No. 09-50822

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL FISHER,
Plaintiff-Appellee,

v.

UNIVERSITY OF TEXAS, ET AL.
Defendants-Appellants.

On Remand from the Supreme Court of the United States

UNCONTESTED MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE GAIL HERIOT AND PETER KIRSANOW AND AMICI CURIAE BRIEF OF GAIL HERIOT AND PETER KIRSANOW IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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UNCONTESTED MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR HEARING EN BANC OF AMICI CURIAE GAIL HERIOT AND PETER KIRSANOW

Amici Curiae Gail Heriot and Peter Kirsanow submit this uncontested motion for leave to file the attached Amici Curiae Brief in Support of Appellant Abigail Noel Fisher's Petition for Rehearing En Banc pursuant to Fed. R. App. P. 29. Neither party objects to the filing of this motion.

INTEREST OF AMICI

Amici curiae are members of the United States Commission on Civil Rights, a federal commission charged with the responsibility of advising the President, Congress and the American people on issues of civil rights. This brief is being filed solely in Amici's capacities as private citizens and not as Commission representatives. Nevertheless, the brief is being informed by Amici's knowledge and experience in civil rights law and policy gained from their collective 19 years on the Commission as well as the pursuits that gave rise to their respective Commission appointments.

REASONS WHY FILING AN AMICUS BRIEF IS DESIRABLE

The Commission with the support of Amici has issued two reports on empirical research indicating that "mismatch" problems created by race preferences in admissions often work to the detriment of these preferences' intended beneficiaries. In 2010, the Commission released a report entitled *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers*. This report examined the extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than identically-credentialed students who attend

schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed-beneficiaries, who are seldom informed of this risk. Three years earlier, the Commission, with the support of Amici, released a report entitled *Affirmative Action in American Law Schools*, in which it examined similar evidence in the legal education context. The research examined in that report indicates that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student's.

Amici thus believe that they are in a special position to inform the Court about the mismatch research, how it fits in with the case law, and why the panel opinion erred by ignoring this evidence and instead going outside of the record to decide the case. *See Funbus Systems, Inc. v. Cal. Pub. Util. Comm'n*, 801 F. 2d 1120, 1124-5 (9th Cir. 1986) (citation omitted); *Neonatology Assocs. v. Commissioner*, 293 F. 3d 128, 132-33 (3d Cir. 2002) (Alito, J., discussing standards for acceptance of amicus briefs).

CONCLUSION

For these reasons, *amici* respectfully request leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or 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.

Appellants:	Abigail Fisher, The Project for Fair Representation
Counsel for Appellants:	Bert Rein, William Consovoy, Thomas McCarthy, Claire Evans
	Wiley Rein, LLP; The Terrill Firm, P.C.
Appellees:	The University of Texas at Austin; David Pryor, Executive Vice Chancellor for Academic Affairs; William Powers Jr., President of the University of Texas at Austin; Board of Regents of the University of Texas system; R. Steven Hicks, Member of the Board of Regents; Wm. Eugene Powell, Member of the Board of Regents; James R. Huffines, Member of the Board of Regents; Janiece Longoria, Member of the Board of Regents; Colleen McHugh, Member of the Board of Regents; Robert L. Stillwell, Member of the Board of Regents; James D. Dannenbaum, Member of the Board of Regents; Paul Foster, Member of the Board of Regents; Printice L. Gary, Member of the Board of Regents; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions; Francisco G. Ciggaroa, M.D., Chancellor of the University of Texas System

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	Latham & Watkins, LLP; Gibson Dunn & Crutcher, LLP
Amici Curiae:	Gail Heriot and Peter Kirsanow
Counsel for Amici Curiae:	Alison E. Schmauch

Amici and their counsel have no financial interest in this litigation. Their interest is as advocates for the Constitution's framework of equal protection under the laws. The Amici are members of the U.S. Commission on Civil Rights, but this brief is filed solely in their capacities as private citizens.

/s/ Alison E. Schmauch
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IDENTITY AND INTEREST OF AMICI CURIAE

Gail Heriot and Peter Kirsanow ("Amici") sit on the eight-member U.S. Commission on Civil Rights. This brief is being filed in Amici's individual capacities as private citizens, although it is informed by Amici's study of "mismatch" as Commissioners and by the civil rights work of Amici that gave rise to their Commission appointments.

ARGUMENT

The Panel Failed to Place the Burden on Defendant to Prove that its Policy is Narrowly Tailored to Serve an Actual Compelling Purpose. Instead its Opinion Advocates on Defendant's Behalf by Furnishing Arguments in Favor of Defendant's Position Not Established from the Record.

Under the strict scrutiny standard, the defendant carries a heavy burden to demonstrate it is motivated by a compelling purpose and that its actions are narrowly tailored to fit that purpose. Part of the reason for the narrow tailoring part of the test is to smoke out insincere invocations to a "compelling purpose." The panel opinion makes carrying that burden look easy. Indeed, that is the problem: It makes it too easy.

This case is very different from *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Grutter*, the plaintiffs hoped to set a precedent prohibiting race-preferential

admissions policies at all universities. No evidence had been presented to prove that the University of Michigan was motivated by anything other than a desire to secure for all its students diversity's pedagogical benefits. The Court therefore held that it should assume the University's good faith. *Grutter* at 329.

That is not so in this case. Ms. Fisher and her various amici have indeed challenged UT's motivations. They have shown that it is rare for universities to be motivated by pedagogy. As Columbia law professor Kent Greenawalt wrote, "I have yet to find a professional academic who believes the primary motivations for preferential admission has been to promote diversity in the student body for the better education of all the students …." Kent Greenwalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979).

Our amicus brief, which we incorporate by reference, contains numerous such statements. See Brief of Amici Curiae Todd Gaziano, Gail Heriot and Peter Kirsanow in Support of the Appellant at 7-9 ("Amicus Brief").[1] See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 471-72 (1997) ("The purpose of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so

[1] Since the filing of that brief, Todd Gaziano's term on the Commission has expired, and he has become a party to an employment contract that strongly discourages his participation in outside litigation as an amicus.

on—period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action.").

The record shows that UT's admissions policy is not narrowly tailored to promote diversity's pedagogical benefits.[2] If it had been, UT would not argue that it needs more Hispanics to establish "critical mass" but not more Asians. In this way, this case is like *UC Board of Regents v. Bakke*, 438 U.S. 265 (1978), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Bakke*, a fixed number of seats had been reserved for under-represented minorities. In *Gratz*, a fixed number of points were awarded to all under-represented minority students. But rigidity does not in itself have constitutional significance. In both cases, the rigidity of the defendant university's admissions policy demonstrated that its purpose was not to reap diversity's pedagogical benefits. If they had been concerned about learning, admissions policy designers at both schools would have been mindful of diversity's many non-racial varieties. They would have created an admissions policy flexible enough to take advantage of diversity's many non-racial forms, while minimizing the pedagogical downsides created by credential gaps.

[2] Indeed, an article published recently in the National Law Journal by UT's president shows that UT is still trying to come up with new reasons not set forth in the record why its admissions policies are constitutional. See Bill Powers, "Op-Ed: Why Schools Still Need Affirmative Action," National Law Journal, August 4, 2014, available at http://goo.gl/5ApB30. Remarkably, Powers argues that affirmative action is necessary to "train leaders" and as a form of "social engineering," but says not a word about its pedagogical or educational benefits.

If UT were concerned about pedagogy, it would be frantic about the considerable evidence that racial preferences do more harm than good—that it would have produced more African American scientists, professors and lawyers if it had practiced race-neutral admissions. Amicus Brief at 21-27. Yet all we hear is silence. The University has shown no interest in the pedagogical downsides of preferential treatment. Under the circumstances, it is impossible to believe that its policy is intended to promote sound pedagogy.

UT has argued that it needs ever-greater preferences to ensure that more minorities enroll in science classes. But as we demonstrate in our Amicus Brief, racial preferences are the *cause,* not the *solution,* for shortages of African American students in science. The reason that UT has not even considered this possibility is simple: It is not being candid with the court about its concern for pedagogy. Its real motivation lies elsewhere.

If a desire to reap diversity's pedagogical benefits is not UT's motivation, then what is? We believe the initial motivation was among those *Bakke* prohibited—the desire to reflect Texas's demographics. *Bakke* at 310 (Opinion of Powell, J.) This explains why UT argues that it needs higher proportions of Hispanics to achieve "critical mass" than it needs of Muslims or Mormons.

Over time, even this explanation has faded. At this point, race preferential admissions have become so woven into the fabric of admissions policies that their continuation mostly reflects mundane bureaucratic necessity. For example, some universities practice discrimination because federally-appointed accrediting authorities require it. *See* California Association of Scholars, *et al.*, Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011) (arguing that *Grutter*-deference does not protect admissions policies adopted to appease accreditors or funders); Margaret Jackson, *University of Colorado Medical School Heals Diversity Gap*, Denver Post, Apr. 21, 2012 ("The university has made a concerted effort to improve diversity among its students since its accrediting body—the Liaison Committee on Medical Education—cited the school for 'noncompliance' in 2010, when just 106 of 614 students were minorities."); Gail Heriot, *The ABA's "Diversity" Diktat*, Wall St. J., Apr. 28, 2008 (chronicling ABA demands for race-preferential admissions).

Pressure from state government plays a role too. More than 23% of medical school and 15% of law school admissions officers report that they have felt "significant" or "some" pressure to engage in affirmative action from state and local governments. Susan Welch & John Gruhl, AFFIRMATIVE ACTION AND

MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS 80, Table 3.3 (1998) ("WELCH-GRUHL"). Indeed, thirty-eight Texas state legislators filed an amicus brief in this case at the Supreme Court supporting UT's admissions policy, showing that legislative interest in UT's race-preferential admissions runs high.

The federal government's sticks and carrots are also a major influence. Some schools report threats of legal action and withheld funds; others report that the need to fill out federal paperwork pressures them to engage in affirmative action. WELCH-GRUHL at 80, Table 3.3*; see also* Public Health Service Act, Title VII, § 736, 42 U.S.C. § 293 (2011) (funding Centers of Excellence "COE" programs in health professions education). HHS allocates funds appropriated for COE to health professions schools in part based on whether these schools "have a significant number of URM [under-represented minority] students enrolled, including individuals accepted for enrollment."

Private foundations and alumni donors have an effect, too, by offering carrots to institutions to increase race-preferential admissions. *See, e.g.*, Daryl G. Smith, et al., Building Capacity: A Study of the Impact of the James Irvine Foundation Campus Diversity Initiative (May 2006) (discussing a $29 million effort to increase California campus diversity); Briefing Room: Commitment to

Diversity Leads to Gift, Apr. 5, 2012 (announcing alumnus's gift to Ohio State). Student groups also demand more diversity—sometimes civilly and sometimes not. In 2011, for example, at the University of Wisconsin, a student mob, egged on by the University's Vice Provost for Diversity and Climate, overpowered hotel staff, knocking some to the floor, to interrupt a press conference at which the speaker was critical of race-based admissions policies. *See* Peter Wood, *Mobbing for Preferences*, Chron. Higher Educ. (Sept. 22, 2011).

Admissions policies, like many statutes and regulations, are like sausages. The less one knows about how they are made, the easier it is to respect their results. It is rare for them to be narrowly tailored for any particular purpose.

The *Grutter* Court would not have approved Michigan's race-preferential policy if Michigan's explanation for it had been "This is what our state legislature wants" or "The Mellon Foundation is very enthusiastic about race-preferential admissions, and that's where the money is." Yet explanations like these are more consistent with UT's actual policy than are claims about capturing diversity's educational benefits. Consequently, UT in no way carried its burden of proof to show its dedication to pedagogically superior education through diversity.

CONCLUSION

For the foregoing reasons, which are more fully contained in our Amicus Brief, Amici urge the Court to accept this case for *en banc* review and reverse the panel's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ALISON SCHMAUCH, certify that today, August 7, 2014, a copy of the supplemental brief for amici curiae, was served upon all parties by electronic case filing and by e-mail per prior agreement of the parties.

/s/ Alison Schmauch
ALISON SCHMAUCH

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this brief contains 7.5 pages printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 10 point font in footnotes produced by Microsoft Word 2007 software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/S/ Alison Schmauch
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