No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABAGAIL NOEL FISHER,
Plaintiff - Appellant

v.

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

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

UNCONTESTED MOTION OF FORMER FEDERAL CIVIL RIGHTS OFFICIALS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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Dated: August 5, 2014

**Counsel of Record*

Former federal civil rights officials, through their undersigned counsel, move this Court for leave to file a brief as *amici curiae* in support of Appellant's Petition for Rehearing En Banc. A copy of the brief is attached to this motion. As cause for this motion, *amici* state as follows:

Amici have permission from all parties to file a brief as *amici curiae* in support of Appellant's Petition for Rehearing En Banc. *Amici* also filed a brief as *amici curiae* with the United States Supreme Court in support of Appellant.

Collectively, *amici* have decades of experience working in the federal agencies charged with the primary responsibility for administering diversity policies in higher education, including the U.S. Civil Rights Commission, the U.S. Department of Education, and the U.S. Department of Justice. *Amici* support innovative and race-neutral approaches to achieving the educational benefits of diversity in higher education and believe that racial preferences are generally unnecessary in light of the race-neutral alternatives available. *Amici* thus believe their brief in support of Appellant's Petition for Rehearing En Banc would be helpful to the Court.

WHEREFORE, *amici* respectfully pray this Court for an Order granting leave to file a brief as *amici curiae* in support of Appellant's Petition for Rehearing En Banc.

DATED this 5th day of August, 2014.

Respectfully Submitted,

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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 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 judge of this Court may evaluate possible disqualification or recusal.

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    c. George R. La Noue
    d. Kenneth L. Marcus
    e. Dr. Ken Masugi
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U.S. Comm'n on Civil Rights, *Fed. Procurement After* Adarand (2005).....4

U.S. Dep't of Justice, *Legal Guidance on the Implications of the Supreme Court's Decision in* Adarand Constructors, Inc. v. Pena, 19 Op. Off. Legal Counsel 171 (1995).....4

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae, through undersigned counsel, submit this brief in support of Appellant's petition for rehearing *en banc*. *Amici* are former federal civil rights officials. Collectively, *amici* have decades of experience working in the federal agencies charged with the primary responsibility for administering diversity policies in higher education, including the U.S. Civil Rights Commission, the U.S. Department of Education, and the U.S. Department of Justice. *Amici* support innovative and race-neutral approaches to achieving the educational benefits of diversity in higher education and believe that racial preferences are generally unnecessary in light of the race-neutral alternatives available. A complete list of *amici* can be found in the Appendix.

STATEMENT OF ISSUE OF EXCEPTIONAL IMPORTANCE

Due to the pernicious effects of racial classifications, the Supreme Court has held that all racial classifications, including those used in higher education admissions programs, must be strictly scrutinized to determine whether less intrusive, race-neutral alternatives can advance the compelling governmental interest that racial classifications purport to serve. *See Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice Powell, in his plurality opinion, noted that courts "should give *particularly*

[1] No counsel for any party has authored any part of this brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest." *Id*. at 280 n.6 (emphasis added). And as the Supreme Court instructed in this case, a government decision that race-neutral means are insufficient is entitled to "no deference." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2420 (2013).

This case has been closely watched by universities nationwide. Of particular importance is the efficacy and legality of race-neutral alternatives, like the University's Ten Percent Plan, to achieving the benefits of diversity. The panel wrongly and without record support criticized the Ten Percent Plan for "its dependence upon segregated schools to produce minority enrollment" and then wholly deferred to the University's judgment that the Ten Percent Plan was insufficient to achieve diversity. The panel decision disregards the clear mandate of the Supreme Court, belittles the achievements of the Ten Percent Plan, and jeopardizes race-neutral alternatives that are used by universities nationwide. Accordingly, *en banc* review of the panel decision is necessary to ensure that race-neutral alternatives remain the preferred means to achieve diversity.

ARGUMENT

I. The Panel Wrongly Concluded the Ten Percent Plan Is an Insufficient Race-Neutral Alternative.

The panel committed multiple errors in concluding that the Ten Percent Plan is not a viable race-neutral alternative to achieving the University's goal of

diversity. To start, the panel completely failed to use any of the various well-developed frameworks for analyzing race-neutral alternatives. Moreover, the Panel failed to appreciate the achievements and successes of the Ten Percent Plan in advancing the University's goals. Finally, the Panel wrongly concluded that the University was justified in deciding that the Plan failed to achieve the proper type of diversity. In doing so, the Panel ignored the mandate from the Supreme Court in this case that the University's rationales must be strictly scrutinized and should receive "no deference." *Fisher*, 133 S. Ct. at 2420.

If a race-neutral means of achieving the benefits of diversity is available, "then the university may not consider race." *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). The Supreme Court emphasized that "strict scrutiny . . . require[s] a court to examine with care, and not defer to, a university's 'serious good faith consideration of workable race-neutral alternatives.'" *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003)).

The panel erred by failing to apply any legal framework or structure to its critique of the Ten Percent Plan. This alone warrants *en banc* review. Various government and non-profit entities have produced means for evaluating the efficacy of race-neutral policies. The Department of Justice, the U.S. Civil Rights Commission, the College Board, the Office for Civil Rights in the Department of Education, and the American Association for the Advancement of Science have all

set forth methods for approaching and analyzing the effectiveness of race-neutral alternatives.[2] The panel simply ignored these guides and chose instead to undertake its own policy analysis of the Ten Percent Plan.

The panel refused even to acknowledge the well-recognized successes of the Ten Percent Plan. Before the Ten Percent Plan, the University explicitly considered race in its admissions process and, in 1996, the entering freshman class was 4.1% African-American and 14.5% Hispanic. *See Fisher*, 133 S. Ct. at 2416. After the Ten Percent Plan, the percentages of African-American enrollees *increased* to 4.5% and Hispanic enrollees to 16.9% in the last year before the current challenged plan was implemented. *Id.* It is undeniable that the Ten Percent Plan is an effective race-neutral means to achieving diversity. The panel's critique of the Ten Percent Plan sets a dangerous precedent for other courts evaluating race-neutral plans and is misguided for three reasons.

First, the panel adopted the University's position with no basis in the record. The University produced no evidence that the diversity among the students admitted under the Ten Percent Plan was insufficient. *See* Slip Op. at 57-58 (Garza, J., dissenting). Instead, the University simply asserted that the *quality* of

[2] *See, e.g.*, U.S. Dep't of Justice, *Legal Guidance on the Implications of the Supreme Court's Decision in* Adarand Constructors, Inc. v. Pena, 19 Op. Off. Legal Counsel 171 (1995); U.S. Comm'n on Civil Rights, *Fed. Procurement After* Adarand (2005), *available at* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf. The academic literature is filled with methods for analyzing race-neutral policies. *See, e.g.*, Carol H. Weiss, *Evaluation: Methods for Studying Programs and Policies* 75-76 (2d ed. 1998).

diversity produced by the Ten Percent Plan was insufficient. This amorphous argument was adopted wholesale by the Panel. Rather than affording the University "no deference" on this point, the panel adopted the University's argument wholesale.

Second, the panel's critique of the Ten Percent Plan as a subterfuge for reliance on de facto housing segregation errs by itself focusing solely on race.[3] The Ten Percent Plan draws students from all high schools, from all areas of Texas, from all walks of life. Far from relying on a "single dimension of selection," (*i.e.*, race) *id.* at 24, the Ten Percent Plan actually ensures a much richer diversity of socio-economics, geography, and culture.

Finally, the panel never explains why *race* must be part of the holistic complement to the Ten Percent Plan. A holistic review of candidates may be proper to fill spots not filled by students admitted under the Ten Percent Plan. Such a holistic review will allow the University to find students who deserve admission based on qualities other than those captured by the Ten Percent Plan. Indeed, the Ten Percent Plan has always been supplemented by a holistic review of

[3] The panel opinion further criticizes the Ten Percent Plan because it boosts minority enrollment "against the backdrop of increasing resegregation in Texas public schools." Slip op. at 25-26. This criticism is without merit and further reflects the panel's inability to acknowledge the merits of the Ten Percent Plan. The panel opinion "elides th[e] distinction between *de facto* and *de jure* segregation." *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007). The panel opinion wrongly, and dangerously, uses the fact of *de facto* segregation as a reason to allow racial classifications. *See id.* ("The present cases are before us, however, because the [segregation at issue was *de facto*]. The justification for race-conscious remedies [based on *de jure* segregation] is therefore not applicable.").

additional candidates. But there is no reason why race must be part of the holistic review and the panel opinion never explains why a holistic review that does not consider race is insufficient. Indeed, the University presented *no evidence* that applicants admitted based in part on their race had any of the qualities that the University asserted were lacking from those admitted under the Ten Percent Plan. *See* slip op. at 57-59 (Garza, J., dissenting). Without such evidence, the University's use of race cannot survive strict scrutiny.

The panel failed to apply the Supreme Court's mandate and wrongly deferred to the University's argument that the diversity produced by the race-neutral Ten Percent Plan was insufficient. Thus, *en banc* review is necessary to evaluate the Ten Percent Plan properly and to apply the proper scrutiny to the University's rationales for employing racial classifications.[4]

II. The Panel's Decision Jeopardizes Race-Neutral Plans Nationwide.

College educators will doubtlessly be affected nationwide by the ultimate decision in this case. The panel's failure to evaluate the Ten Percent Plan properly and its unfounded critique of the Plan will undermine the efforts of universities to

[4] The panel also failed to explain why other race-neutral alternatives were insufficient. For example, universities can encourage the formation of campus organizations that promote the educational goals of diversity. They can invite speakers or performers, organize symposia, or promote study abroad programs. All of these efforts can advance diversity in a race-neutral manner and should have been considered by both the University and the panel.

achieve diversity using race-neutral means. *En banc* review is necessary to ensure that race-neutral plans remain the primary method of achieving diversity.[5]

All of these programs are now at risk because the panel minimized the success of the Ten Percent Plan and other such race-neutral plans. The panel decision allows governments to conclude without any factual support that such plans are insufficient to achieve the desired level and quality of diversity. Such decisions must be subject to strict scrutiny when race-neutral alternatives are cast aside or supplemented by racially-explicit classifications. But the panel opinion teaches that governments and universities can posit hypothetical, post-hoc rationales to justify their race-based policies.

[5] Approximately 40% of Americans live in states that have banned the use of race-conscious admissions policies in higher education, and Universities in these States have developed innovative race-neutral alternatives. *See, e.g.*, Roger Clegg, Take the Fisher Case, Nat'l Rev. Online (Jan. 9, 2012), *available at* http://www.nationalreview.com/phi-beta-cons/287298/take-ifisheri-case-roger-clegg#.

CONCLUSION

The petition for rehearing *en banc* should be granted.

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Certificate of Compliance

This brief complies with all requirements for form, including the type-volume limitations of the Federal Rules of Appellate Procedure 29(d) and 32(a)(7)B) and Fifth Circuit Rule 32.2, because it contains 1702 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2, and the brief is 6 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 Rule 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 5, 2014

/s/ Steven Bradbury
Steven Bradbury

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:

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