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 United States Supreme Court

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF REHEARING EN BANC

Jay Alan Sekulow
Walter M. Weber
Lead Counsel
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Amicus Curiae

Supplemental Statement of Interested Parties

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

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.

Amicus Curiae

1. The American Center for Law and Justice
2. Counsel for the American Center for Law and Justice:
   a. Walter M. Weber
   b. Jay Alan Sekulow

s/Walter M. Weber
Walter M. Weber
Attorney of Record for
American Center for
Law & Justice

TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES i

TABLE OF AUTHORITIES. iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. Racial Categories Are Arbitrary and Ultimately Incoherent. . . . 2

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

CASES

Fisher v. University of Texas at Austin,
631 F.3d 213 (5th Cir. 2011) 5

Fisher v. UT Austin, 133 S. Ct. 2411 (2013) 1

LULAC v. Perry, 548 U.S. 399 (2006) 2

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) 1, 3

Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948) 4

Plessy v. Ferguson, 163 U.S. 537 (1896) 1

Rodriguez v. NASCAR, No. 3:10-cv-00325
(W.D.N.C. Jan. 17, 2012) 6

St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) 5

OTHER AUTHORITIES

Michael Olesker, "When 'black' apparently was not quite black enough," Baltimore Sun (Sept. 3, 2002) 7

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ filed as amicus in support of reversal in *Fisher v. UT Austin*, 133 S. Ct. 2411 (2013). All parties have consented to the filing of this brief.[1]

The ACLJ strongly believes in the unity of all people in one human nature, from fertilization through natural death. Just as there is no difference in kind between prenatal, neonatal, adolescent, or adult human beings, there is likewise no difference in kind between black, white, Asian, or other ethnic groups of human beings. There is one race – the human race. "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment). "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559

[1] No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(1896) (Harlan, J., dissenting). The ACLJ therefore opposes UT's effort to attach consequences to racial labels for individuals.

SUMMARY OF ARGUMENT

There is only one "race" of humans – the human race. Government efforts to pigeonhole groups of people into racial boxes – what Chief Justice Roberts called a "sordid business," *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part) – is ultimately incoherent, as people of mixed ethnicity illustrate. The University of Texas's use of race-conscious admissions to attain a "critical mass" of minority students cannot be narrowly tailored for purposes of strict scrutiny because it necessarily depends upon the use of arbitrary racial labeling.

ARGUMENT

I. Racial Categories Are Arbitrary and Ultimately Incoherent.

When the government *forbids* the differential treatment of individuals on the basis of racial labels, it properly sets itself against race discrimination. But when the government *undertakes* to treat people differentially on the basis of racial labels, it encounters a huge difficulty:

such labeling is ultimately incoherent, as racial categories are both arbitrary and porous. UT cannot use race to attain a "critical mass" of minority students if it cannot even intelligibly define what a minority student is. Hence, the deliberate use of race-conscious admissions cannot be a *narrowly tailored* means to achieve diversity.

The undertaking of a system of racial preference necessarily requires a determination of who counts as belonging to which race. "When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

In a world of completely segregated populations, it might be possible to maintain the fiction that there are intrinsically distinct, identifiable ethnic groups such as "black" and "white," or "Hutu" and "Tutsi," or "Asian" and "Hispanic." But in a cosmopolitan world, such pretensions are utterly illusory. Each day countless children are born with a heritage drawing upon a host of varied ethnic and cultural backgrounds. Indeed there are websites devoted to identifying and celebrating "multiracial"

children. *E.g.*, The Daily Multiracial, http://dailymulitracial.com (listing, and providing ethnic background information for, prominent individuals of mixed ethnic heritage, including Queen Noor, Steve Jobs, Carol Channing, Bob Marley, Naomi Campbell, Bruce Lee, Salma Hayek, Booker T. Washington, Lani Guinier, Eddie Van Halen, Cher, Ben Kingsley, Jennifer Beals, Tiger Woods, Halle Berry, Jim Thorpe, Carly Simon, Barack Obama, Lena Horne, and Roy Campanella). Human beings cannot be pigeonholed into racial boxes. As the Supreme Court of California stated:

> If the [government rule assigning significance to racial categories] is to be applied generally to persons of mixed ancestry the question arises whether it is to be applied on the basis of the physical appearance of the individual or on the basis of a genealogical research as to his ancestry. If the physical appearance of the individual is to be the test, the [rule] would have to be applied on the basis of subjective impressions of various persons. Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the [rule] to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of [the pertinent ethnic groups of] ancestors govern the applicability of the statute. Is it any trace of [the pertinent ethnic] ancestry, or is it some unspecified proportion of such ancestry that makes a person a [member of the pertinent ethnic group]?

Perez v. Sharp, 32 Cal. 2d 711, 738, 198 P.2d 17, 28 (1948).

For that matter, the very notion of discrete human "races" is, at best, highly questionable. As the Supreme Court unanimously observed:

> There is a common popular understanding that there are three major human races – Caucasoid, Mongoloid, and Negroid. *Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary* and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. *Clear-cut categories do not exist*. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that *racial classifications are for the most part sociopolitical*, rather than biological, in nature.

St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (emphasis added) (citing extensive authorities). As Judge Garza explained previously, "The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races." *Fisher v. University of Texas at Austin,* 631 F.3d 213, 264 (5th Cir. 2011) (Garza, J., specially concurring) (footnote omitted).

To be sure, individuals can take great pride in asserting their own ethnic identities, whether Irish, African-American, Italian, Chinese, or

what have you. But it is an entirely different matter *for the government* to attach legal significance to such a label, whatever its source.

It is no answer for the government to have individuals self-designate their race for purposes of government action. If the government defers completely to an individual's unfettered self-description, there is no way to audit the policy; moreover, the government would still be conferring official significance upon one's status as, e.g., "black" or "Semitic." And if the government exercises supervision over the racial designations, it raises the sorry prospect of state agents asserting, for example, that someone is "too white" to qualify for minority status (or vice-versa). This is not an unrealistic scenario. *E.g.*, Rick Chandler, "Driver sues NASCAR, says he was 'too Caucasian' for diversity program," http://offthebench.nbcsports.com/2012/04/20/driver-sues-nascar-says-he-was-too-caucasian-for-diversity-program/ (Apr. 20, 2012) (driver of Puerto Rican and Spanish descent sues over exclusion from program for minorities); Mem. in Support of Deft. Access Marketing & Communication LLC's Mot. for Sum. Judg. at 12 n.7, *Rodriguez v. NASCAR*, No. 3:10-cv-00325 (W.D.N.C. Jan. 17, 2012) ("Plaintiff did not

fit the purpose of the affirmative action program because he looked like a Caucasian male"). *See also* Michael Olesker, "When 'black' apparently was not quite black enough," Baltimore Sun (Sept. 3, 2002) (African-Lebanese plaintiff sues, alleging failure to be hired for "diversity" position at college because he was "not visibly black").

CONCLUSION

This Court should grant rehearing en banc.

Respectfully submitted,

s/Walter M. Weber
Jay Alan Sekulow
Walter M. Weber
Lead Counsel
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Counsel for *Amicus Curiae*

Aug. 5, 2014

CERTIFICATE OF COMPLIANCE

I certify that the attached amicus brief in support of rehearing en banc does not exceed 7½ pages.

Aug. 5, 2014

s/ Walter M. Weber
Walter M. Weber
Attorney for Amicus

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of 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:

Vincent Adrian Ang
Asian American Justice Center
Suite 1200
1140 Connecticut Avenue, N.W.
Washington, DC 20036

Gordon Morris Fauth
Litigation Law Group
Suite 101
1801 Clement Avenue
Alameda, CA 94501

Lawrence J. Fox
Drinker, Biddle & Reath, L.L.P.
Suite 2000
1 Logan Square
Philadelphia, PA 19103-6996

s/ Walter M. Weber
Walter M. Weber
Counsel for Amicus Curiae
American Center for Law &
Justice