

HISPANIC-SERVING INSTITUTIONS AND EMERGING CONSTITUTIONAL ISSUES*

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In 2019, Florida Gulf Coast University's (FGCU) "Florida Educational Equity Report" noted that FGCU "continues to see an increase in enrollment of Hispanic students currently accounting for approximately 20 percent of enrollment."¹ The report further noted that "[o]nce the University reaches 25 percent Hispanic enrollment, we will be eligible to apply for the Hispanic[-] Serving Institution designation (HSI) which would open up the door to additional federal funding."² By December 2021, FGCU was close to achieving its goal. It only needed to increase its percentage of Hispanic students from 24% to 25% of the student population.³

"Achieving an HSI status allows us to become eligible for a lot of funding. That then can support our students, our faculty and support our staff so it's really important to have [the] ability to have access to additional funding that is specifically designated for Hispanic[-]serving institutions," vice-president of student success and management, Mitch Cordova said.⁴

As of September 2022, FGCU is at 24.5% Hispanic enrollment, and it has started "to prepare various Federal Grant applications."⁵

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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¹ PRECIOUS G. GUNTER, FLORIDA EDUCATIONAL EQUITY REPORT 1 (2019), *available at* <https://www.fgcu.edu/equity/documentsandreports/files/2019EquityReport.pdf>.

² *Id.*

³ Stephanie Fernandez, *Local University Aims to Become Hispanic Serving Institution*, FOX4NOW (Dec. 15, 2021, 10:51 PM), <https://www.fox4now.com/news/local-news/local-university-aims-to-become-hispanic-serving-institution>.

⁴ *Id.*

⁵ PRECIOUS G. GUNTER, FLORIDA EDUCATIONAL EQUITY REPORT 19 (2022), *available at*

Federal funding is no small part of the drive towards gaining HSI status. From FY 2011 through FY 2021, HSIs received a total of \$2.387 billion in federal funding.⁶ And available federal funding is only increasing. The FY 2023 appropriations package included over \$324.5 million in funding for HSIs, a nearly \$60 million increase in funding from FY 2022.⁷

In addition to FGCU, many other colleges and universities are actively pursuing the HSI designation. In December 2020, UCLA “announc[ed] the goal of having UCLA designated as an HSI by 2025.”⁸ The university intends to “build[] up . . . campus support infrastructure for Latinx students,”⁹ aiming to entice “several state and federal agencies that provide funding for HSIs to support collaborations between undergraduate teaching and research-intensive institutions, research training grants, and graduate pathways initiatives.”¹⁰ Similarly, in September 2021, the University of Northern Colorado said it hoped to increase its Hispanic population from 23.5% to 25% of the student population. A university official said that “it’s impossible to assign a dollar amount on what the HSI effort will cost,” but that “[t]he way of being for an HSI is really about who we are enrolling and who we are serving.”¹¹ It has already determined a date by which it will start applying for grant funding.¹² And when Texas A&M University’s Hispanic population reached the 25% threshold in November 2021, a university official called it the “realiz[ation of] our commitment to increasing Hispanic and Mexican American representation in our student body.”¹³ The U.S. Department of Education

<https://www.fgcu.edu/equity/documentsandreports/files/2022EquityReport.pdf>.

⁶ HISPANIC ASS’N OF COLLEGES AND U., FEDERAL UNDERFUNDING AND INFRASTRUCTURE NEEDS OF HSIs IN THE AGE OF COVID-19 (2021), https://www.hacu.net/images/hacu/News-rel/2021/2021_HSIsReport.pdf.

⁷ *HACU Statement Recently Released Fiscal Year 2023 Appropriations*, HISPANIC ASS’N OF COLLEGES AND U. (Dec. 20, 2022), <https://www.hacu.net/NewsBot.asp?MODE=VIEW&ID=3910>.

⁸ Letter from Gene D. Block, Chancellor, UCLA, & Emily A. Carter, Executive Vice Chancellor and Provost, UCLA, to Bruin Community (Dec. 7, 2020), available at <https://chancellor.ucla.edu/messages/becoming-hispanic-serving-institution-2025/>.

⁹ *Id.*

¹⁰ UCLA HSI Task Force, *Cultivating the Seeds of Change* 35 (2022), available at <https://ucla.app.box.com/v/HispanicServingInstitution>.

¹¹ Anne Delaney, *University of Northern Colorado Aims for Status as Hispanic Serving Institution*, GREELEY TRIBUNE (CO), Sept. 1, 2021, <https://www.greeleytribune.com/2021/09/01/university-of-northern-colorado-aiming-for-status-as-hispanic-serving-institution/>.

¹² *Hispanic Serving Institutions: Milestones*, UNIV. OF N. COLORADO, <https://www.unco.edu/hsi/milestones/> (last visited Mar. 2, 2023).

¹³ Lesley Henton, *Texas A&M Achieves Designation as HACU Hispanic Serving Institution*, TEXAS A&M TODAY (Nov. 30, 2021), <https://today.tamu.edu/2021/11/30/texas-am-achieves-designation-as-hacu-hispanic-serving-institution/>.

(ED) granted Texas A&M HSI status in March 2022, allowing the school “access to additional funding,” including “awards for facilities, faculty, services to enhance recruitment efforts, improving course offerings, and educational resources.”¹⁴

First created by Congress with the reauthorization of the Higher Education Act in 1992, the HSI designation is given by the Department of Education to degree-granting, accredited, public or private nonprofit higher-education institutions that:

1. have an “enrollment of needy students”; and
2. have an enrollment of at least 25% undergraduate full-time equivalent Hispanic student populations.¹⁵

HSIs seek exclusive funding through several federal award programs, including three from ED, one from the U.S. Department of Agriculture,¹⁶ and one from the National Science Foundation.¹⁷ Funding for HSIs from other federal agencies continues to grow.¹⁸

The HSI program is one of several federal grant programs that require an eligible institution to have a minimum percentage of a specific demographic group in addition to an “enrollment of needy students.” Others include the Alaska Native-Serving and Native Hawaiian-Serving Institutions Program (at least 20% Alaska Native or at least 10% Native Hawaiian),¹⁹ the Asian American and Native American Pacific Islander-Serving Institutions Program (at least 10% Asian American or Native American Pacific Islander),²⁰ the Native American-Serving Nontribal Institutions Program (at least 10% Native American),²¹ and the Predominantly Black Institutions Program (at least 40% Black American).²²

¹⁴ *Texas A&M University Achieves Federal Designation As Hispanic Serving Institution*, TEXAS A&M TODAY (Mar. 11, 2022), <https://today.tamu.edu/2022/03/11/texas-am-university-achieves-federal-designation-as-hispanic-serving-institution/>.

¹⁵ 20 U.S.C. § 1101a.

¹⁶ See generally *Hispanic-Serving Institutions Education Grants (HSI) Program*, NAT'L INST. OF FOOD AND AGRIC., <https://nifa.usda.gov/program/hispanic-serving-institutions-education-grants-program>.

¹⁷ See generally *NSF's Hispanic-Serving Institution Program*, NAT'L SCI. FOUND., <https://nsf.gov/chr/HSIProgramPlan.jsp>.

¹⁸ See *infra* Section III.

¹⁹ 20 U.S.C. § 1059d(b)(2); 20 U.S.C. § 1059d(b)(4).

²⁰ 20 U.S.C. § 1059g(b)(2).

²¹ 20 U.S.C. § 1059f(b)(2).

²² 20 U.S.C. § 1059e(b)(2). This is a distinct federal program from Historically Black Colleges

ED does not publish the entire list of institutions that apply for the HSI designation. But for purposes of membership in the Hispanic Association of Colleges and Universities (HACU)—the organization which has driven the HSI effort since the 1980s—any college, university, or district where total Hispanic enrollment constitutes a minimum of 25% of total enrollment qualifies as a Hispanic-Serving Institution. There is no “needy students” enrollment requirement for HACU membership.²³ And in 2021, HACU listed 559 total HSIs in 29 states, the District of Columbia, and Puerto Rico.²⁴ This included 226 two-year public institutions, 154 four-year public institutions, 8 two-year private institutions, and 171 four-year private institutions.²⁵ In addition to this list of HSIs, HACU counted 393 “emerging HSIs,” which it defined as “nonprofit, degree-granting institutions with full-time equivalent . . . undergraduate Hispanic student enrollment of at least 15% but less than 25%.”²⁶ This list, consisting of institutions in 39 states, included 106 two-year public institutions, 100 four-year public institutions, 10 two-year private institutions, and 177 four-year private institutions.²⁷ Included among these “emerging HSIs” were some of the nation’s most prominent colleges and universities such as the California Institute of Technology, the University of Florida, Johns Hopkins University, Claremont McKenna College, Baylor University, UCLA, Texas A&M University, UC Berkeley, Rice University, the University of Southern California, the University of San Diego, the University of Miami, and New York University.²⁸ Many of these institutions have expressed interest in achieving HSI status.²⁹

and Universities. See 20 U.S.C. § 1061 (“ . . . historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.”).

²³ This list is still helpful to understand HSI eligibility as the “needy students” requirement is waivable by the Secretary of Education. See *infra* Section II.

²⁴ HISPANIC ASS’N OF COLLEGES AND U., HISPANIC-SERVING INSTITUTIONS (HSIs) 2020-21 (2021), available at https://www.hacu.net/images/hacu/conf/2022CapForum/Resources-Menu/2022_HSILists.pdf.

²⁵ *Id.*

²⁶ HISPANIC ASS’N OF COLLEGES AND U., Emerging Hispanic-Serving Institutions (HSIs) 2020-21 (2021), available at https://www.hacu.net/images/hacu/conf/2022CapForum/Resources-Menu/2022_EmergingHSILists.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *infra* Section IV.

In Part I, this Article discusses the HSI program's legislative history and HACU's intimate involvement with the legislation throughout that history. Part II of this Article briefly discusses 20 U.S.C. § 1101, the HSI program's legislative authority. Part III compiles the many sources of federal funding for HSIs. Part IV of this Article lists and discusses several exemplar institutions that have sought recognition as HSIs. Lastly, in Part V, the Article discusses some potential constitutional challenges the HSI program might face as it continues to expand. Now that the U.S. Supreme Court has held that universities and colleges may not use race as a factor in their admissions,³⁰ those institutions that may be engaging in race-balancing admission practices to gain access to funds only available to HSIs are likely at greater risk of litigation.

I. LEGISLATIVE HISTORY

When HACU formed in May 1986, “[e]ach of the association’s . . . member schools claim[ed] 25 percent or more Hispanic enrollment.”³¹ With eighteen founding institutions, the impetus for HACU’s formation was “that, among Hispanics aged 18 to 24, the percentage of high school graduates going on to college had dropped from a peak of 35.8 percent in 1976 to 29.9 percent in 1984.”³² The organization’s 25% threshold appears to have been determined arbitrarily.³³ Its founders notably chose a significantly lower threshold than previously introduced but not enacted federal legislation that defined a “Hispanic Institution” as one “which has an enrollment of which at least 40 percent are Mexican American, Puerto Rican, Cuban, or other Hispanic students, or combination thereof.”³⁴ HACU’s initial aim was to advocate for its members—who were “[f]or the most part, . . . not rich in capital

³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. ___ (2023), available at https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

³¹ Lorenzo Chavez, *Passports to Success*, VISTA: THE HISPANIC MAGAZINE (1986).

³² Charlie Ericksen, *Branching Out*, VISTA: THE HISPANIC MAGAZINE 35 (1991).

³³ DEBORAH A. SANTIAGO, INVENTING HISPANIC-SERVING INSTITUTIONS (HSIS): THE BASICS 6 (2006). Santiago goes on:

The leaders reviewed institutional data from the Chronicle of Higher Education’s annual almanac and noted that a number of institutions had Latino student enrollments of 20 to 40 percent. After much discussion, the institutional leaders agreed that 25 percent Latino student enrollment represented a “critical mass” of students sufficient to signal the organizational change of the institutions themselves.

Id. (citing Telephone Interview with Antonio Rigual, Executive Director, HACU (June 26, 2004)).

³⁴ Higher Education Amendments of 1984, H.R. 5240, 98th Cong. (1984).

resources, nor . . . highly visible state flagships”—and its members’ interests “to national educational policy makers or to foundations and businesses.”³⁵

Steve Altman, then-President of Texas A&I University (now Texas A&M University–Kingsville), told the Corpus Christi *Caller-Times* that

. . . he has found a way to improve the university’s research and graduate programs, a goal he has had since joining the school last September.

Through the newly formed [HACU], Altman hopes to gain the extra dollars needed to achieve the objective.

. . . .

“Historically, institutions with large Hispanic enrollments have been underdeveloped,” he said. “There is not the same range of degree programs at the graduate level as there are at other universities.”³⁶

In March 1989, Representative Albert Bustamante introduced the “Hispanic-Serving Institutions of Higher Education Act.”³⁷ HACU had worked with Rep. Bustamante’s staff during the bill’s preparation.³⁸ The bill called for \$70 million in aid to colleges and universities with a minimum of 25% Hispanic enrollment,³⁹ which reflected HACU’s “institutional membership criterion.”⁴⁰

The bill was intended to establish “a federally supported network of institutions of higher education, which have a student body that has traditionally had a significant portion of Hispanic students.”⁴¹ It was referred to the Subcommittee on Postsecondary Education, but it was not included in that session’s reauthorization of the Higher Education Act.

HACU’s efforts to receive federal recognition for its members came to fruition with the enactment of Title III of the Higher Education Amendments of 1992.⁴² This bill defined an HSI as a degree-granting, accredited, public or private nonprofit higher-education institution which:

³⁵ Antonio Rigual, *Hispanic College Enrollment Must Rise*, EL PASO TIMES (TX), Aug. 20, 1989, at 2G.

³⁶ Suzy McAuliffe, *A&I Finds Answer to Funding Need*, CORPUS CHRISTI (TX) CALLER-TIMES, June 19, 1986, at 17.

³⁷ Hispanic-Serving Institutions of Higher Education Act of 1989, H.R. 1561, 101st Cong. (1989).

³⁸ Rigual, *supra* note 35.

³⁹ H.R. 1561.

⁴⁰ Rigual, *supra* note 35.

⁴¹ H.R. 1561.

⁴² Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448.

1. has an enrollment of “needy students”;
2. “has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students”; and
3. “provides assurances that not less than 50 percent of its Hispanic students are low-income individuals who are first generation college students and another 25 percent of its Hispanic students are either low-income individuals or first generation college students.”⁴³

The 1998 reauthorization of the Higher Education Amendments changed the program by eliminating the “first-generation” requirement and the additional requirement that 25% of an institution’s Hispanic students be “either low-income individuals or first generation college students.”⁴⁴ Representative Ruben Hinojosa, chairman of the Congressional Hispanic Caucus education task force, advocated for the elimination of both requirements because “there was too much bureaucracy in the process” and “although some schools may meet the criteria, they do not collect data on first-generation college students, preventing them from applying for the federal grants.”⁴⁵ The 1998 Amendments defined an HSI as an institution which:

1. has an enrollment of “needy students”;
2. “has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students”; and
3. “provides assurances that not less than 50 percent of the institution’s Hispanic students are low-income individuals.”

The 1998 reauthorization also moved the program from Title III to Title V, apparently “to emphasize the importance of the program and differentiate it from other institutional capacity-building programs.”⁴⁶

The most recent change to the qualifications of an HSI institution occurred with the Third Higher Education Act of 2006.⁴⁷ That bill eliminated one element of HSI-eligibility requirements: that the institution must “provide[] assurances that not less than 50 percent of the institution’s Hispanic students are low-income individuals.”

⁴³ *Id.*

⁴⁴ Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

⁴⁵ *Texas’s Bill Would Pay More to Colleges Serving Hispanics*, AUSTIN (TX) AMERICAN-STATESMAN, Sept. 22, 1997, at B5.

⁴⁶ SANTIAGO, *supra* note 33, at 7.

⁴⁷ Pub. L. No. 109-292, 120 Stat. 1340.

II. 20 U.S.C. § 1101

The express purpose of the HSI program is to “(1) expand educational opportunities for, and improve the academic attainment of, Hispanic students; and (2) expand and enhance the academic offerings, program quality, and institutional stability of colleges and universities that are educating the majority of Hispanic college students and helping large numbers of Hispanic students and other low-income individuals complete postsecondary degrees.”⁴⁸

Defined by section 1101a of Title 20 of the U.S. Code, an HSI-eligible institution is a degree-granting, accredited, public or private nonprofit higher-education institution that:

1. “has an enrollment of needy students”⁴⁹; and
2. “has an enrollment of . . . at least” 25% undergraduate full-time equivalent Hispanic students.⁵⁰

Section 1101a further defines “enrollment of needy students” as:

1. at least 50% of enrolled students receive “need-based assistance under subchapter IV”;⁵¹ or
2. a “substantial percentage” of enrolled students receive Federal Pell Grants.

The “needy students” requirement is, however, waivable by the Secretary of Education if the institution meets one of several requirements,⁵² including if “the Secretary determines that the waiver will substantially increase higher education opportunities appropriate to the needs of Hispanic Americans.”⁵³ Every institution must apply for designation as an eligible institution “each year that [it] wish[es] to apply for a new grant award even if . . . [it has] a currently active grant.”⁵⁴

⁴⁸ 20 U.S.C. § 1101(b).

⁴⁹ 20 U.S.C. § 1101a(a)(2).

⁵⁰ 20 U.S.C. § 1101a(a)(5).

⁵¹ 20 U.S.C. § 1101a(b)(1).

⁵² 20 U.S.C. § 1103a(a).

⁵³ 20 U.S.C. § 1103a(a)(5). The Secretary is required to “submit to Congress every other year a report concerning the institutions” that received waivers to the “needy student” requirement. 20 U.S.C. § 1103a(b)(2).

⁵⁴ DEP’T OF EDUC., ELIGIBILITY 2022 FOR FY22 GRANT APPLICATIONS 2 (2022).

III. FEDERAL FUNDING

If certified by ED as an HSI—that is an institution with at least 25% Hispanic enrollment and “needy students” or a waiver—then an institution is eligible to apply for HSI-specific grants. ED offers three grants to HSIs:

1. *The Developing Hispanic-Serving Institutions Program (DHSI)*: The flagship HSI program, it “provides grants to eligible institutions of higher education to (a) [e]xpand educational opportunities for, and improve the academic attainment of, Hispanic students; and (b) [e]xpand and enhance the academic offerings, program quality, and institutional stability of colleges and universities that are educating the majority of Hispanic college students and helping large numbers of Hispanic students and other low-income individuals complete postsecondary degrees.”⁵⁵ The FY 2023 budget allocated \$182.85 million for the DHSI program.⁵⁶
2. *The Hispanic-Serving Institutions—Science, Technology, Engineering, or Mathematics and Articulation Program (HSI—STEM)*: This program prioritizes applicants that propose (a) “to increase the number of Hispanic and other low income students attaining degrees in the fields of science, technology, engineering, or mathematics”; and (b) “to develop model transfer and articulation agreements between 2-year Hispanic-serving institutions and 4-year institutions in such fields.”⁵⁷ The FY 2023 budget allocated \$94.3 million for this program.⁵⁸
3. *The Promoting Postbaccalaureate Opportunities for Hispanic Americans Program (PPOHA)*: The smallest of the three ED programs, the PPOHA program provides funds (a) “to expand postbaccalaureate educational opportunities for, and improve the academic attainment of, Hispanic students”; and (b) “to expand the postbaccalaureate academic offerings and enhance the program quality in the institutions of higher education that are educating the majority of Hispanic college students and helping large numbers of Hispanic and low-income students complete postsecondary degrees.”⁵⁹ In addition to obtaining HSI status, an institution must “offer[] a postbaccalaureate certificate or

⁵⁵ 34 C.F.R. § 606.1 (2022).

⁵⁶ *Appropriations for HSIs*, HISPANIC ASS’N OF COLLEGES AND U., <https://www.hacu.net/hacu/Appropriations1.asp> (last visited Mar. 2, 2023).

⁵⁷ 20 U.S.C. § 1067q(b)(2)(B).

⁵⁸ *Appropriations for HSIs*, *supra* note 56.

⁵⁹ 20 U.S.C. § 1102.

postbaccalaureate degree granting program” to be eligible for PPOHA funds.⁶⁰ The FY 2023 budget allocated \$19.66 million for this program.⁶¹

ED provides an “eligibility matrix” with statistics from its 2021 programs. Listed in the matrix are institutions that received grants, institutions that were eligible but not grantees, institutions that were “[p]otentially eligible on minority grounds, but . . . needed to apply for a waiver of the core expenses and/or needy student criteria.”⁶²

	Grantees	Eligible, But Not Grantee	Eligible, Waiver Needed
DHSI	219	245	63
HSI-STEM	90	383	87
PPOHA	24	182	76

Beyond ED, other federal agencies have piggybacked off 20 U.S.C. § 1101a. The U.S. Department of Agriculture (USDA) follows 7 U.S.C. § 3103(10), which defines Hispanic-Serving Agricultural Colleges and Universities (HSACUs) as institutions which qualify as HSIs under 20 U.S.C. § 1101a and offer accredited agriculture-related degree programs,⁶³ but excludes 1862 Institutions.⁶⁴

USDA’s National Institute of Food and Agriculture has one grant program for HSIs called the Hispanic-Serving Institutions Education Grants Program. This program attempts to (a) “support the activities of Hispanic-serving institutions to enhance educational equity for underrepresented students”; (b) “strengthen institutional educational capacities”; (c) “attract and support undergraduate and graduate students from underrepresented groups in order to prepare them for careers related to the food, agricultural, and natural resource systems”; and (d) “to facilitate cooperative initiatives.”⁶⁵ The FY 2023 budget allocated \$14 million for this program.⁶⁶

⁶⁰ 20 U.S.C. § 1102a(b)(2).

⁶¹ *Appropriations for HSIs, supra* note 56.

⁶² DEP’T OF EDUC., ELIGIBILITY MATRICES FOR TITLES III AND TITLE V PROGRAMS: FY 2021, <https://www2.ed.gov/about/offices/list/ope/idades/eligibility.html#el-inst> (last visited Mar. 2, 2023).

⁶³ 7 U.S.C. § 3103(11).

⁶⁴ As defined by 7 U.S.C. § 7601(1).

⁶⁵ 7 U.S.C.A. § 3241.

⁶⁶ *Appropriations for HSIs, supra* note 56.

The National Science Foundation provides funding for HSIs through its signature HSI program: Improving Undergraduate STEM Education: Hispanic-Serving Institutions. Authorized by the American Innovation and Competitiveness Act,⁶⁷ the program aims “to incentivize institutional and community transformation; and to promote fundamental research (i) on engaged student learning, (ii) about what it takes to diversify and increase participation in STEM effectively, and (iii) that improves our understanding of how to build institutional capacity at HSIs.”⁶⁸ The FY 2023 budget allocated \$48.5 million for this program.⁶⁹

Some federal agencies use the HSI designation as a criterion to qualify for funding for individual grants, like the U.S. Department of Housing and Urban Development’s Hispanic Serving Institutions (HSI) Research Center of Excellence grant.⁷⁰ Other federal agencies provide funding for HSIs as a part of their respective minority-serving institution (MSI) programs, like National Aeronautics & Space Administration’s Minority University Research and Education Project,⁷¹ the U.S. Department of Defense’s HBCU/MSI Research and Education Program,⁷² the U.S. Department of Homeland Security’s MSI Program,⁷³ and the U.S. Department of Energy’s Reaching a New Energy Sciences Workforce initiative.⁷⁴ Finally, other federal agencies provide funding for individual faculty members at HSIs, including USDA’s E. Kika De La

⁶⁷ Pub. L. 114-329, 130 Stat. 3016.

⁶⁸ *Improving Undergraduate STEM Education: Hispanic-Serving Institutions (HSI Program)*, NAT’L SCI. FOUND., <https://beta.nsf.gov/funding/opportunities/improving-undergraduate-stem-education-hispanic-serving-institutions-hsi> (last visited Mar. 2, 2023).

⁶⁹ *Appropriations for HSIs*, *supra* note 56.

⁷⁰ See generally *FY 2022 for Hispanic Serving Institutions (HSI) Research Center of Excellence*, DEP’T OF HOUSING AND URB. DEV., https://www.hud.gov/program_offices/spm/gmohgmt/grantsinfo/fundingopps/fy22_hsi_roe (last visited Mar. 2, 2023).

⁷¹ See generally *Minority University Research and Education Project*, NASA, https://www.nasa.gov/sites/default/files/atoms/files/edu_nasa_msi_list_aug_2021.pdf (last visited Mar. 2, 2023).

⁷² See generally *Defense Department Announces Fiscal Year 2022 Research Equipment Awards to Minority-Serving Institutions*, U.S. DEP’T OF DEFENSE, <https://www.defense.gov/News/Releases/Release/Article/3126186/defense-department-announces-fiscal-year-2022-research-equipment-awards-to-minor> (last visited Mar. 2, 2023).

⁷³ See generally *Minority Serving Institutions Program*, U.S. DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/science-and-technology/minority-serving-institutions-program> (last visited Mar. 2, 2023).

⁷⁴ See generally *Reaching a New Energy Sciences Workforce (RENEW)*, U.S. DEP’T OF ENERGY, <https://science.osti.gov/Initiatives/RENEW> (last visited Mar. 2, 2023).

Garza Fellowship Program,⁷⁵ and the National Endowment for the Humanities' Awards for Faculty at Hispanic-Serving Institutions.⁷⁶

IV. SEEKING HSI STATUS

Recently, several colleges and universities that have publicly announced their plans to become HSI-eligible institutions and thus gain access to even more federal funding. Here are a few examples:

The University of California, Santa Barbara (UCSB) achieved HSI status in 2015, eager to take the “first step toward enabling [it] to be eligible for federal and private grants that aim to bolster the academic success of Latino students.”⁷⁷ Several programs hosted by UCSB were funded as a result of that status, including Educational eXcellence and Inclusion Training Opportunities (ÉXITO)—which “places aspiring ethnic studies teachers in high school ethnic studies classes”—and Field-based Undergraduate Engagement through Research, Teaching, and Education (FUERTE)—which funds fieldwork for “students who are traditionally under-represented in environmental sciences, especially Latinx, Indigenous, Black, and first-generation undergraduates.”⁷⁸

When Florida Atlantic University became an HSI in 2017, the provost said, “our recent designation as a Hispanic-Serving Institution will help us to further our efforts to bring new programs and new grants that will allow us to truly serve this important and growing population in Florida.”⁷⁹ The school's vice president for research noted that “[f]or faculty in all areas and specialties, this designation . . . means they have access to additional funding for research that was not previously available” and that “[t]his type of funding will enable our faculty to better train our students by engaging them in research projects and preparing them to effectively compete in our global economy.”⁸⁰

⁷⁵ See generally *Hispanic Serving Institutions National Program*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/partnerships/hispanic-serving-institutions> (last visited Mar. 2, 2023).

⁷⁶ See generally *Awards for Faculty at Hispanic-Serving Institutions*, NAT'L ENDOWMENT FOR THE HUMANITIES, [neh.gov/grants/research/awards-faculty-hispanic-serving-institutions](https://www.neh.gov/grants/research/awards-faculty-hispanic-serving-institutions) (last visited Mar. 2, 2023).

⁷⁷ Larry Gordon, *Universities Reap Diversity's Benefits*, LOS ANGELES TIMES, Jan. 29, 2015, B2.

⁷⁸ *Hispanic Serving Research Institution (HSRI) + CSI*, CHICANO STUD. INST., <https://www.csi.ucsb.edu/hsri> (last visited Mar. 2, 2023).

⁷⁹ Gisele Galoustian, *FAU Designated as a Hispanic-Serving Institution*, FAU NEWS DESK (Feb. 7, 2017), <https://www.fau.edu/newsdesk/articles/FAU-hsi.php>.

⁸⁰ *Id.*

In 2018, ED granted Georgia's Dalton State College HSI status. Located in a town that "[t]he recession hit . . . hard," administrators said that the status would open the college up to funding that "could build a new student center, hire more faculty and help students and faculty conduct research."⁸¹ The college received a \$4.2 million grant in 2021.⁸²

The University of Texas at Austin launched an HSI Transition committee in 2019 to "establish the university's timeline for likelihood of HSI status and the timeline for application for the eligibility and associated grant funding," among other goals.⁸³ When the school "reached 26.1% undergraduate Hispanic enrollment" in September 2020,⁸⁴ its administration "announced the designation quietly . . . trying to avoid potential 'backlash' from those who might misinterpret it as some kind of a quota system."⁸⁵ But the university's Latino Studies Department lauded the "milestone moment":

Once attained, full HSI status will eventually bring new opportunities for students, researchers, and faculty through grants by the Developing Hispanic-Serving Institutions (DHSI) Program. This could mean significant funding to expand and enhance educational opportunities for Latino students. In addition, faculty and researchers would be eligible to apply for grants funded by entities such as the National Science Foundation, the Department of Agriculture, the National Institutes of Health, the Department of Housing and Urban Development, and the National Endowment for the Humanities.⁸⁶

⁸¹ Eric Stirgus, *Georgia College, Town Reflect Hispanic Growth and Prosperity*, MACON TELEGRAPH, June 10, 2018, at 5C.

⁸² *Federal \$4.2 Million Grant Increases STEM Experiences at Dalton State*, DALTON STATE, <https://www.daltonstate.edu/about/news.cms/2021/600/federal-4-2-million-grant-increases-stem-experiences-at-dalton-state> (last visited Mar. 2, 2023).

⁸³ OFFICE OF THE EXECUTIVE VICE PRESIDENT & PROVOST, HISPANIC SERVING INSTITUTION TRANSITION COMMITTEE CHARGE FINAL REPORT 1 (2021), *available at* <https://utexas.app.box.com/s/bdvnmnjr40rgw7cmnyfz2mldkv2n9pa>.

⁸⁴ *Four-Year Graduation Rate Tops 70% as UT Austin Admits One of its Largest First-Year Classes*, UT NEWS (Sept. 22, 2020), <https://news.utexas.edu/2020/09/22/four-year-graduation-rate-tops-70-as-ut-austin-admits-one-of-its-largest-first-year-classes/>.

⁸⁵ Joy Díaz & Caroline Covington, *As Its Latino Population Grows, UT-Austin Wary Of Backlash For Becoming A Hispanic-Serving Institution*, TEXAS STANDARD, May 24, 2021, <https://www.texastandard.org/stories/as-its-latino-population-grows-ut-austin-wary-of-backlash-for-becoming-a-hispanic-serving-institution/>.

⁸⁶ UT and Latino Studies Coordinate Efforts to Achieve Hispanic Serving Eligibility, University of Texas at Austin College of Liberal Arts: Latino Studies, <https://liberalarts.utexas.edu/latinostudies/news/ut-and-latino-studies-coordinate-efforts-to-achieve-hispanic-serving-eligibility> (last visited Mar. 2, 2023).

When the College of Southern Idaho became the state's first HSI in 2021, the college celebrated with "speeches, mariachi, panels and the annual Hispanic Youth Leadership Summit."⁸⁷ In a speech before students, President Dean Fisher said that the college had reached an enrollment of 26% Hispanic, and that "[i]f we do this right, in 10 years, I suspect the college will be sitting at 50% Hispanic enrollment."⁸⁸ The college received its first significant grant shortly after.⁸⁹

Arizona State University achieved HSI status in 2022, hoping to replicate the funding success achieved by other HSI public institutions in the state: the University of Arizona had received over \$10 million in HSI-related federal grants from 2018 to 2022, Northern Arizona University had received nearly \$11 million in HSI-related federal grants from 2021 to 2022, and the Maricopa County Community College District had received at least \$22 million in HSI-related federal grants from 2005 to 2022.⁹⁰

V. EMERGING ISSUES

As the HSI program expands, two possible separate and distinct levels of constitutional scrutiny may emerge if the program's constitutionality is challenged in court. First: Can the *federal* government constitutionally fund the HSI program, thus discriminating among institutions expressly based on the racial balances of their student bodies? Second: Are *state* universities which have sought, obtained, and annually maintain their HSI status through race-based decision-making complying with the 14th Amendment's Equal Protection Clause?

A. Federal Funding

Firstly, a plaintiff who sought to challenge the constitutionality of the HSI program could argue that the federal government facially discriminates among institutions based on the racial and ethnic balances of their student bodies in funding the HSI program. Indirectly, through the HSI program,

⁸⁷ Rachel Spacek, *College Named Idaho's First Hispanic-Serving Institution*, IDAHO STATESMAN, Oct. 10, 2021, at A9.

⁸⁸ *Id.*

⁸⁹ *CSI Receives \$2.5 Million Grant to Support College Enrollment and Success*, COLL. OF S. IDAHO (Oct. 11, 2022), <https://www.csi.edu/news/press-releases/csi-receives-2.5-million-grant-to-support-college-enrollment-and-success.aspx>.

⁹⁰ Alison Steinbach & Daniel Gonzalez, *ASU Reaches 'Major Milestone' for Latino Students*, ARIZONA REPUBLIC, July 6, 2022, at 3.

the federal government allocates or denies funds to the schools of students based on their races. Whether that plaintiff challenged the HSI program for indirectly discriminating against particular students because of race,⁹¹ or for directly racially discriminating against schools based on their imputed institutional racial character,⁹² the HSI program may be susceptible to an equal protection challenge on these grounds.

The U.S. Supreme Court has long held that the Constitution imposes such an equal protection limitation on the actions of the federal government. Most of its decisions have anchored this constraint in the Fifth Amendment's requirement that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]" For example, in *Adarand Constructors, Inc. v. Peña*, the Court described the "general rule" that "this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment[.]"⁹³ before holding that "Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."⁹⁴ In 2017, the Court noted in *Sessions v. Morales-Santana* that

⁹¹ Such an argument would presumably mirror that in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). There, the plaintiff argued that it violated the Constitution's equal protection requirement for a federal program to "giv[e] general contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals[.]" *Id.* at 204. Here, students at or applicants to a school would assert that the HSI program (like *Adarand's* contracting program) provides a financial incentive for recipient institutions (like *Adarand's* general contractors) to discriminate based on race against them in admissions or in actions which drive student retention.

⁹² Several lower court decisions have agreed that just as individuals may bring federal claims to enforce their federal rights against racial discrimination, so may legal entities, when their potentially violative treatment by a defendant was motivated by the race of the entities' personnel. *E.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009) (reversing dismissal of a contractor's Section 1981 claim and clarifying that statute applies beyond employment scenarios); *Village Green at Sayville, LLC v. Islip*, 2019 U.S. Dist. LEXIS 167177, *22 (E.D.N.Y. 2019) (holding that a corporate plaintiff had standing to bring a Section 1981 claim against a town whose allegedly racially motivated inaction rendered plaintiff's contract unperformable); *Annuity, Welfare & Apprenticeship Skill Improvement & Safety Funds of the Int'l Union of Operating Eng'rs, Local 15, 15A, 15C & 15D v. Tightseal Constr., Inc.*, 2018 U.S. Dist. LEXIS 138041, *16-20 (S.D.N.Y. 2018) (denying motion to dismiss corporate plaintiff's Section 1981 claim for termination of contract allegedly because of race of corporate plaintiff's personnel); *John and Vincent Arduini Inc. v. NYNEX*, 129 F. Supp. 2d 162, 169 (N.D.N.Y. 2001) (holding that any "limitation on § 1981 standing for a corporation should not be construed as applying to situations where a corporation alleges that it was injured because of its relationship with a person of minority racial identity").

⁹³ 515 U.S. at 217-18.

⁹⁴ *Id.* at 235.

“[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”⁹⁵

Courts police this constraint, as *Adarand* ruled, through the application of strict scrutiny. Thus, a plaintiff who seeks to challenge the constitutionality of the HSI program might claim it violates this equal protection-like requirement. Strict scrutiny requires a “compelling purpose” and “narrow tailoring.”⁹⁶ As several decisions have reiterated, this is the Court’s “most searching examination.”⁹⁷

Applying it, the Court has only ever held three interests to satisfy strict scrutiny as sufficiently “compelling” to even hypothetically justify racial discrimination: (1) national security, in the *Korematsu* anti-precedent; (2) remedying the government’s own historical discrimination, when there is “a strong basis in evidence for its conclusion that remedial action [is] necessary”; and (3) in its higher education, race-based admissions cases, the purported educational benefits of enrolling a diverse student body.⁹⁸

The HSI program serves none of these recognized interests: Congress has not tied HSI status to any role of any institution in preserving or advancing America’s national security; the HSI program does not address the federal government’s own historical discrimination; and any school that obtains a 25% Hispanic population qualifies, even if the school is demographically uniform.

Consider, for example, three colleges in Nevada: Great Basin College, the College of Southern Nevada, and Nevada State College. None has any history pre-dating the end of Jim Crow or the passage of the Civil Rights Act of 1964: Great Basin College was founded in 1967,⁹⁹ the College of Southern Nevada

⁹⁵ 582 U.S. 47, 52, n.1 (2017) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)).

⁹⁶ See generally Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. LEGIS. 217 (2003).

⁹⁷ E.g., *Adarand*, 515 U.S. at 223 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1984) (plurality opinion)).

⁹⁸ *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 316–17 (2013) (Thomas, J., concurring) (citing *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)); *Grutter v. Bollinger*, 539 U.S. 306 (2003), respectively).

⁹⁹ *About Great Basin College*, GREAT BASIN COLL., <https://www.gbcnv.edu/about/> (last visited

was founded in 1971,¹⁰⁰ and Nevada State College was opened in 2002.¹⁰¹ All three are HSIs.

Also consider the University of Texas Rio Grande Valley. Approximately 89% of its student population is Hispanic.¹⁰² It, too, is an HSI, despite its demographic uniformity.

B. State Universities

Next, a plaintiff who seeks to challenge the constitutionality of the HSI program may argue that state universities which have sought, obtained, and annually maintained their HSI status through race-based decision-making are in violation of the 14th Amendment's Equal Protection Clause.

The applicable law for state universities is clear: The 14th Amendment limits how these institutions can use race as they are arms of the states.¹⁰³ Courts apply strict scrutiny to gauge the constitutionality of state-run schools' usage of race.¹⁰⁴ As already discussed, the only compelling interests thus far recognized as potentially satisfying strict scrutiny are national security, redressing the harm caused by an actor's own history of racial discrimination, and the purported educational benefits of a diverse student body.

A defendant in such a challenge would find it difficult to claim that race-based decisions undertaken to seek, obtain, and maintain HSI status were adopted to serve the compelling need of national security as many schools have clearly documented that their desire for additional funding drives their pursuit of that status. A defendant in such a challenge could try to show that it has a recent history of intentional racial discrimination sufficient to provide "a strong basis in evidence for its conclusion that remedial action [is] necessary."¹⁰⁵ Again, with several of these institutions having been founded in recent decades, this might prove to be an arduous task. Finally, a defendant in such a case would likely find it onerous to argue that the decision to seek,

Mar. 2, 2023).

¹⁰⁰ *About Us*, COLL. OF SOUTHERN NEV., <https://www.csn.edu/about-us> (last visited Mar. 2, 2023).

¹⁰¹ *Mission & History*, NEV. STATE COLL., <https://nsc.edu/about/mission-history/> (last visited Mar. 2, 2023).

¹⁰² UTRGV ENROLLMENT PROFILE FALL 2019, *available at* <https://www.utrgv.edu/sair/files/documents/fall-2019-student-profile.pdf>.

¹⁰³ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (treating state university as arm of the state and applying strict scrutiny to gauge constitutionality of its policy of racial discrimination); *Fisher I*, 133 S. Ct. at 2418 (same); *Grutter*, 539 U.S. at 326 (same).

¹⁰⁴ *Id.*

¹⁰⁵ *Fisher I*, 570 U.S. at 317 (Thomas, J., concurring) (citations and punctuation omitted).

obtain, and maintain HSI status was based on the desire to obtain any purported benefits of diversity for their student bodies when so many of these universities documented that they were motivated to seek, obtain, and maintain that status for access to funding.

VI. CONCLUSION

The HSI program is growing as more colleges and universities with growing Hispanic student populations seek the federal money available to HSIs. However, as the program grows, increased attention to it could invite constitutional challenges to its disparate treatment of schools and students based on race. Those challenges would have a plausible basis in existing law.

Other Views:

- David Moltz, *The Emerging Hispanic-Serving Institution*, INSIDE HIGHER ED, Feb. 4, 2010, <https://www.insidehighered.com/news/2010/02/05/emerging-hispanic-serving-institution>.
- *A Proclamation on National Hispanic-Serving Institutions Week, 2022*, THE WHITE HOUSE, Sept. 9, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/09/a-proclamation-on-national-hispanic-serving-institutions-week-2022/>.
- Rachel F. Moran, *Diversity's Distractions Revisited: the Case of Latinx in Higher Education*, 73 S.C. L. REV. 579 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4137816#.