No. 14-981

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Fisher v. University of Texas at Austin, et al.*, 133 S. Ct. 2411 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

SLF advocates for a color-blind interpretation of the Constitution and preservation of the rights granted all citizens in the Equal Protection Clause. In particular, SLF defends the right to educational opportunities regardless of race. This case is important to SLF because the lower court's decision threatens to erode the highest standards required to

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[1] Pursuant to this Court's Rule 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have waived the 10 day notice requirement and consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

include race as a consideration in college admissions set by this Court.

ARGUMENT

I. This Court should grant certiorari because the Fifth Circuit erred when it ignored this Court's instructions and instead deferred to UT's assertion that its race-conscious admissions program was necessary and narrowly tailored.

In *Fisher I*, this Court established that courts must defer to universities' decisions to pursue diversity as an ends, but it also similarly established that courts must *not* defer to universities' claims that use of race is necessary or that "the means chosen . . . to attain diversity are narrowly tailored to that goal." *Fisher v. Univ. of Tex. at Austin, et al.*, 133 S. Ct. 2411, 2414-20 (2013) (*Fisher I*). Once a university declares diversity as a goal, it must establish under a strict scrutiny analysis that 1) no race-neutral alternatives will work to achieve the goal; 2) a race-conscious means is necessary to achieve that goal; and 3) the race-conscious program is narrowly tailored. *Id*. at 2421. This Court instructed reviewing courts to apply an exacting examination to the university's matters of proof and afford it no deference. *Id*.

On remand, the Fifth Circuit did exactly the opposite. Rather than perform an exacting examination, the lower court improperly deferred to the

University of Texas at Austin's (UT) contention that "qualitative" diversity is a compelling educational goal and that it cannot be met without employing UT's race-conscious admissions program. This Court should review this case because the Fifth Circuit improperly deferred to UT's assertions and in doing so, failed to follow this Court's explicit instructions for strict scrutiny. Further, if the lower court had properly applied strict scrutiny, it would have found that UT failed to demonstrate that no race-neutral alternative allowed it to achieve its diversity goal and that putting alternatives aside, UT's race-conscious admissions was not narrowly tailored to achieve that goal.

A. UT failed to demonstrate that no race-neutral alternatives will allow it to achieve its diversity goal.

The Top Ten Percent Law (TTPL) was passed by the Texas General Assembly in 1997 and mandates that any student graduating in the top 10% of his Texas high school class be offered admission to UT; the law is race-neutral. Tex. Educ. Code § 51.803 (1997). The law enrolled 20-25% of the freshman each year and it had an immediate and positive impact on minority enrollment beginning in 1998. Of the 6,322 enrollees in the 2008 freshman class, 5,114 were admitted through the TTPL and 1,208 were admitted through the race-conscious holistic approach. Minorities made up 40% of the students enrolled (2,529 students) for the incoming freshman class, including 25.5% African-American and Hispanic. *Fisher v. Univ.*

of Tex. at Austin et al., 758 F.3d 633, 645 (5th Cir. 2014). Instead of acknowledging these statistics and concluding the race-neutral TTPL was a workable alternative to a race-conscious admissions program, the Fifth Circuit, like UT, took umbrage with the TTPL. *Id*. at 645-61. But, as Judge Garza correctly pointed out in his dissent, neither the wisdom nor the validity of the TTPL is at issue in this litigation. *Id*. at 675 (Garza, J., dissenting).

"[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. The Fifth Circuit erred in concluding UT demonstrated that race-neutral alternatives do not work because, at a minimum, the race-neutral TTPL enrolls a high number of minority students, including African-Americans and Hispanics, who satisfy, with no evidence in the record to the contrary, UT's goal of overall student body diversity or "critical mass."[2]

[2] Since UT Austin bears the burden of proof under a strict scrutiny analysis, its failure to define "critical mass" with clarity should be fatal, especially given the minority enrollment under the TTPL exceeds that approved at the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). *See Fisher*, 758 F.3d at 668-74 (Garza, J., dissenting).

B. UT did not prove that use of race was necessary or narrowly tailored to achieve its diversity goals.

Even if UT could demonstrate that no race-neutral alternatives worked to produce "critical mass," it did not prove that its race-conscious holistic approach is necessary or narrowly tailored. Strict scrutiny "forbids the use of even narrowly drawn racial classifications except as a last resort." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment). The race-conscious holistic admissions approach argued by UT as necessary to its "critical mass" goal produced insignificant increases in African-American and Hispanic enrollment.

In 2008, 216 African-American (58) and Hispanic (158) students were enrolled using the race-conscious admissions policy. *Fisher*, 758 F.3d at 667-69 (Garza, J., dissenting). If you assume that all of the African-American and Hispanic students were admitted because of their race, they account for slightly over 3.4% of the enrolled class. *See Fisher*, 631 F. 3d 213, 260-61 (5th Cir. 2011) (Garza, J., dissenting). UT produces no evidence nor makes any persuasive argument that this small percentage of students affected the diversity of the student body or UT's alleged "critical mass" goal. *See Fisher*, 758 F.3d at 668 (Garza, J., dissenting). "[T]he necessity of using racial classifications" is doubtful when racial classifications have a "minimal impact . . . on school enrollment." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

The analysis disfavors UT more when the number of African-American and Hispanic students enrolled in 2004 not using race is compared with the number of African-American and Hispanic students enrolled in 2008 using race. In 2004, 15.2% of non-TTPL enrollees were African-American or Hispanic, and in 2008, 17.9% of all enrollees were African-American or Hispanic. *Fisher*, 758 F.3d at 644-45. It is reasonable to conclude that no less than the same percentage of African-American and Hispanic students would have been admitted in 2008 on a race-neutral basis. If race were used and it is assumed race was the defining factor for admission, using race could have only contributed to an increase in African-American and Hispanic enrollment of 2.7% – 33 students – between 2004 and 2008. The statistics demonstrate that UT's use of racial classifications for tens of thousands of applicants produced an infinitesimal increase in African-American and Hispanic enrollment and that a race-neutral admissions policy would have (and did) worked "about as well." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986). The percentage increase in African-American and Hispanic enrollees fails to make a constitutionally meaningful impact on the overall student body diversity. *See Fisher*, 758 F.3d at 663-76 (Garza, J., dissenting).

The difference between *Grutter* and this case, like *Parents Involved*, is the necessity and effectiveness of the program. Unlike *Grutter*, where the law school's minority enrollment more than tripled, UT's

race-conscious program has "undeniable" costs that using race imposes without comparable benefits. *Parents Involved*, 551 U.S. at 734, 745. The Fifth Circuit should have concluded that UT did not satisfy its burden of proving that the marginal changes in enrollment "outweigh the cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id*. at 734.

II. The Court should grant certiorari because the Fifth Circuit improperly accepted UT's "diversity within diversity" justification for considering race despite a complete lack of evidence in the record and the lack of any constitutionally acceptable rationale.

The Fifth Circuit improperly accepted UT's contention that a race-conscious admissions program is necessary to supplement the TTPL. *See Fisher*, 758 F.3d at 669-70 (Garza, J., dissenting). During litigation of *Fisher I*, when the case reached this Court, UT abandoned its previous arguments regarding demographic and classroom interests to support its race-conscious admissions program and argued that it needed to consider race to attain "diversity within racial groups." Br. of Respondents 33, *Fisher I*. On remand, UT continued to argue that its race-conscious admissions program was constitutionally justified because it needed to enroll under-represented minority students from majority-white high schools. According to UT, the TTPL did not enroll the right quality of

diverse students (those from privileged backgrounds) and thus, there is not enough "diversity within diversity" as Judge Garza referred to it. *Fisher*, 758 F.3d at 669.

The Fifth Circuit should have rejected UT's new argument because UT failed to lay the necessary (or any) factual predicate. *See id*. at 669-70. Further, by claiming that the TTPL minority enrollees from underprivileged or majority-minority high schools do not have attributes that contribute to campus diversity UT commits the worst offense of stereotyping.

A. UT failed to lay the factual predicate necessary to support its assertion that its race-conscious admissions program is necessary to attain its goal of qualitative diversity.

A party must justify its reasons for employing racial preferences and the reasons must be "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). UT failed to satisfy its burden of showing that the alleged objective – "qualitative" diversity – was its actual purpose for implementing its race-conscious admissions program. Even ignoring the disingenuous nature of UT's assertion that its objective all along was "qualitative" diversity, the record is void of any evidence supporting this justification. Rather than strike down UT's use of race for lack of record evidence, UT's assertion which has no basis

in the record was accepted wholesale by the Fifth Circuit. *See Fisher*, 758 F.3d at 669-71 (Garza, J., dissenting).

More specifically, UT failed to produce evidence about what type of diversity is not represented by the 2,529 minority students enrolled under the TTPL in 2008. *See id*. Only by defining "diversity within diversity" would UT have been able to determine whether the minority enrollees do not add to diversity. UT failed to do so, and again the Fifth Circuit should have rejected the argument.

B. UT's race-conscious "holistic" admissions program and the Fifth Circuit's blind acceptance of it violate the very tenets of the Equal Protection Clause.

By claiming that the TTPL minority enrollees from underprivileged or majority-minority high schools do not have attributes that contribute to campus diversity or will not be catalysts for change, UT commits the worst offense of stereotyping. UT asked the Fifth Circuit "to *assume* that minorities admitted under the [TTPL] do not demonstrate 'diversity within diversity' – that they are somehow more homogeneous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Id*. at 669-70. UT stereotyped the enrollees by test score and race, ignoring the following individual attributes these students likely possess and for which non-TTPL applicants are judged: "demonstrated

leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the socio-economic status, family composition, special family responsibilities, the socio-economic status of the applicant's high school and race." *Id.* at 638 (majority). In doing so, UT sought out underprivileged students of a certain race and privileged students of a certain race.

Despite the lack of any supporting evidence, the Fifth Circuit accepted and furthered "the very stereotyping that the Equal Protection Clause abhors." *See Fisher*, 758 F.3d at 670 (Garza J., dissenting). Because UT's race-conscious "holistic" admissions program and the Fifth Circuit's blind acceptance of it violates the very tenets of the Equal Protection Clause and turns the Fourteenth Amendment on its head, this Court should grant certiorari and reverse the lower court's decision.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, Southeastern Legal Foundation respectfully requests that this Court grant certiorari.

Respectfully submitted,

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