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 SUPREME COURT OF THE UNITED STATES

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION URGING REHEARING EN BANC

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus curiae brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), the undersigned counsel of record certifies that Amicus Curiae, Mountain States Legal Foundation, has no parent companies and has never issued any stock.

TABLE OF CONTENTS

Page

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

ARGUMENT 1

I. THE PANEL FAILED TO FOLLOW THE SUPREME COURT'S INSTRUCTIONS ON APPLYING STRICT SCRUTINY 1

II. THE PANEL'S DECISION APPLIES TO THOSE OUTSIDE THE ACADEMIC SETTING 7

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 7

Fisher v. Univ. of Texas at Austin,
09-50822, 2014 WL 3442449 (5th Cir. 2014) 4,5,6,7

Fisher v. Univ. of Texas at Austin,
133 S. Ct. 2411 (2013) 2,3,4,5,6,7

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 1

Regents of the Univ. of California v. Bakke,
438 U.S. 265 (1978) 2

United States v. Lee,
358 F.3d 315 (5th Cir. 2004) 2

Rules

5th Cir. R. 29 1

Fed. R. App. P. 29(b) 1

Fed. R. App. P. 29(c)(5) 1

Fifth Circuit Rule 29.2 ii

Fed. R. App. P. 26.1 ii

Fed. R. App. P. 29(c) ii

Fifth Circuit Rule 32.1 9

Fed. R. App. P 32(a)(7)(C) 9

Fed. R. App. P. 35(b)(1)(A) 1

Fed. R. App. P. 35(b)(1)(B) 7

Other Authorities

Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 Val. U. L. Rev. 535 (2014) 3

Danielle Holley-Walker, *Defining Race-Conscious Programs in the Fisher Era*, 57 How. L.J. 545 (2014) 2,3

Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2013 Cato Sup. Ct. Rev. 63 (2013) 3

John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of Fisher v. University of Texas at Austin*, 57 How. L.J. 963 (2014) 3,7

Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661 (2014) 3

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. MSLF can bring a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny.

ARGUMENT

I. THE PANEL FAILED TO FOLLOW THE SUPREME COURT'S INSTRUCTIONS ON APPLYING STRICT SCRUTINY.

This Court should grant the Petition for Rehearing En Banc because the panel's decision conflicts with the Supreme Court's decision above. *See* Fed. R. App. P. 35(b)(1)(A); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). (An inferior court "cannot vary [a mandate], or examine it for any other purpose than execution; or give any other or further relief; or review it . . . upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has

[1] This Brief is submitted pursuant to Fed. R. App. P. 29(b) and 5th Cir. R. 29. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

been remanded."); *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) ("Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court . . . ."). The Supreme Court instructed this Court on remand to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2421 (2013). In its decision, the panel failed to follow the Court's instructions and properly apply strict scrutiny.

The Court made clear that "[s]trict scrutiny must not be strict in theory but feeble in fact." *Id.* at 2411. The Court placed the burden on the University to prove "that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Id.* at 2420 (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978)). It directed this Court to perform a "searching examination" of the University's means of achieving the educational benefits of diversity. *Id.* Finally, it ordered this Court to determine whether "no workable race-neutral alternatives would produce the educational benefits of diversity. *Id.*

Many legal scholars correctly recognized the monumental importance of the Supreme Court's decision. Danielle Holley-Walker, *Defining Race-Conscious Programs in the Fisher Era*, 57 How. L.J. 545, 556 (2014) ("[*Fisher*] will likely be remembered for reshaping the narrow tailoring prong of the strict scrutiny standard

. . . ."); Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 673 (2014) ("[*Fisher*] narrows defendants' ability to satisfy narrow tailoring, making strict scrutiny even stricter than it was before."); Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 Val. U. L. Rev. 535, 553 (2014) ("If race-conscious affirmative action is to survive as a constitutionally permissible policy, lawyers will have to become more specific in the articulation of the diversity interest."); Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2013 Cato Sup. Ct. Rev. 63, 85 (2013) (In *Fisher*, the Supreme Court "took the opportunity to clarify the applicable standard in broad terms."); John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of Fisher v. University of Texas at Austin*, 57 How. L.J. 963, 977 (2014) ("It remains to be seen in *Fisher* how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test." (italics added)). The Court's decision strengthened the role of courts in cases challenging race-based government programs, and made clear that the burden is on the government to demonstrate the necessity of a race-based policy. *Fisher*, 133 S. Ct. at 2420; Danielle Holley-Walker, *supra*, 57 How. L.J. at 549 ("Justice Kennedy asserts that the narrow tailoring analysis requires courts to examine whether the use of race is 'necessary.' In order to meet the narrow

tailoring prong of the strict scrutiny standard, the University must show that they have exhausted race-neutral alternatives.").

The panel, however, did not follow the Court's clear instructions. The panel failed to analyze whether the race-based portion of the University's admission policy was necessary to achieve diversity by failing to properly analyze the race-neutral aspect of the University's admission policy, and by failing to analyze alternative, race-neutral admission policies.[2] *See Fisher*, 133 S. Ct. at 2420.

With regard to the Top Ten Percent Plan, the race-neutral aspect of the University's admissions policy, the panel recognized that the policy results in admission of a wide-range of students with various backgrounds. *Fisher*, 2014 WL 3442449 at *12. Despite this recognition, the panel adopted the University's argument that a race-neutral admissions policy did not achieve *enough* diversity, and needed to be supplemented with a race-conscious plan. *Id.* As explained by Judge Garza, the panel did not apply strict scrutiny:

> In effect, the University asks this Court to assume that minorities admitted under the Top Ten Percent Law do not demonstrate "diversity within diversity"—that they are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review.

[2] For in-state admissions, the University automatically accepts any Texas high school student in the top ten percent of his or her class. *Fisher v. Univ. of Texas at Austin*, 09-50822, 2014 WL 3442449, *1 (5th Cir. 2014). To fill the remaining seats available to in-state students, the University conducts a holistic review and purportedly ranks students based on a combination of an academic index score, based on test scores and grades, and a personal achievement index ("PAI") score, based on personal characteristics including race. *Id.* The personal index score is weighted slightly more than the academic score in the holistic review process. *Id.*

> Thus, the University claims, absent its race-conscious holistic admissions program, it would lose the minority students necessary to achieving a qualitative critical mass. But it offers no evidence in the record to prove this, and we must therefore refuse to make this assumption. Regrettably, the majority firmly adopts this assumption . . . .

Id. at *25 (Garza, J. dissenting).

Furthermore, the panel failed to analyze whether workable, race-neutral alternatives are sufficient to achieve diversity. "[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice." *Fisher*, 133 S. Ct. at 2420 (emphasis added). The panel looked at the University's scholarship and outreach programs in a purported attempt to analyze workable, race-neutral alternatives. *Fisher*, 09-50822, 2014 WL 3442449 at *8–9 (5th Cir. July 15, 2014). The panel stated that the goal of these two programs "'was to convince low income students that money should not be a barrier to attending college'" but concluded that the programs were not sufficient to achieve the University's diversity goals. *Id.* at *9.

This brief discussion of two race-neutral alternatives does not satisfy strict scrutiny. The panel failed to examine any other workable race-neutral alternatives. Even assuming that the panel was correct that the holistic review is necessary to achieve diversity, it never analyzed whether the racial component of the holistic

review is necessary.[3] The panel failed to consider what the holistic review process would look like if the University only considered the race-neutral components of diversity. The panel could have recalculated the personal achievement scores of applicants, excluding any score credited for race, and analyzed what effects, if any, the new calculations had on diversity. Instead, the panel disregarded its duty, and the instructions of the Supreme Court, and failed to apply strict scrutiny to the University's admission policy. *Fisher*, 2014 WL 3442449 at *26 (Garza, J., dissenting) ("Perhaps, based on the structure of the University's admissions process, it is possible that the use of race as a factor in calculating an applicant's PAI score incrementally increases the odds that a minority applicant will be admitted to a competitive college within the University. But hypothetical considerations are not enough to meet a state actor's burden under strict scrutiny."). Because the panel disregarded the Supreme Court's instructions, this Court should

[3] The panel concluded that, because there are test score gaps between races, "if holistic review was not designed to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Fisher*, 2014 WL 3442449 *at 8. This giant leap to a conclusion is suspect, and does not satisfy strict scrutiny, because the panel failed to consider any other race-neutral alternatives, *e.g.*, getting rid of the holistic review aspect and admitting based on the top fifteen percent of students from all Texas high schools. *See Id.* at *25 (Garza, J. dissenting) (disputing the University's conclusion that academic-based admissions do not achieve sufficient diversity). While the panel did not need to consider every conceivable race-neutral alternative, strict scrutiny requires that it consider more alternatives than the couple alternatives purportedly attempted by the university. *Fisher*, 133 S. Ct. at 2420 ("Although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, strict scrutiny does require a court to examine with care, and not defer to, a university's serious, good faith consideration of workable race-neutral alternatives." (internal quotations omitted)).

grant rehearing en banc.

II. THE PANEL'S DECISION APPLIES TO THOSE OUTSIDE THE ACADEMIC SETTING.

Furthermore, this Court should grant the Petition for Rehearing En Banc because of the exceptional importance of the case. *See* Fed. R. App. P. 35(b)(1)(B). The panel's opinion is not limited to university admissions policies, but applies to all race-based government programs. As the Supreme Court made clear, "higher-education affirmative action cases do not stand apart from 'broader equal protection jurisprudence,' . . . . Put simply, there is no special form of strict scrutiny unique to higher education admissions decisions." *Fisher*, 09-50822 at *22 (Garza, J., dissenting) (quoting *Fisher*, 133 S. Ct. at 2418).

As a result, the panel's analysis now provides an erroneous example of what constitutes "strict scrutiny" post-*Fisher*. The panel's failure to adequately analyze race-neutral alternatives is sure to affect judicial review of other race-based government programs. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); John C. Brittain, *supra*, 57 How. L.J. at 977 ("It remains to be seen in *Fisher* how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test." (italics added)). The Supreme Court made clear that such a program can only be constitutional if it is necessary to achieve a compelling

state interest, and only if no race-neutral alternative is sufficient to achieve that compelling state interest. *Fisher*, 133 S. Ct. at 2420. The panel's opinion, however, erroneously concludes that a court only needs to take a cursory look at race-neutral alternatives before upholding a race-based government program. In order to ensure that courts continue to apply strict scrutiny correctly, this Court should grant rehearing en banc.

CONCLUSION

This Court should grant the petition for rehearing en banc.

DATED this 5th day of August 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P 32(a)(7)(C) and Fifth Circuit Rule 32.1, this brief is proportionately spaced, has a typeface of 14 points or more (12 points or more for footnotes), and is fewer than seven and a half pages.

DATED this 5th day of August 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 this 5th day of August 2014, which caused all counsel registered with the system to be served electronically.

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