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 *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION SUPPORTING APPELLANT'S PETITION FOR REHEARING EN BANC

S. Kyle Duncan
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
202-714-9492
kduncan@duncanpllc.com

Peter Ferrara
AMERICAN CIVIL RIGHTS UNION
20594 Woodmere Court
Sterling, VA 20165
703-582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that he is aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation and that the American Civil Rights Union has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

S. Kyle Duncan

S. Kyle Duncan
Counsel of record for Amicus Curiae
American Civil Rights Union

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we seek to ensure that the protections of the Constitution apply to all Americans equally regardless of race, without politically correct bias.

STATEMENT OF THE CASE

White female Abigail Noel Fisher was denied admission to the University of Texas (UT) for the Fall semester of 2008, even though her academic qualifications exceeded those of many minority applicants who were admitted. UT explicitly uses racial preferences in admissions, preferring blacks and Hispanics, and disfavoring whites, Asians, and Jewish students.

In 1997, Texas enacted the Top 10% Law, which requires UT to admit all Texas high school seniors in the top 10% of their graduating classes. H.B. 588, Tex. Educ. Code Sect. 51.803 (1997). That entirely race neutral law now accounts each year for "88% of admissions offers for Texas residents and…81% of enrolled Texas freshmen," *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 240 (5th Cir. 2011).[2]

[2] See also Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HBB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen Fall 2008 and Academic Performance of Top 10% and Non-Top 10% Students Academic Years 2003-2007 (Report 11)* (Oct. 28, 2008).

The rest of each year's class is predominantly admitted through a "holistic" review process, "which looks past class rank to look at each applicant as an individual based on his or her achievements and experiences…," as the panel majority explained. *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (July 15, 2014) (Slip Op. at 3). That "holistic review" includes evaluation based on racial preferences.

Plaintiff Fisher was not in the top 10% of her high school class. So her application was considered under holistic review. But because her race was not politically correct, her superior academic achievements were sacrificed to applicants of the officially favored races.

For the Fall of 2008, African-American and Hispanic students accounted for 25.5% of the incoming freshmen class, up from 16.2% in 1998, almost all due to the race neutral Top 10% Law that dominates admissions at UT. *Fisher v. Univ. of Texas at Austin*, No. 09-50822, *supra,* SJA 156a. By the Fall of 2010, a majority of the incoming freshmen class were minority students, with only a negligible impact from the racially based admissions criteria.[3] Yet UT continues to use racial considerations in its admission decisions.

[3] The University of Texas at Austin, Division of Diversity and Community Engagement, 2010-2011 Impact Report, at 6 ("Fifty-two percent of our freshmen are minority students, including 23 percent who are Hispanic…."); *Class of First-Time Freshmen Not a White Majority This Fall Semester at [UT]* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14student_enrollment2010/ (last visited July 25, 2014).

Denied admission to UT based on her race, Petitioner Abigail Fisher sued UT in the United States District Court for the Western District of Texas, alleging that UT's use of race in admissions is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. Sections 1981 and 1983, and Title VI of the Civil Rights Act of 1964. *Fisher v. Univ. of Texas at Austin*, No. 09-50822, *supra,* (Slip Op. at 2).

But the District Court upheld UT's race-based admission's policy as constitutional "as long as *Grutter* remains good law," granting summary judgment. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp, 587 (W.D. Tex. 2009). The Fifth Circuit affirmed, Judges King and Garza specially concurring. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, *supra*. Garza wrote that the court was bound by *Grutter v. Bollinger*, 539 U.S. 306 (2004) which he saw as

> abandon[ing] [strict scrutiny] and substituting in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.

Id. The Fifth Circuit denied rehearing en banc 9 to 7, with Chief Judge Jones writing for five of the dissenters that the panel had "abdicated judicial review of race-conscious admissions programs for undergraduate students." *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301 (5th Cir. 2011).

The Supreme Court, however, granted certiorari, and vacated the ruling of the Fifth Circuit. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2011). The High

Court ruled that "the Equal Protection Clause demands that racial classifications…be subjected to the most rigid" strict scrutiny, and that "the government bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate." *Id.* at 2419. Moreover, the Court ruled that strict scrutiny allows for no deference to the University regarding its justification for racial preferences. *Id.* at 2418-20. The courts must "verify that it is necessary for the university to use race to achieve the educational benefits of diversity," and that any use of race is "specifically and narrowly framed to accomplish that purpose." *Id.* at 2414, 2420. The Court remanded for the courts below to "assess whether [UT] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity [based on] this record…." *Id.* at 2421.

But on remand, the Fifth Circuit panel majority again upheld UT's racial preferences. The majority had to concede that a critical mass of minority students, which had been the issue justifying continued racial preferences in *Grutter v. Bollinger*, 539 U.S. 306 (2004), had been achieved, with the incoming freshman class 25% minority in 2008, and majority minority by 2010. But the majority accepted the argument that continued racial preferences were necessary to ensure that UT got the right mix of minorities. The Top Ten Percent minorities had achieved their top 10% ranking mostly in majority minority schools. But UT

wanted to admit additional minorities to achieve "the multi-dimensional diversity that *Bakke* envisions." (Slip Op. 29-30). This would require enrollment of "minorities with unique talents and higher test scores" not found among those applicants "measured solely by class rank in largely segregated schools." (Slip Op. 36-37).

The majority speculated, without proof, that the "unique talents" of these minority applicants involved "demonstrated qualities of leadership and sense of self" that would be found among minorities who attended integrated "high performing schools" but not among the top 10% of those who had attended mostly "majority minority" schools. (Slip Op. 29). These additional minorities would not be admitted through the top 10% law, by definition, as they were not in the top 10% of their more high performing schools. But they could still have better academic records than minorities in the top 10% of lower performing majority minority schools. These additional minorities would still need racial preferences, however, to beat out the non-minorities from their more high performing schools. Like Abigail Fisher, or other higher performing Asian or Jewish students, or others. These additional minorities could consequently only be assured of admission through the racial preferences of the holistic admissions process. The question presented by this case, therefore, is whether the educational benefits from admitting these additional minorities to an already majority minority university is a

sufficiently compelling government interest to justify the racial preferences necessary to achieve their admission, which would otherwise violate the Equal Protection rights of the white, Asian, Jewish, or other non-minority students that would be displaced from admission by those racial preferences.

SUMMARY OF ARGUMENT

Rehearing en banc is warranted first and foremost because the majority decision in this case utterly failed to follow the instructions of the Supreme Court on remand. That governing Supreme Court decision says the most rigid strict scrutiny applies to racial preferences in public school admissions. That is necessary to protect the Equal Protection rights of those applicants disfavored and displaced by the racial preferences, like Abigail Fisher, and other white, Asian, Jewish, and other applicants.

Those Equal Protection rights can only be overcome by policies serving a compelling government interest, as narrowly tailored as possible to serve that interest. In this case, we have a university that has already achieved majority (over 50%) minority admissions for incoming freshman, 25.5% minority in the year that plaintiff Abigail Fisher applied. In such a context, further discrimination against white, Asian, Jewish, and other American applicants cannot be justified under the Constitution's Equal Protection Clause.

The Supreme Court also instructed that the court on remand was not to give "deference" to UT's choice of admissions policies. Instead the Court held the government bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate. But as Judge Garza explained in his dissent, no such evidence was forthcoming from UT. In this context, upholding UT's racial preference admission policies amounts to exactly the undue deference that the Supreme Court prohibited.

But en banc review is also necessary because this is an extremely important case with nationwide implications. This case is now perfectly framed to decide the fate of racial preferences in at least public university admissions nationwide. With the incoming freshman class just over 25% minority when Abigail Fisher was denied admission precisely because of racial preferences, and UT reaching majority minority just a couple of years later, surely this is the case where the signpost for the end of racial preferences and quotas can be demarked, and the fundamental principles of the Equal Protection Clause can be reestablished.

REHEARING EN BANC SHOULD BE GRANTED

Rehearing en banc should be granted first because the panel majority failed to follow the instructions from the Supreme Court upon remand in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2011). That governing ruling stands for the proposition that the most rigid strict scrutiny applies to racial preferences in public

school admissions. *Id.* at 2419. That is necessary to protect the Equal Protection rights of those applicants disfavored and displaced by the racial preferences, like Abigail Fisher, and other white, Asian, Jewish, and other applicants. These other applicants are protected by the Constitution's Equal Protection rights to be free from racial discrimination by their own government.

Those Equal Protection rights can only be overcome by policies serving a compelling government interest, as narrowly tailored as possible to serve that interest. In this case, we have a university that has already achieved majority minority admissions for incoming freshman, 25.5% minority in the year that plaintiff Abigail Fisher applied. In such a context, further discrimination against white, Asian, Jewish, and other American applicants cannot be justified under the Constitution's Equal Protection Clause.

The Supreme Court also instructed that the court on remand was not to give "deference" to UT's choice of admissions policies. *Id.* at 2418-20. Instead the Court held "the government bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate." *Id.* at 2419. But as Judge Garza explained in dissent, the panel majority completely abdicated this responsibility. Instead of meeting its burden above, UT provided "no evidence" that the minorities admitted under the Top 10% law "are somehow more homogenous, less dynamic, and more undesirably stereotypical than those

admitted under holistic review," or that those admitted under "holistic" review make a more meaningful educational contribution than those admitted under the top 10% law. (Slip Op. 58). In this context, upholding UT's racial preference admission policies amounts to exactly the undue deference that the Supreme Court prohibited, as Judge Garza recognized. (Op. 44, 52).

Indeed, while UT claims that racial preferences are necessary to admit more minority applicants from the more racially integrated, higher performing secondary schools through "holistic" review, the socio-economic factors that UT utilizes in that review work to the detriment of exactly those minority applicants. For the minority applicants attending the higher performing schools tend to come from intact minority families with more resources earning higher incomes.

Moreover, while the Supreme Court instructed the panel to seek "additional guidance…in the Court's broader equal protection jurisprudence," *Fisher* 133 S. Ct. at 2418, the panel majority ignored the equal protection precedents holding that where race only minimally advances a compelling interest, that demonstrates that race neutral policies would have worked about equally as well. *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701, 734 (2007); *id.* at 790 (Justice Kennedy concurring); *Fisher*, 644 F.3d at 307 (Jones, J.). The "holistic" racial preferences in fact produce only comparably minimal impact on minority admissions, and the long history of UT shows that race neutral policies

can work about equally as well, as after the decision in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996).

In addition, the Supreme Court instructed the panel to conduct its strict scrutiny on remand based on the evidence in "this record." *Fisher*, 133 S. Ct. at 2421; (Slip Op. 58 n. 15) (Garza J.). But the panel majority "ventured far beyond the summary judgment record," *id.,* to provide a factual foundation for UT's argument that UT bore the burden of providing. E.g. Op. 18 n. 70; 19 n. 73, 24-25 nn. 97-98, 26-28 nn.101, 103-120, 32 nn.123-26.

That practice also violated hornbook civil procedure. In "an appeal of a summary judgment, the review is a confined to an examination of materials before the lower court at the time the ruling was made; subsequent materials are irrelevant." *Martin's Herend Imps., Inc. v. Diamond & Gem Trading U.S. of Am. Co., 195 F.3d 765, 774* (5th Cir. 1999); *Little v. Liquid Air Corp*., 37 F.3d 1069, 1071 n. 1 (5th Cir. 1994)(en banc). Indeed, the appeal in this case of an original summary judgment motion should have been decided, of course, only on the uncontested facts. *CLS v. Martinez*, 130 S. Ct. 2971, 2982-84 (2010).

Of course, "[f]actfinding is the basic responsibility of the district courts, rather than the appellate courts." *Maine v. Taylor*, 411 U.S. 131, 144-45 (1986). That is why litigants are not allowed to develop facts on appeal. But even worse, here the appellate court majority developed the facts itself to reach the result it wanted.

Therefore, en banc review is necessary so the Fifth Circuit can comply with the Supreme Circuit mandate in this case. But en banc review is also necessary because this is an extremely important case with nationwide implications. This case is now perfectly framed to decide the fate of racial preferences in at least public university admissions nationwide. The incoming freshman class was just over 25% minority when Abigail Fisher was denied admission precisely because of racial preferences. And UT reached majority minority just a couple of years later. Surely this is the case where the signpost for the end of racial preferences and quotas can be demarked, and the fundamental principles of the Equal Protection Clause can be reestablished.

CONCLUSION

For all of the foregoing reasons, the Fifth Circuit should grant en banc review in this case, and reverse the summary judgment order of the district court.

Respectfully submitted,

Peter Ferrara
AMERICAN CIVIL RIGHTS UNION
20594 Woodmere Court
Sterling, VA 20165
703-582-8466
peterferrara@msn.com

S. Kyle Duncan
S. Kyle Duncan
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
202-714-9492
kduncan@duncanpllc.com

Counsel for Amicus Curiae American Civil Rights Union

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 the Court via the ECF system and transmitted to counsel registered to receive electronic service.

S. Kyle Duncan
S. Kyle Duncan

Counsel for Amicus Curiae
American Civil Rights Union

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **2,732** words, exclusive of parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011, Times New Roman, 14-point font.

S. Kyle Duncan
S. Kyle Duncan

Counsel for Amicus Curiae
American Civil Rights Union