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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, PROJECT 21, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT ABIGAIL FISHER'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

No. 09-50822

Fisher, et al. v. University of Texas at Austin, et al.

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons 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.

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INTRODUCTION

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Pacific Legal Foundation, Center for Equal Opportunity, Project 21, Reason Foundation, and Individual Rights Foundation submit this brief amicus curiae in support of Plaintiff-Appellant Abigail Fisher's Petition for Rehearing *En Banc*. All parties have consented to the filing of this brief.[1]

INTEREST AND IDENTITY OF AMICI CURIAE

Pacific Legal Foundation, Center for Equal Opportunity, Project 21, Reason Foundation, and Individual Rights Foundation have filed multiple amici curiae briefs throughout the course of this litigation. All organizations believe in, and advocate for, equality under the law and oppose governmental classifications that treat individuals differently on the basis of race.[2] Amici are familiar with the issues and the scope of their presentation in this case. Amici believe their brief will aid the Court in its consideration of the issues presented in this case and ask the Court to grant the Petition for Rehearing *En Banc*.

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[1] Pursuant to Fed. R. App. Proc. 29(c)(5), Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The interests and identities of each amicus party are set forth more fully in the accompanying motion.

THE PANEL FAILED TO SHOW THAT THE UNIVERSITY'S RACIAL PREFERENCE WAS NARROWLY TAILORED TO ACHIEVING THE EDUCATIONAL BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY

The *Grutter* Court sanctioned a compelling interest in "the educational benefits that flow from a diverse student body" at the University of Michigan Law School. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). Last term the Supreme Court clarified that "educational benefits" must be proven at each institution that endeavors to use race when selecting students for admission. "Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

The panel opinion ignores this requirement and assumed that if there were compelling educational benefits to the use of racial admission preferences at the University of Michigan Law School in the early 2000s, then there are compelling educational benefits to adding racial preferences to the University of Texas's undergraduate admission process a decade later. *See Fisher v. Univ. of Tex. at Austin*, No. 09-50822, 2014 WL 3442449, at *15 (5th Cir. July 15, 2014) (claiming the race-conscious component of the University's admissions plan contributes "to its academic mission—as described by *Bakke* and *Grutter*."). Because the Panel failed to properly scrutinize the purported benefits that flow from the race-conscious

component of the University's admissions plan, the Petition for Rehearing *En Banc* should be granted.

A. The Educational Benefits that Flow From the University's Race-Conscious Admissions Plan Are Highly Dubious

There is ample reason to doubt whether the evidence relied upon by the *Grutter* Court for its finding a compelling interest in the educational benefits flowing from diverse student body can apply to the University's invocation of racial preferences here. In the years since that opinion, new research has been published that significantly questions the benefits that accrue from a diverse student body. *See*, *e.g.*, Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 425-30 (2005) (collecting studies that the social science evidence purporting to tout diversity's educational benefits was and is seriously flawed); John Rosenberg, *"Diversity" Research ~~Advances~~ ~~Progresses~~ Accumulates*, Discriminations, Feb. 6, 2010.[3] But even assuming the continued validity of the research underlying the educational benefits of the a diverse student body at the University of Michigan law school in 2003, those educational benefits of considering race cannot be assumed to be the same for all disciplines at all places at all times.

[3] *Available at* http://www.discriminations.us/2010/02/"diversity"-research-advances-progresses-accumulates/.com (last visited July 30, 2014).

There are many reasons to find that the University's use of race differs from that in *Grutter*. Unlike *Grutter*, the reason racial preferences are being used here is not related to the University's inability to attain a critical mass through race-neutral means. To the contrary, racial preferences are needed here because the Top Ten Percent Plan (Plan) admits "too many" lower-class black and Latino students.[4] *See Fisher*, 2014 WL 3442449, at *10-*12. Are the incremental benefits of preferring some upper-class minority students really necessary to secure the educational benefits of a diverse student body? The panel never answers that question, but instead incorrectly assumes that this marginal increase in racial/economic diversity is "indistinguishable" from the interest recognized in *Grutter*. *Id.* at *13.

It is quite true that one cannot assume that all African Americans and all Latinos think alike or have the same backgrounds. There is nothing intrinsic in racial categories that assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003). But individual differences are precisely the reason that all stereotyping, preference, and discrimination based on race should be rejected—it is not a reason to overlay racial preferences on top of an already racially

[4] Although what the University argues in the courts is noticeably different from what it says to the public. *See* Bill Powers, *Op-Ed: Why Schools Still Need Affirmative Action*, National Law Journal, *available at* http://www.nationallawjournal.com/id=1202665526678/OpEd-Why-Schools-Still-Need-Affirmative-Action (last visited Aug. 4, 2014) (arguing numerous reasons for the University's use of racial preferences, none of which are diversity within diversity).

diverse student body. And there is no reason to think that the educational benefits that result are so clear and overwhelming that it is "necessary" for the University to discriminate against student applicants.

B. Any Benefits that Flow from the University's Race-Conscious Admissions Plan Must Be Weighed Against the Costs

Because the *Fisher* Court explained that a narrow tailoring inquiry requires that universities prove racial preferences are necessary to secure the educational benefits of a diverse student body, *see Fisher*, 133 S. Ct. at 2420, it follows *a fortiori* that those benefits must outweigh the costs. And the costs of racial preferences are inherent, undeniable, and well-known. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007) (plurality op.); *see also Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638-39 (2014) (Roberts, C.J., concurring) (referring to the differing views on the costs and benefits of racial preferences). Government imposed racial classifications tear at the very fabric of our society, dehumanize us as individuals, and significantly hamper the very students they are designed to protect.[5]

The costs of racial preferences are many and widely recognized by the courts.

[5] For a more comprehensive list of the costs of racial preferences *see* Clegg, *Attacking Diversity*, *supra*, at 435-36.

See, e.g., *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (discussing harms of racial preferences); *Grutter*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) (same); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (same); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (same). The specific costs added in the higher education context must be weighed. Due to space limitations, amici will only discuss one of those costs—mismatching individuals and institutions. "Mismatch" has been widely discussed in recent years, *see* Richard H. Sander & Stuart Taylor Jr., *Mismatch* (2012)—yet remarkably was not mentioned at all in the panel's opinion.

Many studies reveal that racial preferences in college admissions result in an "academic mismatch" that leads to lower grades and higher drop-out rates among minority students. *See, e.g.*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (describing academic mismatch at law schools); Rogers Elliott, *et al.*, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, Research in Higher Education, Vol. 37, No. 6 (1996) (mismatch at more selective colleges and universities). Academic mismatch begins when elite universities lower their academic standards to admit a more racially diverse student population. Schools one or two academic tiers below must do likewise, since the minority students who might have attended those lower ranking universities based on their own academic record are instead attending

the elite colleges. The result is a significant gap in academic credentials between minority and nonminority students at all levels.

Even supporters of racial preferences have had to acknowledge that students who attend schools where their academic credentials are substantially below those of their fellow students will tend to perform poorly. "College grades [for students admitted based on race] present a . . . sobering picture." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998). "The grades earned by African-American students . . . often reflect their struggles to succeed academically in highly competitive academic settings." *Id.*

These struggles tend to result in shifting majors as minority students find the coursework too advanced given their skill level. *See* Elliott, *et al.*, *supra*; Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003) ("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools."). The lower an African American student's academic credentials are relative to the average student at his undergraduate college or university, the lower his grades are likely to be and the less likely he is to graduate. Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. Hum. Resources 299, 301 (2000).

Racial preferences in college admissions impose significant costs on minority students. No matter where academic mismatch occurs, lower grades lead to lower levels of academic self-confidence, which in turn increases the likelihood that minority students will lose interest in continuing their education and drop out. The panel decision failed to consider the costs of racial preference—including mismatch—when determining that the University's admissions policy was narrowly tailored, and for this reason, the Court should grant Fisher's Petition for Rehearing *En Banc*.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court grant Plaintiff-Appellee Abigail Fisher's Petition for Rehearing *En Banc*.

DATED: August 5, 2014.

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I hereby certify that on this 5th day of August, 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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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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DATED: August 5, 2014.