No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER.
Plaintiffs-Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*
Defendants-Appellees,

On Remand from the United States Supreme Court

MOTION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Center for Constitutional Jurisprudence hereby states that it is a project of the Claremont Institute, a non-profit educational foundation that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

Amicus, Center for Constitutional Jurisprudence, is a project of the Claremont Institute, a non-profit organization dedicated to upholding the principles of the American Founding, including the operative principle in this case, the self-evident truth of equality articulated in the Declaration of Independence and the Fourteenth Amendment of the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center participated as *amicus curiae* in numerous cases on the constitutionality of race-conscious programs including *Ricci v. DeStefano*, 557 U.S. 557 (2009), *Grutter v. Bolinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

The proposed amicus brief focuses on the panel's failure to apply strict scrutiny. The brief brings to the Court's attention decisions of the Fifth Circuit and the United States Supreme Court outlining a critical difference between strict scrutiny and rational basis review. The brief argues that by permitting the university to introduce a *post hoc* rationale for adoption of the race-conscious program at issue, the panel slipped into rational basis review and violated the remand order of the United States Supreme Court. All of the parties have filed blanket consents for the filing of amicus briefs in support of the petition for rehearing en banc.

WHEREFORE, the Center for Constitutional Jurisprudence prays this Court for an order granting leave for the Center to file the attached amicus curiae brief in support of the petition for rehearing.

DATED: August 5, 2014.

Respectfully submitted,

/s/ Charles Bundren

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INTRODUCTION

As the panel noted, the Supreme Court requires that a state interest in "educational diversity" must be "'defined by reference to the educational benefits that diversity is designed to produce.'" Slip Op. at 12. For purposes of the compelling state interest test, it is simply not enough for a state university to say it is using race-based admissions in order to pursue "educational diversity." It must explain, at the time it adopts the race-conscious program, exactly what "educational benefits" the use of race in admissions "is designed to produce." In this case, however, the university changed its position about the nature of the educational benefits it is pursuing. Because of the tremendous success of the Top Ten Percent program in admitting significant numbers of Black and Hispanic students, the university seeks to shift its argument on remand from a quantitative to a qualitative policy.

Since this case is governed by the strict scrutiny standard, however, the Court may not allow the introduction of new bases for the challenged policy. By allowing the university to shift its argument from a quantitative to a qualitative policy on remand, the panel failed to apply strict scrutiny as that test is defined in the decisions of this Court and the United States Supreme Court. Instead, the panel applied a test more closely approximating rational basis review. Because the panel's decision conflicts with the decisions of this Court and the United States Supreme Court

regarding strict scrutiny review, rehearing en banc is appropriate and the petition should be granted.

ARGUMENT

1. There is no doubt about the university's original basis for adopting the race conscious admissions. In its decision, the Supreme Court noted that the university adopted this policy in 2004 and that the policy was formally described in a document entitled "Proposal to Consider Race and Ethnicity in Admissions." *Fisher v. University of Texas*, 133 S. Ct. 2411, 2416 (2013). The educational benefits from diversity that the university described in this document derived from the numbers of minority students in each class – a simple quantitative goal. *Id*.; The University of Texas at Austin, Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 (Proposal) at 25 (emphasis in original). The report emphasized the need for "*classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." Proposal at 25. Thus, the university described its proposal as seeking a "critical mass" of minority students in the classroom. *Id*. Emphasizing the quantitative nature of the diversity goal, the Proposal set out charts showing raw numbers of students in classes of 5 to 24 total students, highlighting the number of classes with no minority students. *Id*. at 26. This university policy adopted in 2004 – the policy at issue in this case – focused solely on increasing the number of minority students enrolled.

2. On remand from the Supreme Court, the university shifted its argument from a quantitative goal (which was being met by the Top Ten Percent Plan) to a qualitative goal. This led to the panel noting, "[T]he Top Ten Percent Plan came with significant costs to diversity and academic integrity." Slip. Op. at 16. However, the only problem with the Top Ten Percent Plan noted in the Proposal was the increased size of the incoming class. As noted in the Proposal, "The University of Texas at Austin cannot sustain this growth. … [The increased enrollment] stretched the capacity of the faculty, staff, and facilities to a degree that negatively affected the educational experience of students." Proposal at 31.

Nonetheless, the university sought to describe an entirely new justification for its race-based admission process on remand. The panel accepted this shift in argument when it noted that the minority students admitted through the Top Ten Percent Plan may have gone to a school with 90 to 100 percent minority enrollment – a factor the university now argues cannot satisfy the educational diversity goal of the university. Slip Op. at 25-26. The racial makeup of the high school that an applicant attended has nothing to do with the original basis for the race-conscious program. This new argument shifts the purpose of the race-conscious admissions plan from the original amorphous quantitative "critical mass in the classroom" basis to some type of new qualitative argument. The panel not only allowed the university to shift the basis for its race-conscious program, but also allowed it to use evidence

outside the record to support the newly minted claim. *See id*. at 26-28. By allowing this shift in the claimed basis for the race conscious program, the panel failed to apply strict scrutiny.

3. The decisions of this Court and the United States Supreme Court establish that strict scrutiny requires the court to focus its analysis on the original justification for the program. This Court noted in *W.H. Scott Const. Co. v. City of Jackson*, 199 F. 3d 206, 218 (5th Cir. 1999), that it could not consider evidence or rationale that was not considered by the government agency when it adopted the race-conscious program under review. The *Scott Construction* Court noted that this rule flowed from the Supreme Court's decision in *Croson v. City of Richmond*, 488 U.S. 469, 500 (1989) requiring the government agency to identify the basis of its decision to use a racial classification "with particularity" and demonstrate a "'strong basis in evidence for its conclusion that remedial action was necessary.'" *W.H. Scott*, 199 F. 3d at 217. This Court reached the same conclusion in *Messer v. Meno*, 130 F. 3d 130, 136 (5th Cir. 1997).

These decisions follow from the rulings of the United States Supreme Court. As the Court in *Shaw v. Hunt*, 517 U.S. 899 (1996), noted: "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature. To be compelling, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification."

Id. at 949 n.4. The reason for this approach is that racial classifications are presumptively unconstitutional. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Focusing the judicial inquiry on the actual basis identified by the governmental agency for the racial classification allows the court to "smoke out" illegitimate uses of race. *Croson*, 488 U.S., at 493. Even in gender classification cases, in which a less stringent form of heightened scrutiny is applied, the Supreme Court has ruled that the justification for the classification cannot be "invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996)

4. Rational basis, by contrast, requires the court to look at any possible justification for the policy. *Gibson v. Texas Dep't of Ins.*, 700 F. 3d 227, 239 (5th Cir. 2012); *see St. Joseph Abbey v. Castille*, 712 F. 3d 215, 223 (5th Cir. 2013). The reason for this difference in treatment is the policy of "deference to legislative policy decisions." *LeClerc v. Webb*, 419 F. 3d 405, 421 (5th Cir. 2005). This deference is proper where the classification does not target a suspect class or burden a fundamental right. *Id*.

The United States Supreme Court again explained this difference in terms of the constitutional presumption at play. '[B]ecause the classification is presumed constitutional, the '"burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."'" *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080-81 (2012). Thus, there is no need for the

government even to articulate a reason for adopting a classification that is subject only to rational basis review. *Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993).

5. In this case, the panel slipped into rational basis review when it permitted the university to shift the purported basis for the race-conscious program here under review. The shift in rationale is clear. The university adopted the race-conscious admissions policy hoping to achieve "critical mass" "within the classroom." Proposal at 24-25; *Fisher*, 133 S.Ct., at 2416. On remand, however, the university switched from this quantitative rationale to a new qualitative argument. Now the university argues (and the panel accepted for purposes of analysis), that the Top Ten Percent Plan is insufficient to achieve "diversity" because too many of the minority students admitted through the Top Ten Percent Plan went to schools where they were in the majority. Slip Op. at 24-28. Because this was not the basis on which university adopted the race-conscious admissions program, it cannot be considered by the Court when applying strict scrutiny.

CONCLUSION

Allowing the university to argue a new basis for the race-conscious program conflicts with other decisions of this Court and decisions of the United States

Supreme Court. This Court should grant the petition for rehearing en banc and apply strict scrutiny as directed in the remand order of the United States Supreme Court.

DATED: August 5, 2014.

Respectfully submitted,

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STATEMENT OF AMICUS

Pursuant to Federal Rule of Civil Procedure 29(c)(5), Amici Curiae Center for Constitutional Jurisprudence and California Association of Scholars, hereby state:

(A) a party's counsel DID NOT author the brief in whole or in part;

(B) a party or a party's counsel DID NOT contribute money that was intended to fund preparing or submitting the brief; and

(C) a person—other than the amicus curiae, its members, or its counsel—DID NOT contribute money that was intended to fund preparing or submitting the brief.

DATED: August 5, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 5, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Charles Bundren
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CERTIFICATE OF COMPLIANCE WITH RULE 32 (A)
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

The Undersigned Counsel Record Hereby Certifies That:

1. This Brief Complies With The Type-Volume Limitation Of Fed. R. App. P. 32(A)(7)(B) Because:

[X] This Brief Contains 1490 Words, Excluding The Parts Of The Brief Exempted By Fed. R. App. P. 32(A) (7)(B)(Iii),

2. This Brief Complies With The Typeface Requirements Of Fed. R. App. P. 32(A)(5) And The Type Style Requirements Of Fed. R. App. P. 32(A)(6) Because:

[X] This Brief Has Been Prepared In A Proportionally Spaced Typeface Using Microsoft Office Word For Windows 2008, In Times Roman 14-Point Typeface.

/s/ Charles Bundren
Wm. CHARLES BUNDREN