No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authorities

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amici, *e.g.*, *FCC v. Fox TV*, No. 10-1293 (U.S. argued Jan. 10, 2012); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

The ACLJ strongly believes in the unity of all people in one human nature, from fertilization through natural death. Just as there is no difference in kind between prenatal, neonatal, adolescent, or adult human beings, there is likewise no difference in kind between black, white, Asian, or other ethnic groups of human beings. There is one race – the human race. "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment). "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The ACLJ therefore opposes any

---

[1]The parties in this case have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

government effort to attach consequences to racial labels for individuals.

SUMMARY OF ARGUMENT

There is only one "race" of humans – the human race. Government efforts to pigeonhole groups of people into racial boxes – what Chief Justice Roberts called a "sordid business," *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part) – is both ultimately incoherent (as people of mixed ethnicity illustrate) and the hallmark of racism (as with the Nazi efforts to define Jews and the segregationist efforts to define "colored" people). The use of racial labeling by the University of Texas is incompatible with one of the basic premises of the Constitution: the inherent, equal dignity of all persons.

ARGUMENT

I. GOVERNMENT HAS NO BUSINESS ATTACHING SIGNIFICANCE TO RACIAL LABELS.

When the government *forbids* the differential treatment of individuals on the basis of racial labels, it properly sets itself against race discrimination. But when the government *undertakes* to treat people differentially on the basis of racial labels, it runs afoul of the norm of color-blindness that should be the touchstone of government action in light of the Equal Protection Clause of the Fourteenth Amendment.

In particular, a government's use of racial classifications as qualifications for preferences or

disabilities suffers from two glaring flaws: first, such labeling is ultimately incoherent, as racial categories are both arbitrary and porous; and second, such labeling, and the concomitant need to decide who fits into which racial "box," associates the government with some of the worst historical pedigrees in human history.

A. Racial Categories Are Arbitrary and Ultimately Incoherent.

The enforcement of any system of racial preference necessarily requires a determination of who counts as belonging to which race. "When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

In a world of completely segregated populations, it might be possible to maintain the fiction that there are intrinsically distinct, identifiable ethnic groups such as "black" and "white," or "Hutu" and "Tutsi," or "Asian" and "Hispanic." But in a cosmopolitan world, such pretensions are exposed as utterly illusory. Countless children are born each day with a heritage drawing upon a host of varied ethnic and cultural backgrounds. Indeed there are websites devoted to identifying and celebrating such "multiracial" children. *E.g.*, The Daily Multiracial, http://dailymulitracial.com (listing, and providing ethnic background information for, prominent individuals of mixed ethnic heritage, including Queen Noor, Steve Jobs, Carol Channing, Bob Marley, Naomi Campbell, Bruce Lee, Salma Hayek, Booker T. Washington, Lani Guinier, Eddie

Van Halen, Cher, Ben Kingsley, Jennifer Beals, Tiger Woods, Halle Berry, Jim Thorpe, Carly Simon, Barack Obama, and Lena Horne); Multiracial Celebrities, www.blackflix.com/articles/multiracial. html (similar); http://multiracialidentity.com/ (documentary on "multiracial movement"). Human beings cannot be pigeonholed into racial boxes, and it is offensive to insist that the government can – or must, as for purposes of state college admissions – do so. As the Supreme Court of California stated:

> If the [government rule assigning significance to racial categories] is to be applied generally to persons of mixed ancestry the question arises whether it is to be applied on the basis of the physical appearance of the individual or on the basis of a genealogical research as to his ancestry. If the physical appearance of the individual is to be the test, the [rule] would have to be applied on the basis of subjective impressions of various persons. Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the [rule] to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of [the pertinent ethnic groups of] ancestors govern the applicability of the statute. Is it any trace of [the pertinent ethnic] ancestry, or is it some unspecified proportion of such ancestry that makes a person a [member of the pertinent ethnic group]?

Perez v. Sharp, 32 Cal. 2d 711, 738, 198 P.2d 17, 28 (1948).

For that matter, the very notion of discrete human "races" is, at best, highly questionable. As this Court unanimously observed:

> There is a common popular understanding that there are three major human races – Caucasoid, Mongoloid, and Negroid. *Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary* and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. *Clear-cut categories do not exist*. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that *racial classifications are for the most part sociopolitical*, rather than biological, in nature.

St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (emphasis added) (citing extensive authorities). As Judge Garza explained below, "The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races." *Fisher v. University of Texas at Austin,* 631 F.3d 213, 264 (5th Cir. 2011) (Garza, J., specially concurring) (footnote omitted).

To be sure, individuals can take great pride in asserting their own ethnic identities, whether Irish, African-American, Italian, Chinese, or what have you. But it is an entirely different matter *for the government* to attach legal significance to such a label, whatever its source.[2]

B. The History of Government Racial Classification of Individuals Is Not One that Should Be Imitated.

---

[2]It is no answer for the government to have individuals self-designate their race for purposes of government action. (UT currently asks applicants to "select the racial category or categories with which you most closely identify," https://www.applytexas.org/adappc/html/preview12/frs_1.html, providing five categories.) Even if the government defers completely to an individual's unfettered self-description, the government is still conferring official significance upon one's status as, e.g., "black" or "Semitic." And if the government exercises any supervision over the racial designations, it raises the sorry prospect of state agents asserting, for example, that someone is "too white" to qualify for minority status (or vice-versa). This is not an unrealistic scenario, even in the modern world. *E.g.*, Rick Chandler, "Driver sues NASCAR, says he was 'too Caucasian' for diversity program," http://offthebench.nbcsports.com/2012/04/20/driver-sues-nascar-says-he-was-too-caucasian-for-diversity-program (Apr. 20, 2012) (driver of Puerto Rican and Spanish descent sues over exclusion from program for minorities); Mem. in Support of Deft. Access Marketing & Communication LLC's Mot. for Sum. Judg. at 12 n.7, *Rodriguez v. NASCAR*, No. 3:10-cv-00325 (W.D.N.C. Jan. 17, 2012) ("Plaintiff did not fit the purpose of the affirmative action program because he looked like a Caucasian male"). *See also* Michael Olesker, "When 'black' apparently was not quite black enough," Baltimore Sun (Sept. 3, 2002) (African-Lebanese plaintiff sues, alleging failure to be hired for "diversity" position at college because he was "not visibly black").

Governments have tried before to undertake the "sordid business" of "divvying us up by race," *LULAC*, 548 U.S. at 511 (Roberts, C.J., joined by Alito, J., concurring and dissenting) – and the results have not been pretty.

1. Germany and Rwanda

The ugliest examples are associated with genocide.

In Germany in the early 20th Century, for example, the national regime composed detailed formulae for determining who would or would not be deemed Jewish. As Justice Stevens acidly observed, "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . ." *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (citing German law defining Jews by ancestry or by combination of ancestry and marriage or religious practice). The horrific steps following this categorization led to the deaths of millions of Jews.

In Rwanda, racial labeling immensely facilitated the genocidal massacre of hundreds of thousands of Tutsis in 1994. Mandatory government identification cards listed bearers as belonging to supposedly distinct tribal groups, most notably either Hutu or Tutsi. "[T]he designation 'Tutsi' spelled a death sentence at any roadblock." Jim Fussell, "Group Classification of National ID Cards as a Factor in Genocide and Ethnic Cleansing," Presentation to the Seminar Series of the Yale University Genocide Studies Program (Nov. 15,

2001), *available at* www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/.

2. United States

The United States has had its own unhappy experiments with government conferral of significance upon racial labels. In particular, enforcement of racial segregation and miscegenation laws required the government to attach legal significance to the question what racial "box" a person belonged to.

In *Morgan v. Virginia*, 328 U.S. 373, 382 (1946), this Court observed: "In states where separation of races is required . . ., a method of identification as white or colored must be employed." *See also id.* at 383 & n.28 (listing as examples tests for "any ascertainable Negro blood" and "one-fourth or more Negro blood"). Lower courts consequently had to wrestle with the ultimately arbitrary question, "Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

The case of *Wall v. Oyster*, 36 App. D.C. 50 (1910), is illustrative. The *Wall* case involved the use of racial labels to determine admission to educational institutions. In the District of Columbia, the government maintained separate schools for "white" and "colored" children. *Id.* at 53. A child named Isabel Wall began attending the "white" school, but the principal excluded her "shortly thereafter . . . on the ground that she was a 'colored child,'" despite the fact that Isabel asserted "she is a white child in personal appearance, and is so treated and recognized by her neighbors and friends." The trial court acknowledged that "'[T]here was to be observed of the child no

physical characteristic which afforded ocular evidence suggestive of aught but the Caucasian,'" but ruled that because "'the child is of negro blood of one eighth to one sixteenth . . . her racial status is that of the negro [and s]he is, therefore, "colored," according to the common meaning of the term . . . .'" *Id*. at 50-52.

The D.C. Court of Appeals affirmed. That court observed that "the duty was necessarily devolved . . . upon the board of education to determine what children are white and what are colored whenever that question shall arise in a particular case." *Id*. at 54. The court noted the variety of approaches taken by the states: "In some States 'colored persons' are declared by the statute to be those having a certain proportion of negro blood in their veins, – in some instances one fourth; in some one eighth; in some one sixteenth; and in others any admixture." *Id*. at 56. Since Congress had provided no such mathematical definition, the appeals court believed itself "compelled to ascertain the popular meaning of the word 'colored.'" *Id*. at 57. After reviewing the approach taken in several cases and consulting the dictionary, the court concluded that "the word 'colored,' as applied to persons or races, is commonly understood to mean persons wholly or in part of negro blood, or having any appreciable admixture thereof." *Id*. at 58.

The *Wall* court's struggle with the delineation of racial categories was by no means unique. Other courts undertook similar challenges. *E.g.*, *State ex rel. Farmer v. Board of School Comm'rs*, 226 Ala. 62, 145 So. 575 (1933) (upholding exclusion of creole children from "white" school and their relegation to "colored" school, and discussing similar precedents and policy of racial separation); *Weaver v. State*, 22 Ala. App. 469, 471 (1928) (miscegenation prosecution) ("It was proper to

prove that defendant's grandfather had 'kinky hair.' This is one of the determining characteristics of the negro. This also applies to the questions involving the nose and other features. It is proper in a case of this kind to prove the race of defendant by description of any or all the characteristics belonging to the negro race, and even a photograph has been held to be admissible"); *State v. School Dist. No. 16*, 154 Ark. 176, 179 (1922) ("it cannot be said there was no substantial evidence tending to show a trace of negro blood in the veins of said children"); *State v. Treadway*, 126 La. 300, 52 So. 500 (1910) (miscegenation prosecution) (extensive treatment of distinction between "Negro" and "colored" to determine that an "octoroon" was not a "Negro"); *Messina v. Ciaccio*, 290 So. 2d 339 (La. App. 1974) (birth certificate designation of race) (discussion of imprecision of various racial terms). *Cf. McLaughlin v. Florida*, 379 U.S. 184, 187 (1964) ("At the trial one of the arresting officers was permitted, over objection, to state his conclusion as to the race of each appellant based on his observation of their physical appearance").

These official excursions into racial classification rightly strike the modern mind as appallingly racist and insensitive to the fundamental humanity of all persons, regardless of skin color, features, or ancestry. "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting).

In the present case the University of Texas, a governmental entity, gives significance – and thus potentially dispositive significance – to a prospective student's racial label. Ishop Dep. at 19 (JA 169a). Indeed, the applicant's race appears on the front page

of the application. *Id*. *See also* https://www.applytexas.org/adappc/html/preview12/frs_1.html (sample current application form). That the university professes a benign motive for this exercise does not change the fact that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove v. Klutznick*, 448 U.S. at 534 n.5 (Stevens, J., dissenting). Regardless of whether the government itself makes the racial labeling determination or puts upon the individual the task of self-labeling (with or without any government oversight to forestall manipulation of the system, *see supra* note 2), it is the *government* that ultimately says the label *matters*. That is inconsistent with the Fourteenth Amendment.

CONCLUSION

"The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). This Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Amicus Curiae

May 29, 2012