No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER

Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN, *ET AL.*

Defendants - Appellees

On Remand from the Supreme Court of the United States

BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN LEGAL FOUNDATION AND THE 80-20 NATIONAL ASIAN-AMERICAN EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

***Fisher, et al. v. University of Texas at Austin, et al.*, No. 09-50822**

The undersigned counsel of record for *Amici Curiae* the Asian American Legal Foundation and the 80-20 National Asian-American Educational Foundation 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.

Amici Curiae

1. The Asian American Legal Foundation

2. The 80-20 National Asian-American Educational Foundation

3. *Counsel for Amici Curiae:*

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/s/ Gordon M. Fauth, Jr.
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Asian American Legal Foundation submits the following corporate disclosure statement: The Asian American Legal Foundation is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code. It has not issued any shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the 80-20 National Asian-American Educational Foundation submits the following corporate disclosure statement: The 80-20 National Asian-American Educational Foundation is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code. It has not issued any shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

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INTEREST OF AMICI CURIAE

The outcome of this case is of critical importance to *Amici Curiae* and their constituents, who are Americans of Asian ethnic origin.[1] The Asian American Legal Foundation ("AALF") was founded to protect and promote the civil rights of Asian Americans, and specifically because Asian Americans were being discriminated against in the name of a purportedly benign purpose. Members of AALF were instrumental in the struggle to end discrimination against Chinese American students in the San Francisco public school system. *See Ho v. San Francisco Unified Sch. Dist.*, 147 F. 3d 854 (1998); *Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (1999) (on remand). More information on AALF and its mission can be found on its website at http://www.asianamericanlegal.com.

The 80-20 National Asian American Educational Foundation ("80-20") is a national nonprofit, nonpartisan organization sharing a commitment of equal opportunity and civil rights for Asian Americans and all people. 80-20 speaks for the Asian American community with authority by virtue of its open and neutral national surveys of members of the community. 80-20's historically unprecedented survey of approximately 47,000 Asian Americans revealed

[1] All parties have given blanket consents to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission.

overwhelming support (by a more than 52:1 ratio) within the community for race-neutral, merit-based college admission policies. More information about the survey is available at http://www.80-20educationalfoundation.org/projects/colleges.asp.

Amici Curiae and their constituents respectfully ask this Court to hear their arguments in favor of Appellant's petition for rehearing *en banc*.

ARGUMENT

I. THE COURT UTTERLY FAILED TO CONSIDER THE EFFECT OF THE ADMISSIONS PROGRAM ON ASIAN AMERICANS, A MINORITY GROUP HARMED BY THE CHALLENGED PROGRAM.

The Court's majority opinion approving the race-conscious University of Texas at Austin ("UT" or "University") admissions program is deeply flawed. The Court erroneously described the issue as being "white" versus "minority," failing to consider that Asian Americans, an ethnic *minority*, are the group most harmed by the challenged program. The Court stated, "Given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Fisher v. Univ. of Tex. at Austin*, Case No. 09-50822, Slip Opinion ("Slip Op."), (5th Cir, July 15, 2014) at 18. The facts say otherwise, beginning with the fact that Asians, the group with highest test scores, are not white.

In 2008, the student body at UT was 19% Asian. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606, n. 10 (W.D. Tex. 2009). For Non-Top Ten Percent admittees, the SAT test score average for Asians was 1346 versus 1300 for whites; Asian applicants also had higher GPAs. *See Implementation and Results of the Texas Automatic Admissions Law: Demographic Analysis of Entering Freshmen, Report 12*, Tables 6a, 6c (UT Austin, Oct. 29, 2009) at http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf (last visited July 31, 2014); *see also Do Elite Colleges Discriminate Against Asians?*, PriceOnomics (April 24, 2013), at http://blog.priceonomics.com/post/48794283011/do-elite-colleges-discriminate-against-asians (last visited July 30, 2014) ("Asian applicants have 67% lower odds of admission than white applicants with comparable test scores").

Thus, race-blind, merit based admissions would most likely result in the admission of more Asian American students.

Under the challenged program, Hispanic applicants are given preference because of their race but applicants of Asian ancestry are not, despite the fact that "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." *Fisher*, 645 F. Supp. 2d at 606. The fact that UT already enrolls a greater number of Hispanics than Asians establishes unequivocally that the admission program's true purpose cannot be the

achievement of a "critical mass" of Hispanic students.[2]

The Court's failure even to recognize that the burden of the challenged program falls disproportionately on Asian Americans, a historically discriminated against minority group, demonstrates that the Court's strict scrutiny analysis is seriously flawed and should be revisited. *See Fisher*, 133 S. Ct. at 2419 ("Strict scrutiny is a searching examination"); *Adarand Constructors, Inc. v. Pena*, 515 US 200, 227 (1995) (race classifications mandate "detailed judicial inquiry").

II. THE COURT'S ERROR IS PARTICULARLY EGREGIOUS GIVEN THE HISTORICAL DISCRIMINATION AGAINST ASIAN AMERICANS IN EDUCATION.

The Court's failure to properly consider the effect of the race-conscious program on Asian Americans is particular disturbing given the discrimination faced by Asian Americans throughout their history in this country. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991);

[2] A goal consistent with the facts is racial balancing—that is, making the student body mirror the racial composition of the State of Texas. In 2008, the University's student body was 20% Hispanics and 19% Asian; however, those groups respectively represented 36% and 3.4% of the Texas population. *Fisher*, 645 F. Supp. 2d at 606 and n. 10. Indeed, in its 2004 proposal that led to the race-conscious program, the University admitted its desire to mirror the state's racial demographics: "[S]ignificant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." *Proposal to Consider Race and Ethnicity in Admissions* at 24, June 25, 2004, *available at* http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (last visited July 31, 2014).

Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Time and again, Chinese Americans received equal treatment only after appealing to the courts for vindication of their rights as Americans.

In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco school officials to admit a Chinese American girl denied entry because she was "Mongolian." *See* McClain, *supra*, at 137. In response, the California legislature set up separate "Chinese" schools to which Chinese American children were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 207-208 (May 1998) ("Chinese" were segregated even when "Japanese" were not).

Chinese Americans were among the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." *Id.* at 382.

In *Gong Lum v. Rice*, 275 U.S. 78 (1927), the Supreme Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a

member of the "yellow" race. *Gong Lum* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id*. at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco." *Lee* at 1216.

Unfortunately, in the instant case, the Court has sanctioned a program that, once again, discriminates against Asian Americans—and it did so without even recognizing, let alone analyzing the adverse impact on this minority group.

III. THE COURT ERRED IN NOT RECOGNIZING THAT THE TOP TEN PERCENT LAW HAD ALREADY ACHIEVED A "CRITICAL MASS."

"[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). Under Texas' race-neutral Top Ten Percent Law, the University had already achieved a critical mass of minority students. *See* Tex. Educ. Code § 51.803 (1997). In 2004, the combined African-American and Hispanic enrollment was 21.4% (African-American 4.5% and Hispanic 16.9%),

and the total non-white population rose to nearly 43% of the incoming freshman class. *See* Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment (Doc. 94-2) at 13 (W.D. Tex. Jan. 23, 2009). These substantial levels of minority enrollment show that the University could (and did) use the Top Ten Percent Law to achieve a "critical mass" of minority representation—without the use of race—exceeding that approved at the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). *See Fisher*, Slip Op. at 34.

The Court's finding that Hispanics are insufficiently represented even though present in larger numbers than Asians means either: (1) the Court is wrong and there is a critical mass of both, or (2) Asians are not worth as much as Hispanics in promoting "cross-racial understanding," breaking down "racial stereotypes," and enabling students to "better understand persons of different races." *Grutter*, 539 U.S. at 329. The latter dubious proposition is not supported by the record, leaving the Court's ruling without support. It is also racist.

Significantly, the Court failed, or refused, to identify except in circular terms the critical mass sought by UT. This failure is noteworthy both because it does not supply the clarity required by strict scrutiny and because, as noted *supra*, the critical mass for the favored ethnicities achieved by the Top Ten Percent Law was already higher than that achieved by the race-conscious program in *Grutter*.

Clearly, the Court ignored evidence that the Top Ten Percent Law had

already achieved a critical mass of minority students. This achievement obviates any legal basis for a race-conscious admission program, especially one that causes harm to a historically disadvantaged minority group. With the "ultimate burden" on the University to show otherwise, *Fisher*, 133 S. Ct. at 2420, the Court should have found that the University utterly failed to carry its burden.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff-Appellant's petition for a rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with all requirements for form, including the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and Fifth Circuit Rule 32.2, because it contains 1554 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2, and the brief is 7 1/2 double-spaced pages. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word in a proportionally-spaced typeface in 14-point Times New Roman type.

Dated: August 1, 2014

/s/ Gordon M. Fauth, Jr.
Gordon M. Fauth, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st Day of August 2014, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court via the ECF system and transmitted to counsel registered to receive electronic service. I also caused a true and correct copy of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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