

No. 20-50448

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

TONY K. MCDONALD; JOSHUA B. HAMMER; MARK S. PULLIAM,  
*Plaintiffs-Appellants*

v.

JOE K. LONGLEY, Immediate Past President of the State Bar of Texas;  
RANDALL O. SORRELS, President of the State Bar of Texas; LAURA GIBSON,  
Member of the State Bar Board of Directors and Chair of the Board; JERRY C.  
ALEXANDER, Member of the State Bar Board of Directors; ALISON COLVIN,  
member of the State Bar Board of Directors,

*Defendants-Appellees*

---

On Appeal from the United States District Court for the Western District of Texas,  
Austin Division, No. 1:19-cv-219-LY, Hon. Lee Yeakel, District Judge

---

**BRIEF ON BEHALF OF CONCERNED LAWYERS OF COLOR AS  
*AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE**

---

Jasmine S. Wynton  
jwynton@thompsoncoburn.com  
Mackenzie Salenger  
msalenger@thompsoncoburn.com  
Thompson Coburn LLP  
1919 McKinney Ave., Suite 1000  
Dallas, TX 75201  
Tel: (972) 629-7100  
Fax: (972) 629-7171

*Attorneys for Amicus Curiae*

**CERTIFICATE OF INTERESTED PERSONS**

- (1) No. 20-50448, *McDonald v. Sorrels*;
- (2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.
  - Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam, *Plaintiffs-Appellants*
  - Members of the Board of Directors of the State Bar of Texas, sued in their official capacity, *Defendants-Appellees*:
    - Randall O. Sorrels, *Texas Bar Immediate Past President*
    - Larry P. McDougal, *Texas Bar President*
    - Sylvia B. Firth, *Texas Bar President-Elect*
    - Jerry C. Alexander, *Immediate Past Chair of Texas Bar Board*
    - John C. “Charlie” Ginn, *Chair of the Texas Bar Board*
    - Victor A. Flores, *TYLA Immediate Past-President*
    - Britney E. Harrison, *TYLA President*
    - Benny Agosto, Jr.
    - Jeffrey W. Allison
    - Andrés E. Almanzán
    - Chad Baruch
    - Kate Bihm
    - Rebekah Steely Brooker
    - David N. Calvillo
    - Luis M. Cardenas
    - Derek Cook
    - Robert D. Crain
    - Christina M. Davis
    - Alistair B. Dawson
    - Michael Dokupil

- Dr. Maria H. Ferrier
  - Steve Fischer
  - Lucy Forbes
  - Shari Goldsberry
  - Marc E. Gravely
  - August W. Harris III
  - Joe “Rice” Horkey, Jr.
  - Wendy-Adele Humphrey
  - Michael K. Hurst
  - Yolanda Cortés Mares
  - Carra Miller
  - Lydia E. Mount
  - Stephen J. Naylor
  - Jeanine N. Rispoli
  - Carmen M. Roe
  - Adam T. Schramek
  - Mary L. Scott
  - David Sergi
  - Alan E. Sims
  - D. Todd Smith
  - Jason C.N. Smith
  - Diane St. Yves
  - Andrew Tolchin
  - Santos Vargas
  - G. Michael Vasquez
  - Amy Welborn
  - James Wester
  - Kimberly P. Wilson
- *AIG, State Bar of Texas Insurer*
  - *Amici*
    - State of Texas
    - Former Texas Bar Presidents
      - Allan K. DuBois

- Harper Estes
- Kelly Frels
- Guy N. Harrison
- Roland K. Johnson
- Lynne Liberato
- Richard Pena
- Eduardo R. Rodriguez
- Frank E. Stevenson II
- Terry O. Tottenham
- Former Texas Bar College Chairs
  - Claude E. Ducloux
  - John C. Grace
  - Cori Harbour-Valdez
  - Veronica F. Jacobs
  - Steven C. James
  - David Keltner
  - Herman H. Segovia
- Former Chairs of the Texas Bar Council of Chairs
  - Talmage Boston
  - Patrick J. Maher
  - Melissa D. Matthews
  - Robert M. “Randy” Roach, Jr.
  - Charles Herring, Jr.
  - James M. McCormack
  - Amon Burton
  - Gaines West
  - Robert P. Schuwerk
- Texas Legal Ethics Counsel
  - Charles Herring, Jr.
  - James M. McCormack
  - Amon Burton
  - Gaines West
  - Robert P. Schuwerk
- Concerned Lawyers of Color
  - Arthur E. Anthony

- Christa Brown-Sanford
- Jesús Castellón
- Caroline Harrison
- Glenwood F. Hill, II
- Debra Hunter Johnson
- Peter C. Lewis
- Jill B. Louis
- Buena Vista Lyons
- Sonja J. McGill
- Hon. Rudolph K. Metayer
- Steven J. Moses
- Christopher R. Mugica
- Michael D. Pegues
- Courtney B. Perez
- Mandy Price, Esq.
- Ebony R. Rivon
- James Stafford, III
- Paul K. Stafford
- J.L. Turner Legal Association
  - No parent corporation or publicly held corporation owns 10% or more of J.L. Turner Legal Association's stock.
- Houston Lawyers Association
  - No parent corporation or publicly held corporation owns 10% or more of Houston Lawyers Association's stock.
- NEW Roundtable, Inc.
  - No parent corporation or publicly held corporation owns 10% or more of NEW Roundtable, Inc.'s stock.
- The following attorneys have appeared on behalf of Plaintiffs-Appellants Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam either before this Court or in the district court: Jeffrey M. Harris, William S. Consovoy,

Cameron T. Norris, and Tiffany H. Bates, all of Consovoy McCarthy PLLC; and Samuel D. Adkisson, formerly of Consovoy McCarthy PLLC.

- The following attorneys have appeared on behalf of Defendants Appellees, members of the State Bar of Texas Board of Directors sued in their official capacity, either before this Court or in the district court: Thomas S. Leatherbury, Patrick W. Mizell, Joshua S. Johnson, and Morgan A. Kelley, all of Vinson & Elkins LLP; and Deborah Carleton Milner, formerly of Vinson & Elkins LLP.
- The following Defendants were named in Plaintiffs' First Amended Complaint, see ROA.2135-2154, but were dismissed without prejudice pursuant to a stipulation between the parties, see ROA.3145-3148: Seana Willing, in her official capacity as Chief Disciplinary Counsel of the State Bar of Texas; and Pablo Javier Almaguer, Noelle M. Reed, John Neal, Bruce Ashworth, Gena Bunn, Magali Suarez Candler, Teresa Acosta, Dave Obergfell, William Skrobarczyk, Vance Goss, Javier S. Vera, and Sheri Roach Brosier, in their official capacities as Members of the Commission for Lawyer Discipline of the State Bar of Texas.
- The following attorneys have appeared on behalf of amici the State of Texas: Hon. Ken Paxton (Attorney General of Texas), Jeffrey C. Mateer (First Assistance Attorney General), Ryan L. Bangert (Deputy First Assistant Attorney General), and Kyle D. Hawkins (Solicitor General).
- The following attorneys have appeared on behalf of amici former Texas Bar presidents, former Chairs of the Texas Bar College, and former Chairs of the Texas Bar Council of Chairs: Dylan O. Drummond and Jim A. Moseley, both of Gray Reed McGraw LLP.
- The following attorneys have appeared on behalf of amici Texas Legal Ethics Counsel: Jason M. Panzer and Lauren Ross, both of Herring & Panzer, L.L.P.

- The following attorneys have appeared on behalf of amici Concerned Lawyers of Color: Jasmine S. Wynton and Mackenzie M. Salenger, both of Thompson Coburn LLP.

Pursuant to 5th Cir. R. 29.2, amici certify that no supplemental statement of interested parties is necessary.

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS.....II

TABLE OF CONTENTS..... VIII

IDENTITY AND INTEREST OF AMICI CURIAE ..... XII

STATEMENT UNDER FED. R. APP. P. 29(A)(4)(E).....XV

SUMMARY OF ARGUMENT .....1

ARGUMENT .....3

    A.    The Bar’s support of diversity initiatives is critically important to furthering Texas’s constitutionally-permissible interests in regulating the legal profession and improving the quality of legal services. ....3

    B.    The Bar’s diversity and inclusion initiatives are essential to achieving a more fair and equitable profession.....5

        1.    Texas has a long history of discrimination in the legal profession. ....5

        2.    The lack of diversity in the legal profession continues today.....5

        3.    Diversity in the legal profession benefits all Texas lawyers. ....8

    C.    The Bar’s support of diversity helps build and maintain public confidence in the judicial system. ....9

CONCLUSION.....14

CERTIFICATE OF CONFERENCE.....16

CERTIFICATE OF SERVICE .....17

CERTIFICATE OF COMPLIANCE.....18



**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990) .....	1, 13
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950) .....	8
<b>Other Authorities</b>	
<i>A Decade Of Watching Black People Die</i> , NPR (May 31, 2020), <a href="https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die">https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die</a> .....	9
Allison E. Laffey and Allison Ng, <i>Diversity and Inclusion in the Law: Challenges and Initiatives</i> , AMERICAN BAR ASSOCIATION (May 2, 2018) .....	2
Christine Simmons, <i>170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business</i> , The American Lawyer (Jan. 27, 2019), <a href="https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/">https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/</a> .....	6
Daniel S. Wittenberg, <i>Corporate Clients Demand More Diversity from Law Firms</i> , AMERICAN BAR ASSOCIATION (June 20, 2017) .....	5
Debra Cassens Weiss, <i>Majority of minority female lawyers consider leaving law; ABA study explains why</i> , ABA JOURNAL (June 22, 2020) .....	7
Debra Cassens Weiss, <i>Percentage of black associates in large law firms finally tops 2009 level, but not by much</i> , ABA Journal (Dec. 18, 2019) .....	6
Dev Stahlkopf, <i>Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel’s Perspective</i> , AMERICAN BAR ASSOCIATION (May 6, 2020).....	8
<i>Implicit Bias: Building Awareness and Overcoming Obstacles</i> , STATE BAR OF TEXAS: ANNUAL MEETING (June 14, 2019) .....	11

Institute for the Advancement of the American Legal System, *Public Perspectives on Trust & Confidence in the Courts* (June 2020), [https://iaals.du.edu/sites/default/files/documents/publications/public\\_perspectives\\_on\\_trust\\_and\\_confidence\\_in\\_the\\_courts.pdf](https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf).....13

Jason Reid, *Source: NFL plans to play Black national anthem before Week 1 games*, ESPN (July 2, 2020), [https://www.espn.com/nfl/story/\\_/id/29401000/nfl-plans-play-black-national-anthem-week-1-games](https://www.espn.com/nfl/story/_/id/29401000/nfl-plans-play-black-national-anthem-week-1-games).....10

John G. Browning, *Dallas Law Firms Lack Diversity*, D MAGAZINE (April 2015), <https://www.dmagazine.com/publications/d-ceo/2015/april/dallas-law-firms-lack-diversity/> .....7

Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. Cal. L. Rev. 507 (2020).....12

Kadir Nelson’s “Say Their Names,” THE NEW YORKER (June 14, 2020) .....9

Katrina Grider, *Unconscious Bias in the Legal Profession*, STATE BAR OF TEXAS: WOMEN IN THE LAW (March 16, 2018) .....11

Kenneth Artz, *Public Trust and Confidence in the Civil Legal System: A Q&A With Logan Cornett and Natalie Anne Knowlton*, TEXAS LAWYER (July 16, 2020), <https://www.law.com/texaslawyer/2020/07/16/public-trust-and-confidence-in-the-civil-legal-system-a-qa-with-logan-cornett-and-natalie-anne-knowlton/> .....2

Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CENTER (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/>.....10

Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> .....9

Mark Curriden, *Texas Bar Virtual Meeting Gets Heated Over President’s BLM Comments*, TEXAS LAWBOOK (July 27, 2020), <https://texaslawbook.net/texas-bar-virtual-meeting-gets-heated-over-presidents-blm-comments/> ..... 11

Miguel Gutierrez, Jr. & John Jordan, *Protests against police brutality and racism: scenes from small Texas towns and cities*, TEXAS TRIBUNE (June 15, 2020), <https://www.texastribune.org/2020/06/15/texas-protest-police-brutality-racism/> ..... 10

Paul P. Murphy, *Baseball is making Black Lives Matter center stage on Opening Day*, CNN (July 24, 2020), <https://www.cnn.com/2020/07/23/us/opening-day-baseball-mlb-black-lives-matter-trnd/index.html> ..... 10

STATE BAR OF TEXAS: DEPARTMENT OF RESEARCH AND ANALYSIS, *Racial/Ethnic Minority Attorneys: Attorney Statistical Profile (2019-20)*, [https://www.texasbar.com/AM/Template.cfm?Section=Content\\_Folders&Template=/CM/ContentDisplay.cfm&ContentID=48795](https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=48795) .....6

STATE BAR OF TEXAS: OUR MISSION, <https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm> (last visited Aug. 4, 2020) ..... 1

*Uncovering and Proving Implicit Bias in Jury Selection and Trial*, STATE BAR OF TEXAS: BILL OF RIGHTS COURSE (March 27, 2016) ..... 12

**IDENTITY AND INTEREST OF AMICI CURIAE**

Amici here include (i) Texas lawyers of color that are partners at regional, national, and international law firms; are elected officials; act as general counsel to privately-held and publicly-traded companies; and serve in leadership positions in communities, in local bar associations across Texas, in State Bar of Texas boards, sections, and committees;<sup>1</sup> (ii) local African-American bar associations in Dallas, Texas and Houston, Texas; and (iii) a nonprofit organization comprising more than 80 black women in-house and outside counsel attorneys in Texas (collectively, “Amici” or “Concerned Lawyers of Color”).

The State Bar of Texas supports an Office of Minority Affairs and a number of programs aimed at enhancing diversity in the legal profession. Amici—and each of them—have an interest in ensuring that these programs remain an integral part of the State Bar of Texas’s commitment to diversifying the profession and furthering the ancillary benefits that accrue to the citizens of Texas as a result of such diversity.

A number of concerns prompted the filing of this brief, including the following:

- Notwithstanding the notable demographic shifts altering the social landscape across Texas, lawyers of color remain underrepresented in the profession in Texas, including in corporate law firms, in academia

---

<sup>1</sup> The individual attorneys that appear as Amici are acting in their personal capacities and not as representatives of any entities and organizations with which they are affiliated.

and in the state and federal judiciary, a trend that inhibits access to the justice system for a large segment of Texas’s population; and

- Achieving a committed and active justice community representative of the diverse peoples and cultures of Texas is essential to the effective delivery of legal services, engendering trust in the legal system and further respect for the rule of law—a goal which cannot be achieved without a fully supportive State Bar.

Amici, therefore, have a strong interest in ensuring both that the State Bar of Texas remains able to (i) collect the dues necessary to fulfill its budgetary mandates and (ii) continue its irreplaceable support for initiatives promoting diversity in the profession. Because Plaintiffs-Appellants’ claims existentially threaten those interests, the undersigned submit this amicus curiae brief to further inform the Court about the critical role that diversity plays in the legal profession.<sup>2</sup>

The following are members of the Concerned Lawyers of Color joining in this brief:

**Arthur E. Anthony**  
Partner, Locke Lord LLP

**Jill B. Louis**  
Partner, Perkins Coie,  
LLP

**Courtney B. Perez**  
Partner, Carter Arnett PLLC

**Christa Brown-Sanford**  
Partner, Baker Botts,  
L.L.P.

**Buena Vista Lyons**  
Partner, FordHarrison  
LLP

**Mandy Price, Esq.**  
Co-Founder & CEO,  
Kanarys, Inc.

**Jesús Castellón**  
Senior Counsel, Perkins  
Coie, LLP

**Sonja J. McGill**  
Partner, Spencer Fane  
LLP

**Ebony R. Rivon**  
Owner & Managing Partner,  
Rivon Law Firm, PLLC

---

<sup>2</sup> This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

**Caroline Harrison**  
Managing Partner, Pham  
Harrison, LLP

**Hon. Rudolph K.  
Metayer**  
Attorney, Chamberlain  
McHaney, PLLC

**James Stafford, III**  
Partner, Scheef & Stone,  
LLP

**Glenwood F. Hill, II**  
Assistant General  
Counsel, Preston Hollow  
Capital, LLC

**Steven J. Moses**  
Shareholder, Cowles  
& Thompson, P.C.

**Paul K. Stafford**  
Managing Partner, Stafford  
Law Firm, P.C.

**Debra Hunter Johnson**  
President, Reciprocity  
Consulting Group

**Christopher R. Mugica**  
Partner, Jackson Walker  
LLP

**J.L. Turner Legal  
Association**

**Peter C. Lewis**  
Partner, Scheef & Stone,  
LLP

**Michael D. Pegues**  
Shareholder, Polsinelli,  
P.C.

**Houston Lawyers  
Association**

**NEW Roundtable, Inc.**

**STATEMENT UNDER FED. R. APP. P. 29(a)(4)(E)**

The Concerned Lawyers of Color confirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than the Concerned Lawyers of Color, their members, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

## SUMMARY OF ARGUMENT

With over 100,000 members, the State Bar of Texas (the “Bar”) is one of the largest state bar organizations in the country.<sup>3</sup> To further the State’s interest in regulating the profession and improving the quality of legal services—interests long-recognized as permissible under *Keller v. State Bar of California*—the Bar supports critical diversity and inclusion programs, many of which are administered through its Office of Minority Affairs (“OMA”). 496 U.S. 1 (1990). The Bar—through the OMA—provides important resources and institutional support for several committees and flagship programs devoted to enhancing diversity and inclusion. These programs are critical if Texas—with its long history of racial discrimination in the legal profession that continues to this day—is to achieve and maintain a more diverse, fair, and equitable legal profession and provide competent legal services to clients of all backgrounds.

Appellants incorrectly argue that these initiatives have little to do with and extend beyond furthering the State’s interests in regulating the legal profession or improving the practice of law. Quite the opposite, the Bar’s support of diversity and inclusion initiatives is necessary to advance the profession and improve the quality

---

<sup>3</sup> See STATE BAR OF TEXAS: OUR MISSION, <https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm> (last visited Aug. 4, 2020).



of the provision of legal services to an increasingly-diverse population in Texas and beyond. Amici submit that the Bar’s diversity initiatives have played a critical role in the development of their legal careers, helping each of them to rise to the positions they hold today.

Although these Concerned Lawyers of Color and a small percentage of others like them may have managed to rise through the ranks of major law firms, corporations, the government, and elsewhere, research and statistics show that there is still much more progress to be made. Indeed, as noted by the American Bar Association, “[d]espite the increased emphasis on diversity and inclusion within the legal field over the past decade or so, the legal profession remains one of the least diverse of any profession.” Allison E. Laffey and Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AMERICAN BAR ASSOCIATION (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/>.

Appellants fundamentally fail to understand that diversity in the legal profession benefits *all* attorneys, not just diverse ones. They also fail to grasp the serious harm persistent racial discrimination inflicts on public confidence in the legal system, which is already too low. *See, e.g.,* Kenneth Artz, *Public Trust and Confidence in the Civil Legal System: A Q&A With Logan Cornett and Natalie Anne*

*Knowlton*, TEXAS LAWYER (July 16, 2020), <https://www.law.com/texaslawyer/2020/07/16/public-trust-and-confidence-in-the-civil-legal-system-a-qa-with-logan-cornett-and-natalie-anne-knowlton/>. As recent events have shown, increased support of diversity can help improve the public’s perception of our legal system—which is desperately needed right now. Thus, in order to advance the legal profession and prevent alienation of the very individuals for whom Texas attorneys must advocate, diversity and inclusion initiatives like those administered by the Bar must be embraced.

### **ARGUMENT**

**A. The Bar’s support of diversity initiatives is critically important to furthering Texas’s constitutionally-permissible interests in regulating the legal profession and improving the quality of legal services.**

Many diverse attorneys face the dual challenges of navigating a profession in which they are largely underrepresented and that has historically discriminated against them. Thus, it is critical to have programs to help diverse attorneys become meaningfully engaged in the broader legal community. In particular, the OMA implements programs that focus on increasing involvement in the Bar by—and enhancing employment and economic opportunities for—minority, women, and LGBT attorneys in the legal profession. The OMA implements this vision by providing leadership and financial support for several committees including the Diversity in the Profession Committee, the Women in the Profession Committee,

and the Texas Minority Counsel Program Steering Committee. The OMA also sponsors several programs across Texas including:

- the *Texas Minority Counsel Program*—a client development, networking, and continuing legal education event for diverse attorneys who provide legal services for corporate and government clients;
- the *Texas Minority Attorney Program*—a one-day continuing legal education seminar and networking event geared towards diverse solo and small firm practitioners;
- the *Texas Minority Law Student Program*—an initiative that gives local attorneys the opportunity to mentor law students from diverse backgrounds;
- *LeadershipSBOT*—an initiative designed to increase diverse leadership participation within the legal community through the nomination of lawyers who possess both the desire and the potential to assume leadership roles in their communities and the Bar; and
- a *classroom pipeline program*—an initiative that matches local attorneys with opportunities to encourage diverse grade school students to pursue a career in the legal profession.

Although OMA programs target diverse and historically-underrepresented attorneys and communities, many among the Amici either have served on these committees or planned and attended these programs, and can attest that these programs are marketed to and attended by Texas attorneys, law students, and K-12 students of all races, ethnicities, sexual orientations, and socio-economic groups.

Given Texas’s racial, ethnic, and socio-economic diversity, these types of programs administered by the OMA benefit all Texas lawyers and the clients they serve.

**B. The Bar’s diversity and inclusion initiatives are essential to achieving a more fair and equitable profession.**

**1. Texas has a long history of discrimination in the legal profession.**

As the district court correctly found, “Texas has a long history of discrimination in the legal profession and legal education.” ROA.3448 (citing *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993) (en banc) (recognizing “Texas’ long history of discrimination against its black and Hispanic citizens in all areas of public life”). While great strides have been made in diversifying the legal profession and legal education in Texas, discrimination, unfortunately, is still ever-present in the legal industry (and in society at large). The Bar’s diversity initiatives help reduce barriers caused by centuries of discrimination and promote fairness and equity among all Texas lawyers, which overall creates a healthier legal system in Texas.

**2. The lack of diversity in the legal profession continues today.**

Today, the “[l]aw is one of the least diverse white-collar professions.” See Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, AMERICAN BAR ASSOCIATION (June 20, 2017), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/>. In

fact, due to the lack of diversity in the legal profession, more than 170 general counsel and corporate legal officers penned an open letter to law firms last year, in which they signaled their disappointment over the recent “largely male and largely white” partnership classes, questioned whether law firms value diversity, and declared that they will prioritize their spending on firms who commit to diversity and inclusion. *See* Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, *The American Lawyer* (Jan. 27, 2019), <https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/>. Hopefully, this strong encouragement from firm clients will lead to greater diversity and inclusion efforts, but, as of now, the statistics are sobering.

For example, at large law firms, the percentage of Black associates—still well below 5%—has only increased by 0.1% since 2009; the percentage of minority partners has only reached 9.55%; and, most troubling, the percentage of minority equity partners is only 7.6%. *See* Debra Cassens Weiss, *Percentage of black associates in large law firms finally tops 2009 level, but not by much*, *ABA Journal* (Dec. 18, 2019), <https://www.abajournal.com/news/article/percentage-of-black-associates-in-large-firms-finally-tops-2009-level-but-not-by-much> [hereinafter *Percentage of Black Associates Article*]. Unfortunately, the statistics in Texas prove to be disappointing as well. *See, e.g.*, STATE BAR OF TEXAS: DEPARTMENT OF

RESEARCH AND ANALYSIS, *Racial/Ethnic Minority Attorneys: Attorney Statistical Profile* (2019-20), [https://www.texasbar.com/AM/Template.cfm?Section=Content\\_Folders&Template=/CM/ContentDisplay.cfm&ContentID=48795](https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=48795); John G. Browning, *Dallas Law Firms Lack Diversity*, D MAGAZINE (April 2015), <https://www.dmagazine.com/publications/d-ceo/2015/april/dallas-law-firms-lack-diversity/> (“Despite minority groups combined now comprising 56 percent of Texas’ population and 15.4 percent of the total number of lawyers in Texas, members of racial or ethnic minorities make up only 12 percent of the number of attorneys at Dallas’ 16 largest firms.”).

These statistics are especially concerning because “[w]omen and people of color continue to be well represented in law school and in the summer associate class, but at each year after that women and people of color leave the lawyer ranks at law firms at a higher rate than white men, and women of color remain the most underrepresented of all.” *See Percentage of Black Associates Article*. A June 2020 ABA report further emphasized that only 2% of equity partners at large law firms are women of color (a statistic that has remained stagnant for two decades), nearly all participants reported experience with bias and stereotyping, and women of color have the highest rate of attrition from law firms. *See Debra Cassens Weiss, Majority of minority female lawyers consider leaving law; ABA study explains why*, ABA

JOURNAL (June 22, 2020), <https://www.abajournal.com/news/article/most-minority-female-lawyers-consider-leaving-law-aba-study-explains-why>.

**3. Diversity in the legal profession benefits all Texas lawyers.**

The law has long recognized the benefit of diversity in the legal profession. *See, e.g., Sweatt v. Painter*, 339 U.S. 629, 634 (1950). As the U.S. Supreme Court once observed, the law “is an intensely practical” profession that cannot be learned in a vacuum. *Id.* Likewise, the practice of law also cannot take place in a vacuum. Indeed, many practicing lawyers today, Amici included, can attest to the positive impact that networking and mentorship opportunities—which the OMA’s programs provide—have on the development of legal careers. Diverse attorneys benefit from a Bar organization that actively engages with them and that helps remove historical and systemic barriers to their inclusion in the legal community. The Bar, too, benefits from the inclusion of diverse attorneys into the organization. This is because the Bar, much like a law school, “cannot be effective in isolation from the individuals . . . with which the law interacts.” *See id.*

Indeed, research has shown that increased “diversity makes us more innovative and more creative,” “enables better decision making,” and is correlated to increased business performance and profitability. *See* Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel’s Perspective*, AMERICAN BAR ASSOCIATION (May 6, 2020),

[https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/). Thus, diversity can yield significant performance dividends for any organization, including the Bar.

**C. The Bar’s support of diversity helps build and maintain public confidence in the judicial system.**

Appellants point to voluntary bar associations in states such as New York and Illinois as proof that there is a less restrictive way to promote diversity among lawyers, see Appellants’ Br. at 3, however, this argument ignores today’s realities. As made clear by the recent explosion of protests across the nation sparked by the death of George Floyd, and activism inspired by the Black Lives Matter (“BLM”) movement—which advocates against racially-motivated and state-sanctioned acts of violence against African-Americans—systemic racism has been, and very much remains, a pervasive issue in Texas and the country at large. *See generally* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [hereinafter *BLM Largest U.S. Movement Article*]; Kadir Nelson’s “*Say Their Names*,” THE NEW YORKER (June 14, 2020), <https://www.newyorker.com/culture/cover-story/cover-story-2020-06-22>; *A Decade Of Watching Black People Die*, NPR (May 31, 2020),



<https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die>; Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CENTER (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/>; see also Jason Reid, *Source: NFL plans to play Black national anthem before Week 1 games*, ESPN (July 2, 2020), [https://www.espn.com/nfl/story/\\_/id/29401000/nfl-plans-play-black-national-anthem-week-1-games](https://www.espn.com/nfl/story/_/id/29401000/nfl-plans-play-black-national-anthem-week-1-games) (explaining the NFL's stance condemning racism and affirming that Black lives matter); Paul P. Murphy, *Baseball is making Black Lives Matter center stage on Opening Day*, CNN (July 24, 2020), <https://www.cnn.com/2020/07/23/us/opening-day-baseball-mlb-black-lives-matter-trnd/index.html> (describing the MLB's efforts in support of BLM). Indeed, an estimated "15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks," likely making these protests the largest social movement in the country's history. See *BLM Largest U.S. Movement Article*. Texas saw the same demonstrations occur, and not just in its largest cities, but in its smaller cities and towns as well. See Miguel Gutierrez, Jr. & John Jordan, *Protests against police brutality and racism: scenes from small Texas towns and cities*, TEXAS TRIBUNE (June 15, 2020),

<https://www.texastribune.org/2020/06/15/texas-protest-police-brutality-racism/>.

Despite the renewed emphasis on dismantling racism, the United States and Texas, specifically, still have a long way to go.

For instance, recent remarks by the Texas Bar President and one of its directors demonstrate that there is still much progress to be made in the Bar regarding understanding systemic racial discrimination and the movements like BLM that advocate against it. *See* Mark Curriden, *Texas Bar Virtual Meeting Gets Heated Over President's BLM Comments*, TEXAS LAWBOOK (July 27, 2020), <https://texaslawbook.net/texas-bar-virtual-meeting-gets-heated-over-presidents-blm-comments/>.

These recent events further highlight the need for the Bar's support of programs that help educate Texas attorneys about issues facing the diverse attorneys they work with and the diverse populations they serve. For example, people of color do not simply face overt racial discrimination in today's society; they also encounter implicit bias, a form of unconscious discrimination to which the legal system is not immune. Given the severe impact implicit bias can have in the practice of law, the Bar provides continuing legal education on the best ways to uncover and address this issue. *See, e.g., Implicit Bias: Building Awareness and Overcoming Obstacles*, STATE BAR OF TEXAS: ANNUAL MEETING (June 14, 2019); Katrina Grider, *Unconscious Bias in the Legal Profession*, STATE BAR OF TEXAS: WOMEN IN THE

LAW (March 16, 2018); *Uncovering and Proving Implicit Bias in Jury Selection and Trial*, STATE BAR OF TEXAS: BILL OF RIGHTS COURSE (March 27, 2016).

Significantly, the ways in which implicit bias impact the legal system are still being uncovered. A recent study considered the relationship of implicit racial bias and jury decision-making in tort cases, with a specific focus on how race, responsibility, and injury are intertwined. *See* Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. Cal. L. Rev. 507 (2020). Notably, when study participants were asked to award a dollar amount in a tort case against individual defendants, “black plaintiffs were awarded lower dollar damage awards than white plaintiffs.” *See id.* at 550. This troubling result further demonstrates the ways in which people of color must navigate the legal system around them, especially when seeking justice in a court of law, and the way they perceive fairness and equity in the judicial system.

The aforementioned examples of racial discrimination that persist today—which are by no means exhaustive—reinforce the need for the existence of diversity and inclusion programs funded by the Bar, especially at a time when it is critically important to build and maintain public perception of fairness and equity in the judicial system. Social movements like BLM that strive for racial equality have highlighted the racial disparities that haunt the criminal justice system where attorneys play a significant role—from the legislature, to the prosecutor’s office, to

the law firm, and to the judiciary. Without programs that foster diversity and inclusion, the State of Texas risks further losing public confidence in the fairness of the judicial system. *See, e.g.*, Institute for the Advancement of the American Legal System, *Public Perspectives on Trust & Confidence in the Courts* (June 2020), [https://iaals.du.edu/sites/default/files/documents/public\\_perspectives\\_on\\_trust\\_and\\_confidence\\_in\\_the\\_courts.pdf](https://iaals.du.edu/sites/default/files/documents/public_perspectives_on_trust_and_confidence_in_the_courts.pdf) (“A majority of participants expressed concerns about the fairness of the current civil process, many of which centered on perceptions of systemic racial or gender bias, differential treatment based on financial ability, and judicial biases.”). It cannot reasonably be disputed that a more fair and equitable judicial system is “germane to” the state interests that justify integrated bars like the State Bar of Texas. *See Keller*, 496 U.S. at 13-14.

Contrary to Appellants’ and the Texas Attorney General’s contentions, promoting diversity and inclusion in the bar is not a “political” or “ideologically-charged” initiative. That Appellants and the Texas Attorney General even contend that diversity is a “controversial” issue that they allege, without support, “many of [the Bar’s] members object,” see Appellee’s Br. at 19, 24, only further demonstrates (i) the need for the Bar’s support in administering diversity and inclusion programs; and (ii) that less restrictive means would be inadequate in furthering the State of Texas’s interests in regulating the profession and improving the quality of legal services in Texas. With more united voices than ever before speaking out against

racial inequality, now is not the time to strip the Bar of its ability to regulate the profession and promote a fair and equitable legal profession for diverse lawyers, as Appellants would have this Court do.

### **CONCLUSION**

The Bar's diversity and inclusion programs help advance the profession and improve the quality of legal services in Texas by providing access to programming and educational opportunities that undoubtedly make Texas attorneys more competent practitioners when representing clients from all walks of life. Amici submit that this critical role of regulating the profession and improving the quality of legal services in Texas cannot be achieved through a voluntary bar association. Rather, a mandatory bar that supports diversity and inclusion is the best vehicle to achieve a more competent, fair, and equitable profession. For these reasons, the Concerned Lawyers of Color support the Bar's request that the Court affirm the district court's decision below.

Dated: August 6, 2020

Respectfully submitted,

/s/ Jasmine S. Wynton

Jasmine S. Wynton

jwynton@thompsoncoburn.com

Mackenzie Salenger

msalenger@thompsoncoburn.com

Thompson Coburn LLP

1919 McKinney Ave., Suite 1000

Dallas, TX 75201

Tel: (972) 629-7100

Fax: (972) 629-7171

*Attorneys for Amicus Curiae*

**CERTIFICATE OF CONFERENCE**

The undersigned certifies that on August 4, 2020, I conferred with counsel for Appellants, Jeffrey Harris of Consovoy McCarthy PLLC, and counsel for Appellees, Thomas Leatherbury of Vinson & Elkins LLP, and their clients have consented to the filing of this brief.

/s/ Jasmine S. Wynton  
Jasmine S. Wynton

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 6, 2020, I electronically filed the foregoing Brief of the Concerned Lawyers of Color with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Jasmine S. Wynton*  
Jasmine S. Wynton



**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 3,502/6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

*/s/ Jasmine S. Wynton*  
Jasmine S. Wynton