No. 09-50822

In the
United States Court of Appeals for the Fifth Circuit

ABIGAIL NOEL FISHER
Plaintiffs-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 RICHARD D. KAHLENBERG IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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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 Fifth Circuit 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 of recusal.

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INTEREST OF AMICUS CURIAE

Richard D. Kahlenberg is a senior fellow at The Century Foundation, a non-profit, non-partisan research organization founded in 1919.

He is the author of *The Remedy: Class, Race, and Affirmative Action* (Basic Books, 1996), which was described by the *New York Times* as "by far the most comprehensive and thoughtful argument thus far for . . . affirmative action based on class." He is also the editor of three Century Foundation books that address race-neutral affirmative action strategies: *America's Untapped Resource: Low-Income Students in Higher Education* (2004); *Rewarding Strivers: Helping Low-Income Students Succeed in College* (2010); and *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* (2014). *The New York Times* has identified Kahlenberg as the nation's "leading liberal against affirmative action" and *Diverse Issues in Higher Education* called Kahlenberg "arguably the nation's chief proponent of class-based affirmative action in higher education admissions."

According, Kahlenberg respectfully asks this Court to hear his arguments in favor of rehearing en banc.

ARGUMENT

I. The Panel Erred in Dismissing the Ability of Race-Neutral Strategies to Produce Sufficient Racial and Ethnic Diversity.

In *Fisher v. University of Texas*, the U.S. Supreme Court held that in pursuing the compelling purpose of diversity, universities bear "the ultimate burden of demonstrating, before turning to racial classifications, that available workable race-neutral alternatives do not suffice." 113 S.Ct. 2411, 2420 (2013).

A. The Texas Top Ten Percent Plan ("TTPP") Is a "Workable" Race-Neutral Strategy.

1. It Produced Substantial Racial and Socioeconomic Diversity.

As the panel conceded, the TTPP, combined with socioeconomic affirmative action, produced as much—indeed slightly more—racial diversity in 2004 (4.82% African American and 16.21% Hispanic) than the use of race had in 1996 (4.37% African American and 15.37% Hispanic). Slip. Op. ("Op.") at 22-23. The TTPP also produced substantial socioeconomic diversity, an attribute that courts have valued alongside of racial diversity—and a feature lacking at selective colleges generally. Anthony P. Carnevale, Stephen J. Rose, & Jeff Strohl, "Achieving Racial and Economic Diversity with Race-Blind Admissions Policy," in *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* 192 (Richard D. Kahlenberg, ed., 2014). In 2013, for example, 21% of incoming students admitted through the TTTP were from

families making less than $40,000, compared with 6% of those admitted under discretionary admissions. William Powers, *The University of Texas at Austin: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175*, at 30 (Dec. 20, 2013).

2. Responding to Critiques of the Texas Top Ten Percent Plan.

Given the undeniable success of the TTPP in producing racial, ethnic and socioeconomic diversity, the panel then suggests two reasons why the plan is purportedly "unworkable." Op. at 23-30.

First, the panel oddly turns the success of TTPP in producing socioeconomic and racial diversity on its head by faulting the plan for not admitting more privileged students of color who attend more affluent integrated high schools and could serve as bridge-builders between races. Op. at 29. This subset of students is hardly absent on selective campuses. One study found that 86% of African American students at selective schools are middle or upper class. William Bowen and Derek Bok, The Shape of the River 341 (1998). National research suggests that even if grades and test scores were the sole basis for admissions, roughly one-third of the current population of African American and Latino students would be admitted, and that those from privileged backgrounds are most likely to qualify without consideration of race. Carnevale Rose, & Strohl, *supra*, at 194-95. Moreover, if the university is specifically seeking students who are bridge-

builders, racial preferences for privileged students of color are an unnecessary and blunt instrument. Instead, students of all races who demonstrated that in the past they have been leaders in fostering interracial dialogue could receive special consideration.

Second, the panel suggests that the TTTP is flawed because it admits students with "lower standardized test scores" noting that the SAT gap with those admitted through discretionary review ranged from 21 points in 2007 to 66 points in 2008. Op. at 23-24. Higher scores, the panel suggests, "predict[ ] . . . higher levels of . . . graduation." Op. at 29. But nowhere does the panel point to negative academic consequences associated with the TTPP in practice. In fact, in 2000, UT's president noted that "minority students earned higher grade point averages last year than in 1996 and have higher retention rates." Larry Faulkner, *The "Top Ten Percent Law" Is Working for Texas* (Oct. 19, 2000). Moreover, careful research by Sunny Niu and Marta Tienda of Princeton University found that between 1993 and 2003, black and Hispanic students admitted through the TTPP "consistently perform as well or better" than white students ranked at or below the third decile. Sunny X. Niu & Marta Tienda, *Minority Student Academic Performance under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 44 Educ. Evaluation & Pol'y Analysis 32 (2010).

B. Socioeconomic Affirmative Action Is a "Workable" Race-Neutral Strategy.

The panel also erred in dismissing socioeconomic affirmative action programs as a viable alternative. The panel failed to point to any evidence on the actual impact of UT's socioeconomic program and instead referenced a 1998 study by William Bowen and Derek Bok on the limitations of narrow *income-based* affirmative action programs. Op. at 34-34. The panel also implicitly suggested that socioeconomic affirmative action programs are flawed because they "conclude that skin color is no longer an index of prejudice." Op. at 35.

But research finds that when socioeconomic affirmative action programs are constructed using a wide variety of variables—not just parental income, but factors such as wealth/net worth, parental education, and neighborhood and school levels of poverty—they can produce substantial racial and ethnic diversity, precisely because this wider array of socioeconomic factors better captures the economic impact of ongoing and past racial discrimination than does income alone. For example, New York University's Dalton Conley finds that wealth, because it is handed down from generation to generation, better reflects the nation's legacy of slavery and segregation than does income. Dalton Conley, "The Why, What, and How of Class-Based Admissions Policy," in *The Future of Affirmative Action*, *supra*, at 209. Black Americans typically have incomes that are 70% of white incomes, but black wealth is just 10% of white wealth. *Id,* at 209. Likewise, in part

because of housing discrimination, black and Hispanic families with incomes in excess of $75,000 live in neighborhoods with *higher* poverty rates than white families earning less than $40,000. John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project, at 5 (July 2011).

Research suggests that a university that favors "strivers," students who have overcome a wide variety of socioeconomic obstacles—including low wealth and high neighborhood poverty levels—can produce substantial racial and ethnic diversity. For example, scholar Matthew Gaertner reports that at the University of Colorado at Boulder, a sophisticated socioeconomic affirmative action plan that gives considerable weight to economic disadvantage could achieve even more racial diversity than using race per se. Matthew Gaertner, "Advancing College Access with Class-Based Affirmative Action: The Colorado Case," in *The Future of Affirmative Action*, *supra*, at 181. Likewise, Georgetown University researchers Anthony Carnevale, Stephen J. Rose and Jeff Strohl found that using a variety of socioeconomic factors at the nation's most selective 193 institutions could yield a higher combined proportion of African American and Latino students than racial preference programs currently do. Carnevale, Rose & Strohl, *supra*, 192; *see also* David Leonhardt, *If Affirmative Action Is Doomed, What Next?* N.Y. Times, June 17, 2014.

C. Additional Race-Neutral Strategies Exist That Were Not Utilized by the University of Texas at Austin.

The panel also errs in concluding that "UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program." Op. at 22.

My study with Halley Potter of race-neutral strategies employed by ten leading universities that faced bans on using race found that universities employed a number of programs not used by UT. For example, the University of California at Berkeley, UCLA, the University of Georgia, and Texas A&M, after dropping race from consideration, all discontinued the use of legacy preferences for the children of alumni. Richard Kahlenberg and Halley Potter, A Better Affirmative Action, 26-61 (2012). This change in admissions policies can have a beneficial impact on racial minorities because legacy preferences disproportionately benefit white students. John Brittain and Eric Bloom, "Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions," in *Affirmative Action for the Rich* 127-32 (Richard D. Kahlenberg ed., 2010) Likewise, some institutions, such as the University of Michigan and the University of California, beefed up transfers from community colleges as a way of promoting racial, ethnic, and economic diversity, a strategy not employed by UT Austin. Kahlenberg and Potter, *supra*, 35, 53. These types of

actions could mitigate the extent to which discretionary admissions at UT, as the panel noted, are now disproportionately white. Op. 17.

Overall, the experience of the ten leading universities where race has been banned in admissions suggests that in the majority of cases (7 of 10), levels of both African American and Hispanic representation have been matched or exceeded with race-neutral strategies. Kahlenberg and Potter, *supra*, at 12. The panel's dismissive attitude toward race-neutral strategies is contradicted by the strongest social science research available.

CONCLUSION

The Court should hear this case en banc and reconsider the judgment of the panel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I 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. 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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