently was not the first time that Judge Thomas had benefitted from affirmative action, as years earlier he reportedly had won "a race-based scholarship to attend college." Los Angeles Daily Journal, 1 (July 16, 1991).

[17] Thomas, Assessing the Years, 392. Judge Thomas concluded this sentence as follows: "but Congress must share a great deal of the blame." Id.

cases.[18] Specifically with regard to its purported policymaking role on affirmative action: "The Court has made rather creative interpretations of equal protection and legislative intent in a number of civil rights cases beginning with Regents of the University of California v. Bakke."[19]

Although Bakke today seems to have been so correctly decided that it is a component part of the fabric of American law, it is at least possible that Bakke could be revisited by a newly configured, activist, anti-affirmative-action Supreme Court. In addition, it is a virtual certainty that the Court within only a few more years will review the legality and constitutionality of race- and ethnic-conscious scholarships for minorities. These are matters which we would not want constitutionally colorblind Clarence Thomas to be able to rule on.

D. School Desegregation Remedies

Any review of Clarence Thomas' legal position on school desegregation should

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[18] In his analysis leading to his use of Bakke as an illustration of wrongful political and social policymaking, Judge Thomas stated, in relevant part:

> "There is no question that courts have entered the policymaking process in an important way. But the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions.
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> "When political decisions have been made by judges, they have lacked the moral authority of the majority.
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> "When they [the courts] have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced on.
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> * * *
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> "The dignity of the judiciary is not enhanced by its politicization."

Id. at 394-95 (brackets added).

[19] Id. at 395.

begin with a brief review of the Supreme Court's unanimous decisions in Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I"), and in Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"). This is because Clarence Thomas has criticized not only the remedies for school desegregation but also the basis for the original Brown I decision itself.

In the initial 1954 decision, which was based upon and effectively compelled by a long series of earlier Supreme Court decisions holding that racial segregation in higher education was unconstitutional under the equal protection clause of the Fourteenth Amendment,[20] the Court unanimously ruled: "Separate educational facilities are inherently unequal." Brown I, 347 U.S. at 495. This unanimous ruling unquestionably was based on the equal protection clause of the Fourteenth Amendment.[21]

Following rebriefing and reargument on the issue of remedy, the Court a year later unanimously ruled that the public school systems were required "to effectuate a transition to a racially nondiscriminatory school system" and that this transition was to occur "with all deliberate speed." Brown II, 349 U.S. at 301.

Clarence Thomas' quarrel with Brown I is not with its result but with the grounds on which it was based. Because he firmly believes that African American school children

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[20] See, e.g., McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). See generally Brown I, 347 U.S. at 492.

[21] As stated by the unanimous Supreme Court in Brown I, 347 U.S. at 495:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

"can do quite well in their own schools,"[22] Judge Thomas disagrees with the equal-protection-of-the-laws premise of Brown I that separate is inherently unequal, and he in fact disagrees with the Supreme Court's reliance in Brown I on the equal protection clause at all.[23]

Instead, according to Judge Thomas, Brown I should have been based on Justice Harlan's constitutional colorblindness dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), which Judge Thomas believes was in turn based primarily on the Fourteenth Amendment's privileges or immunities clause, which Judge Thomas in turn believes incorporates or should incorporate principles of higher law or natural law.[24]

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[22] Williams, "A Question of Fairness," The Atlantic Monthly, 72 (Feb. 1987).

[23] See generally Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63 (1989) (cited hereafter as "Higher Law"); Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 983 (1987) (cited hereafter as "Plain Reading").

As Judge Thomas concluded in another writing, following a reference to Brown I: "The main problem with the Court's opinions in the area of race is that it never had an adequate principle in the great Brown precedent to proceed from." Thomas, Assessing the Years, 392-93.

[24] This sometimes-confusing and often-circular argument is set forth primarily in Thomas, "Higher Law," and Thomas, "Plain Meaning." Although Judge Thomas' reasoning is not entirely clear to us, we nevertheless attempt to summarize his views briefly here by quoting from several of his seemingly most relevant statements.

> "Brown v. Board of Education would have had the strength of American political tradition behind it if it had relied upon Justice Harlan's [colorblindness] arguments instead of relying on dubious social science. That case might have been an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment."

Thomas, "Higher Law," 68 (brackets added, footnote omitted).

> "Justice Harlan's reasoning, as we understand him, provides the best basis for the Court opinions in the Civil Rights [sic] cases from Brown on."

Thomas, "Plain Meaning," 700.

> "Our best guide to the purpose behind the Privileges or Immunities Clause of the Fourteenth Amendment is Justice John Marshall Harlan's famous and lone dissent in Plessy v. Ferguson.
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> * * *
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> "It is not sufficiently appreciated that Justice Harlan's dissent focused on both the Thirteenth and the entire Fourteenth Amendments --

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Among the problems with Clarence Thomas' approach to Brown I and its progeny is the fact that his approach swims against the tide of enormous scholarly research concluding that the equal protection clause is the core of the Fourteenth Amendment. Also problematic are not only his willingness to reject the then-emerging equal protection jurisprudence on which Brown I was based, see supra note 21, but also his apparent willingness to reject the legal arguments advanced by all the parties in a case and to legislate his own views instead.

But the primary problem with Clarence Thomas' approach is that it seems to omit the Fourteenth Amendment's equal protection clause entirely from constitutional jurisprudence.

And if there can be no or only a few violations of the equal protection clause, there then can be no or only few remedies therefor. And that seems to be the next step

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> *in particular, the 'privileges or immunities of citizens of the United States'* clause. Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence. He brings us back to privileges and immunities by constantly speaking of 'citizens' and then rights. For example, Justice Harlan spoke of segregation as putting the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. That Justice Harlan spoke of 'citizens' rather than 'persons' shows that he relied on the Privileges or Immunities Clause rather than on either the Equal Protection or Due Process Clause, both of which refer to persons. For Justice Harlan, the key to the Civil War amendments was the privileges and immunities of citizens of the United States.
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> * * *
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> "In Justice Harlan's view, the original intention of the framers of the Fourteenth Amendment was to bring about an equality of rights or privileges and immunities exercised by United States citizens."

Thomas, "Higher Law," 66-67 (footnotes omitted).

> "In order to appreciate the subtleties of Justice Harlan's dissent, one must read it in light of the 'higher law' background of the Constitution. Justice Harlan understood, as did Lincoln, that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."

Thomas, "Plain Meaning," 701.

in Judge Thomas' approach:

> "[Fourteen years after Brown I], in the Green v. County Board of Education case, we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education."[25]

In a mere two sentences, Judge Thomas reflected both a serious misunderstanding of school desegregation law and a severe disagreement with that body of law. First, neither Brown I or Brown II "ended segregation" as both were followed by a more-than-decade-long campaign of Massive Resistance. Second, the Supreme Court's remedy of desegregation through integration commenced with Brown II, as pointed out above, and not with Green v. County School Board, 391 U.S. 430 (1968), in which a unanimous Supreme Court merely held freedom-of-choice plans to be inadequate to satisfy the mandate of Brown II in view of the decades upon decades of legally entrenched segregation. Third, Judge Thomas' reference to the beginning of "a disastrous series of cases requiring busing" merely emphasizes his disagreement with Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in which the Court held that the trial court did not abuse its remedial discretion in requiring redrawn school attendance zones and altered feeder patterns (which in turn required some school buses to travel in different directions) so as to remedy a prolonged pattern of unconstitutional actions.

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[25] Thomas, Assessing the Years, 393 (footnote omitted).

Finally, in view of the fact that Judge Thomas apparently would allow parents who care about a decent education -- all parents care about a decent education -- to trump constitutional rights, he appears to prefer judicial policymaking of his own totally contrary to the neutral constitutional principle reiterated by a unanimous Supreme Court in the Little Rock case: that "constitutional rights ... are not to be sacrificed or yielded" because of opposition to those rights, Cooper v. Aaron, 358 U.S. 1 (1958).

The next generation of school desegregation cases moving toward the Supreme Court involve the issue of when a federal court should relinquish jurisdiction and in effect permit resegregation.[26] There can be little doubt about Judge Thomas' position on this crucial issue.

E. Equal Protection for Undocumented Children

The foregoing review of Clarence Thomas' legal views on equal protection in the context of school segregation and desegregation reveals his ideological preference to abandon the Fourteenth Amendment's equal protection clause and to substitute instead his view of the Fourteenth Amendment's privileges or immunities clause (including his concepts of higher law and of natural law) as paramount. See supra note 24 and accompanying text.

Regardless of what freedoms Judge Thomas might find to be encompassed within the privileges or immunities clause, the fact of the matter is that his preferred privileges

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[26] See, e.g., Keyes v. School District No. 1, Denver, 895 F2d 659 (10th Cir. 1990), cert. denied, 498 U.S. __, 111 S.Ct. 951, 112 L.Ed.2d 1040 (1991).

or immunities clause protects only "citizens,"[27] whereas the equal protection clause protects "any person."[28]

Since the privileges or immunities clause cannot and does not protect noncitizens, Judge Thomas may very likely reject the Supreme Court's historical application of equal protection doctrine to protect noncitizens[29] in cases running from Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco ordinances effectively outlawing Chinese laundries violate equal protection), to Plyler v. Doe, 457 U.S. 202 (1982) (Texas law which denies a free public education to undocumented children violates equal protection). In fact, had Judge Thomas rather than Justice Thurgood Marshall been on the Supreme Court at the time of Plyler, and had Judge Thomas rejected equal protection analysis in favor of his privileges or immunities approach, MALDEF's 5-4 victory in Plyler would have been a 5-4 loss.

F. Privacy and Reproductive Choice

Because at least half of the community we represent is female, and because most Latinas are economically disadvantaged and disproportionately at or below the poverty line, MALDEF for more than a decade has sought to preserve the constitutional right to

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[27] The privileges or immunities clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV § 1 (emphasis added).

[28] The equal protection clause provides in relevant part: "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1 (ellipsis and emphasis added).

[29] Since Judge Thomas finds it inappropriate to apply the equal protection clause to protect African Americans (for whom the Fourteenth Amendment was primarily designed), it would be difficult indeed, and certainly legally inconsistent, for him to extend the equal protection clause to noncitizens.

reproductive choice. We thus have been most skeptical about Supreme Court nominees who question continuation of the right to choice based on the constitutional right to privacy. Clarence Thomas is such a nominee.

In his "Higher Law" article published in 1989, Judge Thomas introduced his philosophical objection to a Ninth Amendment right to privacy as follows:

> "The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established by Griswold v. Connecticut, 381 U.S. 479 (1965)....
>
> "I elaborate on my misgivings about activist judicial use of the Ninth Amendment in Thomas, 'Civil Rights as a Principle Versus Civil Rights as an Interest,' in Assessing the Reagan Years, 398-99 (D. Boaz ed. 1988)."[30]

In the 1988 publication, Judge Thomas expressed more than just his "misgivings" about the Ninth Amendment right to privacy. He began as follows:

> "I cannot resist adding a note here to the recent discussion of the meaning of the Ninth Amendment ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'). It relates directly to our theme of civil rights and

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[30] Thomas, "Higher Law," 63 n. 2 (ellipsis and emphasis added).

> the courts. Some senators and scholars are horrified by Judge Bork's dismissal of the Ninth Amendment, as others were horrified by Justice Arthur Goldberg's discovery, or rather invention, of it in Griswold v. Connecticut. But the Ninth Amendment has to be considered in its context at the founding."[31]

Judge Thomas thereupon argued that "the Constitution is a document of limited government," that Supreme Court recognition of any unenumerated right in the Ninth Amendment would "give to the Supreme Court certain powers to strike down legislation," that such power in essence "would seem to be a blank check" for the Court to discover any right and to require "Congress to raise taxes to enforce this right," that accordingly "[m]aximization of rights is perfectly compatible with total government and regulation," and that, therefore, "[f]ar from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom."[32]

Apart from Judge Thomas' "misgivings" about, if not disagreement with, the Supreme Court's "invention" of the Ninth Amendment right to privacy, even more controversial have been his printed remarks on natural law in a speech delivered a year earlier at the Heritage Foundation. In that speech, Judge Thomas quoted approvingly from John Quincy Adams:

> "Our political way of life is by the laws of nature, of

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[31] Thomas, Assessing the Years, 398 (emphasis added, footnote omitted).

[32] Id. (brackets added).

> nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."[33]

He also stated that the "need to reexamine the natural law is as current as last month's issue of Time on ethics," and, most controversially, that "Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."[34]

As is set forth in footnote 34 below, the core of Mr. Lehrman's argument is that,

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[33] Thomas, "Why Black Americans Should Look to Conservative Policies," 9 (Heritage Foundation, 1987) (cited hereafter as "Conservative Policies").

[34] Id. at 8. In view of Judge Thomas' endorsement of the essay by Lewis Lehrman, a well known right-to-life activist, it may be worth quoting from that article here:

> "May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration [of Independence] and the Constitution, is to be set aside in favor of the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of legal authority, implicit or explicit, in the actual text or history of the Constitution itself?
>
> "Are we finally to suppose that the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution -- are we, against all reason and American history, to suppose that the right to life as set forth in the American Constitution may be lawfully eviscerated and amended by the Supreme Court of the United States with neither warrant nor amendment directly or indirectly from the American people whatsoever? Is it not a biological necessity, if it were not manifestly plain from the sequence of the actual words in the Declaration and in the constitutional amendments themselves, that liberty is made for life, not life for liberty? Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?"

Lehrman, "The Declaration of Independence and the Right to Life," The American Spectator, 21, 23 (April, 1987) (brackets added, emphasis in the original).

as a matter of natural law, fetuses are entitled to constitutional protection to life from the moment of conception. This argument, if enshrined in law, would justify more than just overruling Roe v. Wade, 410 U.S. 113 (1973), as it would also impose a constitutional prohibition on abortion. States would no longer have even the authority that existed prior to 1973 to permit abortion.

Given Clarence Thomas' hostility to any unenumerated rights in the Ninth Amendment combined with his express endorsement of Mr. Lehrman's essay as "a splendid example of applying natural law," confirmation of Judge Thomas as Justice Thomas could lead not only to the elimination of the constitutional right to reproductive choice but also to the elimination altogether of the constitutional right to privacy.

III. Judge Thomas' Testimony Before This Committee

Apparently recognizing that many of the philosophical positions that he had taken in his speeches and his writings were not only out of the mainstream but often extreme, Clarence Thomas appeared to pursue at least four strategies in his five days of testimony before this Committee: first, he occasionally reiterated and tried to defend several of his previously-stated philosophical views (particularly his opposition to virtually all forms of affirmative action as unlawful and unconstitutional); second, he tried to modify and in fact to moderate some of his most extreme views; third, he refused to answer questions in a few areas altogether (particularly with regard to whether he would overrule the constitutional right to reproductive choice); and, finally, and most sweepingly, he argued that his past philosophical positions should be deemed irrelevant to the confirmation

process because they were arrived at and presented when he was a policy maker rather than in his current role as an "impartial" judge. To at least several and maybe to many Members of this Committee, parts of Clarence Thomas' testimony accordingly bordered on being unbelievable.

Most problematic to me is Judge Thomas' argument that his past philosophical views should now be disregarded. That is an argument which itself must be disregarded. Because his past philosophical views were freely arrived at by Clarence Thomas, because those views were voluntarily delievered in speeches and voluntarily presented in numerous writings, because those views form at least part of the reason he was nominated in the first place, and because no nominee can or is expected to shed his or her philosophical views upon nomination to the judiciary, Clarence Thomas' past philosophical views are of crucial importance to the determination of whether he should be confirmed by the Senate. And it is precisely because of his widely-expressed past philosophical views that we urge the Senate not to confirm Clarence Thomas.

A. One area in which Judge Thomas did not alter his views in his testimony before this Committee concerns his widely expressed legal view that race-based or gender-based affirmative action goals, timetables, or preferences of any kind in employment are unlawful and unconstitutional. Although he maintined this legal position at the outset of his testimony under questioning by Senator Spector (on Wednesday, September 11), he sort of conceded in response to questioning by Senator Spector and by Chairman Biden (on Friday, September 13) that such policies might sometimes be okay, but only from a policy viewpoint; Judge Thomas declined to give even tentative

approval in a legal context. His consistent speeches and writings, of course, leave no doubt about Judge Thomas' position from a legal viewpoint.

Supreme Court adjudication in this area hangs in the balance today. Judge Thomas should not be confirmed.

B. In the area of congressionally-enacted MBE set-aside programs and similar federal programs, Judge Thomas here too did not alter his prior views about the unconstitutionality of such programs. Although he agreed in his testimony (on Monday, September 16) that the Supreme Court, in such decisions as Metro Broadcasting, has accorded more deference to Congress than it has to the states in this area, Judge Thomas declined to state his legal view. But his legal philosophy here is also well known from his speeches and writings.

Given that Metro Broadcasting was decided barely more than a year ago on a 5-4 vote with Justice Marshall in the majority, Supreme Court adjudication in this area also hangs in the balance today. Judge Thomas should not be confirmed.

C. On the matters of inclusion and diversity in higher education, Judge Thomas only slightly altered his previously-expressed legal criticsm of the Supreme Court's approval of race- and ethnic-based affirmative action programs. As a beneficiary of such a program at Yale Law School, he conceded under questioning by Senator Brown (on Wednesday, September 11) and by Senator Kennedy (on Thursday, September 12) his approval of Yale's affirmative action program, but again only from a policy perspective, not from a legal viewpoint. And, under questioning by Senator Simon (on Wednesday, September 11), Judge Thomas similarly voiced approval of race- and ethnic-

based scholarships, but only from a policy perspective, not from a legal perspective. His legal philosophy opposing all forms preference, again, are well known.

Given that Bakke was a 4-1-4 decision rendered in 1978 -- with Justices Marshall, Brennan, and Powell casting key votes -- the legality and constitutionality of inclusive affirmative action plans in higher education, and even of essential race- and ethnic-based scholarships, may hang in the balance today. Judge Thomas should not be confirmed.

D. As to his legal views on school desegregation remedies, Judge Thomas somewhat expanded upon his previous criticism of several Supreme Court decisions by stating to Senator Spector (on Monday, September 16) that the remedies must be related to improving the quality of education, thereby at least implying that he continues to oppose such desegregation remedies as integrating students and integrating faculty as a bottom-line principle of having not African American schools, Hispanic schools, and Anglo schools, but just schools.

Resegregation issues are currently pending before the Supreme Court, and cases presenting similar issues will be reviewed hereafter. Judge Thomas should not be confirmed.

E. As far as I'm aware, Judge Thomas was not asked about and did not testify about his stated preference for the privileges or immunities clause, rather than the equal protection clause, as the "core" of the Fourteenth Amendment's guarantee of equality under law. Because the privileges or immunities clause applies only to "citizens," whereas the equal protection clause protects "any person," his preferred approach to Fourteenth Amendment decision-making is especially troubling to me.

Fourteenth Amendment cases involving discrimination against noncitizens come before the Supreme Court quite frequently. Again, Judge Thomas should not be confirmed.

F. Finally, on the issue of reproductive choice, Judge Thomas during his testimony repeatedly sought to distance himself from some of his previously-expressed views (by, for example, at least recognizing a constitutional right to privacy in the liberty clause of the Fourteenth Amendment, and by claiming that he never intended his belief in natural law to be used in constitutional adjudication), but he repeatedly refused to comment on his view of the constitutional right to choice. This is something that the Senate and the American people have a right to know.

Given that the constitutionality of the right to reproductive choice is certain to be reevaluated by the Supreme Court, given that his vote on this issue could be crucial to its outcome, and in view of his previously-stated antagonism to the right to choice, Judge Thomas should not be confirmed.

Conclusion

Presenting MALDEF's position in opposition to the confirmation of Clarence Thomas is not a task that I have looked forward to at all.

I know Judge Thomas. I consider him a friend. And, as other witnesses have brought to the attention of this Committee, there is no question that he has many extremely positive qualities.

Additionally, on matters of importance to Hispanics, there similarly is no question

that, during his tenure at the EEOC, he was accessible to me in my various roles at MALDEF, and that he was accessible to others too. He also was sensitive to matters of particular concern to Hispanics. Illustrative was his support for Spanish-language forms and brochures. And commendable here was his testimony in response to Senator DeConcini (on Thursday, September 12) about his opposition to English-only policies which affect Hispanics so negatively.

Nevertheless, in determining our position here, we at MALDEF had to look at the entire picture in the context of a Supreme Court nomination, and we in particular had to look closely indeed at Judge Thomas' legal and philosophical views about the civil rights laws and constitutional provisions, and about Supreme Court decisions interpreting them, all of such importance to protecting and advancing the rights of Hispanics. The big picture, we found, was not at all a positive one.

Based on his widely-expressed legal and constitutional views, which are summarized herein, we reached the inescapable conclusion that Judge Thomas should not be, and cannot be, on the Supreme Court. We accordingly urge the Senate to exercise its co-equal role in this process by not confirming Clarence Thomas as an Associate Justice of the Supreme Court of the United States.