



## BLACK MALE INITIATIVE CONVENING

on *Fisher v. University of Texas*

Hosted by The Kirwan Institute for the Study of Race and Ethnicity &  
Todd Anthony Bell National Resource Center on the African American Male

At The Ohio State University  
September 17, 2012

## History Of The BMI *Amicus* Brief Project Black Male Initiative Leadership Convening, September 17, 2012

On August 13, 2012, a National Coalition of Black Male Achievement Initiatives (BMIs) and Black Men and Boys projects filed an *amicus* (friend of the court) brief in *Fisher v. University of Texas*, a high profile college admissions case currently pending before the United States Supreme Court. The BMI *amici* urged the Court to uphold the procedures of the University of Texas at Austin (UT), which permit admissions officials to consider race along with a number of other factors when putting together a diverse entering class. Abigail Fisher challenged the constitutionality of those procedures after being denied admission, claiming she was rejected due to her race (Fisher is white). The BMI brief was filed along with dozens of others, making the case one of the most heavily briefed cases in Supreme Court history.

Below follows a history of the events that led the BMI Coalition to file its brief, a discussion of the significance of the *Fisher* case, a synopsis of the main arguments included in the BMI Coalition brief, and a concluding section on the road that lies ahead. Coalition of BMIs decides to bring status of Black males before the U.S. Supreme Court in the *Fisher* case.

In February 2012, the U.S. Supreme Court agreed to hear the arguments of Petitioner, Abigail Fisher, a white applicant to the University of Texas at Austin, who had claimed unsuccessfully before the federal courts in Texas that she was unconstitutionally denied a seat in UT's freshman class due to race.

After the Supreme Court agreed to hear the case, several conference calls coordinated by the NAACP Legal Defense Fund and the Lawyers Committee were held to coordinate *amici* briefs to be filed in support of Respondent, UT, defending the constitutionality of its holistic, race-conscious admissions procedures. After participating in a number of those calls, Sharon Davies, Executive Director of the Kirwan Institute for the Study of Race & Ethnicity and the John C. Elam/Vorys Sater Professor of Law at The Ohio State University, reached out to the leaders



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of a number of the nation's foremost initiatives, centers and projects doing work in the area of Black male achievement to gauge their interest in including the unique perspective of Black males in the briefing efforts.

Discussions about the possibility of a BMI brief included, among others, Dr. James L. Moore, Executive Director of the Todd Anthony Bell National Resource Center on the African American Male at The Ohio State University, Elliott Dawes, University Director of the City University of New York Black Male Initiative (CUNY BMI), Prof. Shaun R. Harper, Director of the Center for the Study of Race & Equity in Education at the University of Pennsylvania, and the leadership of the 2025 National Network for Black Men and Boys, coordinated by Shawn Mooring, its Network Manager.

Unlike the voices of leading civil rights organizations like the NAACP, the National Urban League and the Lawyers Committee, BMIs had not previously participated in any affirmative action case as a cognizable group. Davies discussed with the BMI leaders the value that a brief focused on the obstacles faced by Black males in obtaining access to the nation's most selective universities might add to the other *amicus* briefs being planned.

When consensus was reached and leaders of several of the BMIs and BMB projects indicated that they desired to participate, the Kirwan Institute agreed to lead the briefing effort on their behalf. The 2025 National Network for Black Men and Boys agreed to connect Kirwan with its network of members and to help coordinate communications between Kirwan and the BMI group as the brief was being prepared.

Abigail Fisher filed her "merits brief" with the U.S. Supreme Court on May 21, 2012. All *amicus* briefs in support of her position were due to be filed by May 28, 2012. On or before that date 17 briefs were filed supporting Fisher's claims, and 2 additional briefs were filed ostensibly in support of neither party but which are fairly read to support Fisher's position as well. UT filed its merits brief on August 6, 2012. All *amicus* briefs in support of the University's position were due to be filed by August 13, 2012.



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The staff of the Kirwan Institute had begun to gather research that would inform the brief in June 2012, in consultation with the 2025 Network and other BMI leaders. Sharon Davies took a leading role drafting the amicus brief, with the help of several members of Kirwan's staff, including Brookes Hammock, Cheryl Staats, Jason Reece, Christy Rogers and Tom Rudd. Tracie Ransom, a Senior Associate with Porter Wright Morris & Arthur LLP in Columbus, OH, also participated in drafting the brief and served as Counsel of Record for the BMIs. Drafts of the BMI Coalition brief were circulated in late July, and a final brief for the BMI Coalition was completed and filed on August 13, 2012, along with 73 other briefs submitted in support of UT's arguments. During this period the 2025 Network and the Kirwan Institute also had preliminary discussions about building a communications strategy to accompany the filing of the brief.

The U.S. Supreme Court will hear the oral arguments of counsel for the parties on October 10, 2012. The Court can reasonably be expected to hand down its decision later in the term, possibly as late as June 2013.

### **The significance of *Fisher v. University of Texas***

The highest federal appellate court in Texas previously rejected most of Abigail Fisher's arguments before the U.S. Supreme Court agreed to reconsider them, with one important exception. In her brief before the U.S. Supreme Court, Fisher has urged the Court to overrule or significantly modify the current controlling authority of its 2003 decision in *Grutter v. Bollinger*. Because Fisher failed to advance this argument when the case was before the federal courts in Texas, UT has opposed the argument as falling outside the scope of the precise question the Supreme Court agreed to hear when it granted Fisher's petition. Fisher's argument challenging the validity of the *Grutter* decision places in jeopardy admissions processes similar to those used by University of Texas/Austin by colleges and universities around the country.



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Regarding the current state of the law, the Court's 2003 decision in *Grutter* upheld the constitutionality of race-conscious admissions processes in higher education, but it also imposed a great number of limitations on universities that choose to consider the race of applicants when deciding whether to admit them. Most important for present purposes, the Court warned in *Grutter* that race conscious admissions are only constitutional because universities have a "compelling interest" in putting together and reaping the benefits of a diverse student body. Despite this compelling interest, the *Grutter* Court also held that that any time a university chooses to consider a person's race in an admissions decision, it must do so only as a part of a "holistic" review of the applicant's file. That means admissions committees may consider an applicant's race, but only as one of a multiple of factors, because many other characteristics can also contribute to the diversity of a freshman class. The Court stressed that such a race-conscious review of an applicant's file must not be "mechanistic" or designed to admit a pre-set number of minorities (a quota) into a class. In other words, universities must "narrowly tailor" their use of race as much as possible in pursuit of the "compelling interest" it has in creating a diverse student body.

Fisher is now arguing that the Court should either overrule *Grutter* and disallow the use of race in admissions decisions altogether, or that it should severely curb the circumstances in which race can be considered because a "strict" look at the ways in which universities actually use race in admissions decisions (Fisher thinks) shows that these uses have not been "narrowly tailored" enough.

When the issue of race-conscious admissions processes in higher education was last before the Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* cases, two *amici* briefs in particular submitted in support of the University of Michigan's admissions procedures seemed to exert special influence on the Court's decision to uphold carefully conducted race-conscious admission practices: 1) a brief from former high-ranking officers and civilian leaders of the military forces, and 2) a brief from 65 leading American business that recruited from graduates



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of leading institutions of higher education. Two similar briefs have been filed in the *Fisher* case urging the retention of holistic, race-conscious admissions: one filed by a group of high ranking former military officers, including Gen. Colin Powell, and a second brief filed by a number of Fortune 100 companies. Kirwan has prepared a separate analysis discussing these briefs in greater detail.

Given the current composition of the U.S. Supreme Court, and the fact that one of its more liberal members, Justice Elena Kagan, must recuse herself from the case (Kagan was involved in the case when it was before the federal courts in Texas prior to her appointment to the U.S. Supreme Court), there is cause for real concern that *Fisher* could bring an end to affirmative action in higher education.

Regardless of the outcome in *Fisher*, the case will provide many opportunities to deepen the nation's understanding of how social advantage and disadvantage is created through a system of the interacting and unequal structures that surround the lives of the nation's children. A more nuanced understanding of how racial advantage and disadvantage is produced is needed to help dispel the widely-held oversimplified belief that people succeed or not based solely on their own determination and hard work.

The BMI Coalition brief.

The brief filed by the BMI Coalition urges the Court to uphold the admissions procedures of the University of Texas (UT) which permit admissions officials to consider race along with a number of factors when putting together a diverse entering class, and argues that a contrary decision could dramatically narrow the pathways to college for underrepresented minorities, particularly young Black males who are especially vulnerable to exclusion.

The BMI brief urges the Supreme Court to examine the low numbers of African American males currently enrolled at selective colleges and universities before deciding whether to prevent admissions officers from considering race along with other aspects of an applicant's biography when putting together a diverse entering class. Studies of college diversity rarely



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uncouple information about a student’s race or ethnicity from his gender, the BMI brief notes. This obscures the fact that—even with the use of holistic race-conscious review—the numbers of African American males currently enrolled at selective universities are already distressingly low. “As a percentage of the student bodies at selective flagship universities,” the brief states, a 2006 survey revealed, “the average black male enrollment rate at these institutions was a stunning 2.8%.”

The brief proceeds in two parts. Part I relies on the compelling state interest in student body diversity (which the Court has repeatedly reaffirmed) as the basis for its argument in support of UT’s procedures. This part of the brief emphasizes that the quality of the college learning environment is enriched for all when students from various racial and ethnic backgrounds have the chance to study and grow together, and that the inclusion of meaningful numbers of underrepresented minorities on our college campuses ensures that students will be better prepared to participate fully in our country’s civic life. Integrated classrooms are thus fundamental to the nourishment of good citizenship and to the health of our democracy. As the nation’s demographics move toward “majority minority” in the middle of this century, this is more critical than ever before. Unfortunately, public colleges and universities have struggled to include meaningful numbers of Black and Latino students, particularly Black males, in their entering classes. Holistic review of the files of applicants, including the consideration of race, has been one of the most potent tools for keeping the doors of our universities open to these students, and attracting them inside. Therefore, Part I of the brief urges the Court to reaffirm once again the constitutionality of that essential tool.

The BMI brief urges the Supreme Court to uphold the admissions procedures of the University of Texas at Austin (UT) which permit admissions officials to consider race along with a number of other factors when putting together a diverse entering class. The brief notes that, in Fall 2009, “only 1.79% of UT’s full-time first-time undergraduates were Black males (129



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Black male freshmen out of 7,199)." The elimination of race-conscious admissions procedures will make this crisis even worse, the BMI brief argues.

Beyond UT's interest in student body diversity, the brief also urges the Supreme Court to recognize that states have an interest in addressing the harmful effects of racial isolation and the severely disadvantaged social conditions that surround and negatively impact the lives of many of their African American residents. African Americans continue to be disproportionately isolated from educational, economic and social opportunity to a degree not experienced by any other racial or ethnic group, the BMI brief argues, and states have a compelling interest in reducing conditions that impair the equal opportunity for advancement of their residents. Failure to address such social conditions imperils the well-being of all of a state's residents. "These enduring patterns of social inequality will worsen if pathways to academic opportunity for Black youth are blocked," the brief argues.

September 17, 2012 BMI Leadership Convening

To prepare the BMI Coalition Leadership for the opportunities that accompany the filing of its brief, the Todd Anthony Bell Center and the Kirwan Institute invited signatories to the brief and a select group of their supporters to meet at Ohio State University in Columbus, Ohio on Monday, September 17, 2012 to discuss next steps. The idea behind the convening is to disseminate materials prepared by the Kirwan Institute that may be helpful to the BMI leadership when engaging their stakeholders and constituencies around *Fisher* in the lead up to and in the aftermath of the oral arguments on October 10, 2012. The convening will also give the BMI leadership an opportunity to build a communications and action strategy that deepens understanding of the challenges that Black males in America face in multiple domains.



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