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, Case No. 11-345

On Appeal from the United States District Court for the Western District of Texas, Case No. A-08-CA-263-SS, The Honorable Sam Sparks

---

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Paul J. Orfanedes *
Chris Fedeli
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172

* *Counsel of Record*

Dated: August 5, 2014

STATEMENTS OF *AMICI* AND OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c)(1), undersigned counsel for *amici* state that Judicial Watch, Inc. and the Allied Educational Foundation are non-profit organizations. They have no stock or parent corporation. As such, no public company owns 10% or more of their stock.[1] Pursuant to Fed. R. App. P. 29(c)(4), *amici* Judicial Watch, Inc. and the Allied Educational Foundation hereby incorporate the statements of the identity of the parties, party interests, and authority to file contained in their separate Motion for Leave to file this *amicus* brief, which is being filed simultaneously with this court.

Pursuant to Fifth Cir. R. 29.2, only the *amici* on this brief, undersigned counsel, and the persons and attorneys listed by Petitioners in their Petition for Rehearing *En Banc* have an interest in this *amicus curiae* brief.

[1] Pursuant to Fed. R. App. P. 29(c)(5), the parties have given blanket consent to the filing of *amicus* briefs. No counsel for a party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

TABLE OF CONTENTS

PAGE

STATEMENTS OF *AMICI* AND OF INTERESTED PARTIES.....i

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS iii

ARGUMENT.....1

CONCLUSION.....8

CERTIFICATE OF SERVICE AND ELECTRONIC FILING 10

TABLE OF CITATIONS

CASES **PAGE**

Fisher v. Univ. of Texas, 133 S. Ct. 2411 (2013) 1, 2

Fisher v. Univ. of Texas, Case No. 09-50822 (5th Cir. 2014).....1

Fisher v. Univ. of Texas, 645 F. Supp. 2d 587 (W.D. Tex. 2009) 3, 6

McMillan v. City of New York, 253 F.R.D. 247 (E.D.N.Y. 2008) 8

Plessy v. Ferguson, 163 U.S. 537 (1896) 7

United States v. Ortiz, 897 F. Supp. 199 (E.D. Pa. 1995) 5

OTHER AUTHORITIES

American Anthropological Association, "Statement of Race," (May 17, 1998) available at http://www.aaanet.org/stmts/racepp.htm 2

American Anthropological Association, "Response to OMB Directive 15," (Sept. 1997) available at http://www.aaanet.org/gvt/ombdraft.htm 2

ApplyTexas, "Sample Application," available at https://www.applytexas.org/adappc/html/preview12/frs_1.html 3

Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News*, (May 3, 2012), available at http://www.cbsnews.com/8301-503544_162-57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/ 5

Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," available at http://www.narf.org/pubs/misc/faqs.html 5

Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), available at http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/ 4

ARGUMENT

The University of Texas at Austin's ("UT") diversity program fails strict scrutiny because it loosely categorizes individuals into unsound and ambiguous racial and ethnic groups, and so is not narrowly tailored. The Supreme Court's opinion in *Fisher* establishes that even allegedly "benign" racial discrimination used to achieve "diversity" must be subject to exacting strict scrutiny. *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2421 ("*Fisher*") ("Strict scrutiny must not be strict in theory but feeble in fact."). The Fifth Circuit panel failed to apply this standard.

On remand, rather than undertake a rigorous analysis of the UT's use of racial categorization, the panel merely excused UT's lack of conformity to *Fisher*. For instance, the panel relied on UT's "critical mass" diversity target, a phrase that is undefined and largely undefinable. *Fisher v. Univ. of Texas*, Case 09-50822, 5th Cir. 2014 ("Slip Op.") at p. 30; *Id.*, Garza dissent at p. 44. And this unknowable "critical mass" standard is only the tip of the iceberg. Elsewhere, the Fifth Circuit panel finds UT may use race to promote not only diversity, but a special kind of "holistic diversity." Slip Op. at p. 21. This concept of holistic diversity, or "diversity within diversity," is similarly ambiguous and, as Judge Garza explains, "too imprecise to permit the requisite strict scrutiny analysis." Slip Op. at p. 56.

These unintelligible measures are only compounded by the underlying ambiguity of UT's policy of allowing applicants to self-select the race to which

they belong in order to gain a "plus" factor towards admission. As the American Anthropological Association ("AAA") has explained, racial categories are simultaneously too crude to convey accurate information about individuals and groups,[2] and also too likely to convey misinformation. *Id.* The AAA has even recommended the government phase-out its use of racial categories.[3] Because race is, in essence, a social construct, it is inherently ambiguous. This ambiguity is compounded by the ambiguity of allowing applicants to self-select their race in order to gain a "plus" factor towards admission. In light of these dual ambiguities, UT has not demonstrated that it narrowly tailored its racial admissions policy.

Following the Supreme Court's ruling in *Fisher*, the Fifth Circuit was required to evaluate whether UT's racial categorization program survived strict scrutiny based on the existing record of this case. *Fisher*, 133 S. Ct. at 2421. A closer review of that record shows that UT's system of racial classification is

---

[2] American Anthropological Association, "Statement on "Race," (May 17, 1998) available at http://www.aaanet.org/stmts/racepp.htm ("In the United States both scholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups").

[3] American Anthropological Association, "Response to OMB Directive 15," (Sept. 1997) available at http://www.aaanet.org/gvt/ombdraft.htm. ("[T]he effective elimination of discrimination will require an end to such categorization, and a transition toward social and cultural categories that will prove more scientifically useful and personally resonant for the public than are categories of "race."").

extraordinarily simplistic. Applicants to UT are required to complete and submit a standardized "ApplyTexas" application. The application asks for a yes or no answer to the question, "Are you Hispanic or Latino? (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race)."[4] Applicants are directed to "select the racial category or categories with which you most closely identify," choosing one or more of "American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White." *Id.* The District Court concluded that, "even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application." *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 597-98 (W.D. Tex. 2009).

UT's reliance on five broad racial categories and a single ethnic category to achieve "holistic diversity" is not narrowly tailored. Students must self-identify their race, but it remains unclear what makes one applicant a "Hispanic or Latino," an "American Indian or Alaska Native," an "Asian," "Black or African American," a "Native Hawaiian or Pacific Islander," or simply "White." UT does not specify whether an applicant must be a "full-blooded" member of his or her self-identified race or ethnic group, or whether 1/2, 1/4, 1/8, 1/16, or 1/32 is sufficient to be granted or denied the "plus" factor.

[4] ApplyTexas, "Sample Application," available at https://www.applytexas.org/adappc/html/preview12/frs_1.html.

The fact that Question 7 offers only one possible choice of ethnicity – Hispanic or Latino – is particularly problematic. Obviously, this single ethnic category does not begin to recognize or encompass the tremendous diversity of cultures, languages, religions, and heritages of the human race. Also undefined by UT's policy is whether the terms "Hispanic" and "Latino" refer to persons of full or partial Spanish ancestry only, or also to persons of other European ancestry such as the Germans and Italians and persons of Jewish background who immigrated to predominantly Spanish speaking countries in Central and South America and the Caribbean before immigrating to the United States. It also is unclear whether Question 7's reference to South America "or other Spanish culture or origin" includes Portuguese-speaking Brazil.

In addition, according to an April 2012 study by the Pew Hispanic Center, only twenty-four percent (24%) percent of Hispanic adults self-identify by the terms "Hispanic" or "Latino."[5] Fifty one percent (51%) say they self-identify by their family's country or place of origin, and twenty one percent (21%) use the term "American" most often to refer to themselves. *Id.* The study concluded that this "system of ethnic and racial labeling does not fit easily with Latino's own sense of

[5] Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), available at http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/ .

identity." *Id.* And at least one court has found that the term "Hispanic" is itself *nothing more* than self-identification:

> [w]hether or not a person is an Hispanic is not a biological characteristic but a psychological characteristic as to how one identifies himself or herself. It is not simply whether one has some Spanish ancestry or whether one speaks Spanish as a first language… A person's surname is not a definite indicator… [W]hether a person is Hispanic in the final analysis depends on whether that person considers himself or herself Hispanic.

United States v. Ortiz, 897 F. Supp. 199, 203 (E.D. Pa. 1995).

With respect to the "American Indian or Alaska Native" racial category, the Native Americans Rights Fund acknowledges that "[t]here exists no universally accepted rule for establishing a person's identity as an Indian."[6] UT's policy is completely silent as to who is entitled to a "plus" factor for being an "American Indian or Alaska Native." This definitional problem was highlighted in the controversy over Senator Elizabeth Warren during her 2012 campaign for Senate. Based on nothing more than "family lore" and "high cheek bones," Ms. Warren claimed, perhaps quite sincerely, that she was 1/32nd Cherokee and therefore a Native American and a minority.[7] Under UT's policy, an applicant who similarly identified herself as an "American Indian" based on "family lore" and "high

[6] Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," available at http://www.narf.org/pubs/misc/faqs.html.

[7] Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News*, (May 3, 2012), available at http://www.cbsnews.com/8301-503544_162-57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/.

cheekbones" would gain a "plus" factor toward admission, but an identical applicant without this same "family lore" or "high cheek bones" (or who was unaware that one of her 32 great-great-great grandparents happened to be Cherokee) would not. Imagine a freshman class at UT comprised of 6,715 Elizabeth Warrens, all identical but for the difference in the race or ethnicity of a single great-great-great grandparent. *See Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 590 (there were 6,715 students in UT's 2010 freshman class). How much additional "holistic" diversity would UT actually have achieved by taking the race of these students into account in the admissions process?

UT makes no effort whatsoever to define the term "Asian," which just as commonly refers to the four billion human beings who inhabit the largest and most populous continent on Earth as it does to a single "race" of people. It lumps together the two most populous countries on the planet, China and India, each of which has more than a billion people and a multitude of languages, cultures, and religions. It is unclear whether UT's use of the term includes applicants who are or whose ancestors were of full or partial Near or Middle Eastern origin, including persons of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered "White."

Defining who is "Black" is a divisive, problematic, and highly sensitive subject, inextricably woven into the history of slavery and segregation in the United States.

But like the self-identified categories "Hispanic," "American Indian," "White," or "Asian," it too is ambiguous. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Homer Plessy self-identified as "White," but the State of Louisiana considered him to be "Black" because one of his great grandparents was from Africa, making him 7/8ths "White" and 1/8th "Black." *Id.* at 541. The Supreme Court observed:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, others that it depends upon the preponderance of blood, and still others that the predominance of white blood must only be in the proportion of three fourths.

Id. at 552. By considering "race" in admissions, UT perpetuates this same bizarre fiction alive in the days of *Plessy*. And yet, even today, UT has no better answer to the question of who is "Black or African American" than the Supreme Court attempted in 1896. UT makes no effort to define what it means by its use of the term "Black or African American" in its admissions policy. Its failure to do so further highlights the inequality that its use of race creates. If two applicants are of both European and African ancestry, but one applicant self-identifies as "Black" and the other applicant self-identifies as both "Black" and "White," do both applicants receive the same "plus" factor? If one applicant self-identifies as "Black" and the other, like Mr. Plessy, self-identifies as "White," should the latter applicant be denied the "plus" factor?

In 2008, a U.S. District Court addressed this same issue, but rejected outright the use of "race" as a factor in damage calculations, observing:

> Franz Boas, the great Columbia University Anthropologist, pointed out that "[e]very classification of mankind must be more or less artificial;" he exposed much of the false cant of "racial" homogeneity when he declared that "no racial group is genetically 'pure.'"… [T]he reality [is] that the diversity of human biology has little in common with socially constructed "racial" categories.

McMillan v. City of New York, 253 F.R.D. 247, 249-250 (E.D.N.Y. 2008).

CONCLUSION

Amici respectfully request that the Petition be granted.

Dated: August 5, 2014

Respectfully submitted,

s/ Paul J. Orfanedes
Paul J. Orfanedes *

s/ Chris Fedeli
Chris Fedeli

JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172 (phone)
(202) 646-5199 (fax)
porfanedes@judicialwatch.org
cfedeli@judicialwatch.org

* *Counsel of Record*

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: August 5, 2014 *s/ Chris Fedeli*