November 18, 2015

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Harris:

We write in our individual capacities as private citizens and not on behalf of the eight-member U.S. Commission on Civil Rights regarding both the amicus curiae brief that we recently submitted in *Fisher v. University of Texas* (No. 14-981)(*Fisher II*) and the docket entry for that brief.

As our brief carefully points out in the first paragraph on page 1, we filed the brief "in our individual capacities as private citizens." The very first sentence of that first paragraph refers to us as "two members of the eight-member U.S. Commission on Civil Rights," thus making it doubly clear that we are not a majority of the Commission and not purporting to act for the Commission.

Throughout the brief we refer to ourselves with the plural term "Amici," since there are two of us. We never refer to ourselves as "the Commission" or by the singular "Amicus" (which might be taken as a reference to the U.S. Commission on Civil Rights).

The cover reinforces the fact that the brief was intended as *our* brief and not the official brief of the U.S. Commission on Civil Rights. In listing our address, telephone number and email address, each of us used our regular full-time place of business and not the Commission's official place of business. For one of us (Heriot), a law professor, that full-time place of business is the University of San Diego School of Law; for the other (Kirsanow), a practicing attorney, it is the Cleveland law firm of Benesch, Friedlander, Coplan & Aronoff, L.L.P. The brief's title refers to us by our first and last names and also as "Members of the U.S. Commission on Civil Rights," because that is what we have in common and because that is where we derived much of the specific expertise that we were attempting to convey to the Court.[1]

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[1] We note that no one denies that we have the authority to refer to ourselves as members of the U.S. Commission on Civil Rights so long as it is clear that we are not speaking on behalf of the Commission. Similarly, no one denies that we (and all persons) have the authority to cite and discuss the Commission's reports. While it shouldn't affect our authority to cite those reports, the arguments made in our brief generally comport with positions taken by the Commission as a whole in two published reports, *Affirmative Action in American Law Schools* (2007) and *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers* (2010). Both these reports were approved prior to the appointment of most of

We do not believe that anyone (least of all a Justice of the U.S. Supreme Court or a law clerk) has been misled into believing that our brief is the official brief of the U.S. Commission on Civil Rights (which we understand does not itself have the authority to file briefs).[2] Indeed, we believe that if anyone who peruses the brief can honestly claim to have been misled, there is just no hope for that individual. Nevertheless, at our two most recent meetings, our Commission colleagues have expressed concern that our brief is "improperly confus[ing]" and that it raises "ethical considerations."[3] At our October 14, 2015 meeting, one of our colleagues even inquired into the possibility of sanctions against us. (See Preliminary Transcript of October 14, 2015 Meeting of the U.S. Commission on Civil Rights at 73-74). Also in a letter to Solicitor General Donald B. Verrilli, Jr. adopted by the Commission at its November 18, 2015 meeting (unsigned version as adopted attached), our colleagues have expressed concern that the Court docket's description of our brief is misleading.

Given that we have clearly declared on the first page of our brief that it was filed "in our individual capacities as private citizens," we would ordinarily pay no attention to careless talk about sanctions or misrepresentations. But alas, those who write or speak about controversial issues can't be too careful these days. Recent troubling events, both inside and outside the Commission, counsel us, out of an abundance of caution, to write you this letter noting our colleagues' concerns.

A good example of such a troubling event is the forced resignation—at the behest of Sen. Elizabeth Warren (D-MA)—of Robert Litan from his position as a senior follow at the Brookings Institution. Despite the fact that Dr. Litan had clearly disclosed the source of his

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the Commission members who currently are voicing concerns over our brief. Our decision to file an amicus brief in our private capacities was in part motivated by a desire to prevent those two reports from slipping down the memory hole. See George Orwell, Nineteen Eighty-Four 34-35 (1954).

[2] To our knowledge, no one has raised similar concerns in connection with the numerous amicus curiae briefs that have been filed before the Supreme Court by multiple members of Congress, including the *Fisher* case itself. For example, in Brief of U.S. Senators Harry Reid, Tom Harkin, Richard J. Durbin, Charles E. Schumer, Patty Murray, Carl Levin, John F. Kerry, Barbara A. Mikulski, Dianne Feinstein, Barbara Boxer, Jack Reed, Mary L. Landrieu, Frank Lautenberg, Benjamin L. Cardin, Bernard Sanders, Christopher A. Coons, and Richard Blumenthal as Amici Curiae in Support of Respondents in Fisher v. University of Texas (No. 11-345)(*Fisher I*), the amici failed to point out that they were filing in their personal capacity, failed to point out that they do not constitute a majority of the U.S. Senate or of the U.S. Congress, and failed to provide contact information and affiliations outside of their Congressional role. Yet no one is foolish enough to believe that their brief was the official brief of the U.S. Senate or of the U.S. Congress. See also Brief Amici Curiae of 38 Current Members of the Texas State Senate and House of Representatives in Support of Respondents in Fisher v. University of Texas (No. 11-345)(*Fisher I*)(same, mutatis mutandis). Similarly, no one raised concerns in connection with Brief for Amici Curiae Current and Former Civil Rights Officials in Support of Petitioner in Fisher v. University of Texas (No. 11-345)(*Fisher I*)(same, mutatis mutandis).

[3] More to the point, at the Commission's November 18, 2015 meeting, the Commission Chairman declared it an "embarrassment" that members of the Commission would be taking a position against race-preferential admissions. We believe his comment went to the heart of the disagreement over our brief. Such a comment, however, goes to the merits of our argument and not whether we have violated any ethical considerations in filing the brief.

funding for his report in the text of the report, she sought to have him removed from Brookings after forty years as a scholar on the ground of failure to disclose more prominently.[4] Within hours, Litan was gone. Somewhat similarly, at the Commission last year the then-General Counsel threatened one of our special assistants with felony prosecution for voluntarily assisting on her own time in the production of our brief in *Fisher I* and other amicus briefs. This special assistant is a full-time, Schedule C political appointee, and no sensible interpretation of the law prevented her from working on the *Fisher I* amicus brief in her spare time. Indeed, we understand that Congressional staff members have done just the same. Just to be safe, however, she has removed herself from any participation, however minor, in our amicus activities.[5]

Our bottom line on the current controversy is this: We certainly have no objection to your changing the official docket notation concerning our brief on the Court's web site from *"Brief amici curiae of Gail Heriot and Peter Kirsanow, Members of the United States Commission on Civil Rights filed"* to *"Brief amici curiae of Gail Heriot and Peter Kirsanow filed."* Neither do we have any objection to your attaching this letter to our brief or otherwise alerting the Members of the Court and their law clerks that our brief is not the official brief of the U.S. Commission on Civil Rights.

If you believe that this is or should be unnecessary, all we can say is that we agree. But we are used to it. We have to spend a lot of our time—far too much—responding to efforts to prevent us from speaking out on the issues on which we believe we have a moral duty to speak. We take pride, however, in the fact that we have never shrunk from speaking on account of those efforts.

Just to be clear, we should note here that none of the time spent producing the brief was billed to the Commission and that no Commission resources whatsoever were spent on the brief. All printing expenses came out of our own pocket. We plan to follow that same procedure when we file amicus briefs in the future.

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[4] See Andrew Ackerman, Brookings Economist Resigns Under Pressure from Sen. Elizabeth Warren, Wall Street Journal, Sept. 29, 2015 ("'She's dissatisfied with the disclosure but I don't think it could have been any clearer,' [Litan] said ...."; Kevin Cirilli, Dem Economists Attack Elizabeth Warren Over Brookings Firing, The Hill, October 1, 2015 ("'Those who differ with Litan instead should offer a substantive rebuttal to the paper in question ...,' the economists wrote in a letter ....").

[5] No effort was made to threaten us with the same felony prosecution, since the statute that our former general counsel cited all-too-clearly applies only to full-time federal employees and not (except in special situations not relevant here) to part-time federal officials like us. 18 U.S.C. § 205. We should also note that we have no evidence that our fellow Commissioners approved of the now-former general counsel's threats.

Even more recently, the same former general counsel and other members of the Commission's staff attempted to persuade Congress (through the Government Accountability Office) that we should be prevented from writing letters to Congress on Commission letterhead on civil rights issues before the Commission when our view deviates from the Commission's position—even when those letters begin (as our letters always do) with the disclaimer "We write as two members of the eight-member U.S. Commission on Civil Rights and not on behalf of the Commission as a whole." Fortunately for our ability to fulfill our duties as Commissioners, Congress's Continuing Resolution did not adopt the former General Counsel's view. We did, however, have to spend more time than we should have to responding to the argument.

If you have any questions for either of us concerning this matter, please do not hesitate to contact us at the addresses, telephone numbers or e-mail addresses listed below.

Sincerely yours,

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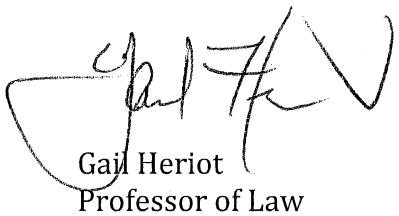

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