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 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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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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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*, 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); *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

In particular, SLF advocates for a color-blind interpretation of the Constitution and preservation of the rights granted all citizens in the Equal Protection Clause, and defends the rights to educational

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

opportunities regardless of race. This case is important to SLF because it threatens to erode the highest standards required to include race as a consideration in college admissions set by this Court.

SUMMARY OF ARGUMENT

"[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). For that reason, a court cannot accept a university's assertion that its admissions process uses race in a permissible way without giving close analysis to the evidence of how the process works in practice. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (*Fisher I*). To defend its use of racial classifications, the University must not only identify a legitimate "compelling interest," but also demonstrate a "strong basis in evidence" that the consideration of race is necessary to further that compelling interest. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.); *Croson*, 488 U.S. at 500. The University failed to satisfy its burden and produced no evidence to support any of its ever-changing justifications for use of race.

Ignoring this Court's Equal Protection Clause jurisprudence and explicit instruction to analyze the evidence, the Fifth Circuit improperly accepted the University's contention that its race-conscious program is necessary to create "diversity within diversity" despite the University's inability to point to *any* record evidence, let alone strong evidence, to substantiate its need to establish "qualitative" diversity. When the Fifth Circuit disregarded this Court's Equal Protection Clause jurisprudence, it not only allowed a patently unconstitutional race-conscious admissions program that encourages the worst form of stereotyping to stand for a second time, it also undermined the Equal Protection Clause and put the right to equal protection under the law in grave danger.

ARGUMENT

I. This Court applies the "strong basis in evidence" test to all racial classifications.

Absent the showing of a "strong basis in evidence," a court simply lacks the relevant context upon which to conclude that the use of racial classifications is necessary in a particular circumstance. First introduced in Justice Powell's plurality opinion in *Wygant*, the "strong basis in evidence" test enables a court to exercise its independent judgment as to whether racial classification is truly necessary. *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (citing *Wygant*, 476 U.S. at 277).

In *Wygant*, the Court rejected a school district's attempt to justify its race-conscious anti-layoff policy that favored minority teachers with less seniority over non-minority teachers with greater seniority. The district argued that the program helped minority students by providing "role models" of the same race. *Wygant*, 476 U.S. at 275. The plurality criticized that rationale, noting it would allow the school district "to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." *Id*.

The school district also argued the layoff policy was required to remedy prior discrimination. The Court rejected this contention, pointing out the need for a "strong basis in evidence." *Id*. at 277. Without that evidentiary predicate, "an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination." *Id*. at 278; *see also id*. at 278 n.5 ("If the necessary factual predicate is prior discrimination – that is, race-based state action is taken to remedy prior discrimination by the governmental unit involved – then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan."). The Court observed that the school district never made the necessary factual determination. *Id.*

Three years later, this Court emphasized the importance of the "strong basis in evidence" standard when reviewing the City of Richmond's minority

set-aside plan. The Court explained, "[t]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool." *Croson*, 488 U.S. at 493. Engaging in a "searching judicial inquiry into the justification" offered by governmental bodies allows courts to distinguish between "benign" or "remedial" classifications and classifications "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id*. In addition, that scrutiny "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id*.

The City of Richmond's plan lacked the necessary strong basis in evidence for several reasons. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id*. at 500. The City failed to provide an evidentiary basis for its contention that racial discrimination existed. *Id*. at 502-03. And, the evidence it did present related solely to African-Americans; nothing in the record spoke to past discrimination against other minorities like Indians, Eskimos, and Aleuts, who were also beneficiaries of the set-aside. *Id*. at 506. Accordingly, the Court rejected the "factual predicate" offered by the City to justify its use of race because it was too "generalized," ultimately inferring improper motive from the absence of a strong basis in

evidence to support the race-conscious program. *Id*. at 498.

More recently in *Gratz v. Bollinger*, this Court explained that "[b]ecause 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification'," *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)), its review of the race-conscious admissions program at issue had to entail "a most searching examination." *Id*. Because the university could not establish a "most exact connection" between its use of race as a selection criteria and the reasons justifying that use, this Court found the race-conscious admissions program unconstitutional. Similarly, this Court found the race-conscious plan implemented by the school district in *Parents Involved*, unconstitutional because the school district could not provide any evidence that its remedial action was necessary or that the school district discriminated against racial minorities in the past. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 754-55 (2007).

Also illustrative is this Court's decision in *Ricci v. DeStefano*, where it "adopted" the "strong basis in evidence" standard "as a matter of statutory construction." 557 U.S. at 584. There, the City argued it could discard the results of a promotional exam on the basis of its belief that certifying the result could expose it to disparate-impact liability from black firefighters. As part of its strict scrutiny analysis, the

Court required the City to produce strong evidence that its exams were not job-related and consistent with business necessity or that there existed an equally valid, less-discriminatory alternative. *Id*. at 586. The only evidence the City could produce consisted of "a few stray (and contradictory) statements." *Id*. at 560. The lack of any strong basis in evidence to support the City's asserted reasons for its race-conscious program confirmed that its explanation "was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency." *Id*. at 597 (Alito, J., concurring).

Accordingly, this Court's Equal Protection Clause jurisprudence provides that any racial classification, for whatever purpose, must satisfy strict scrutiny's requirements of "necessity" and "tailoring" through a showing of a strong basis in evidence. Like each of the governmental entities in the foregoing cases, the University is bound by that requirement.

II. For the second time in this case, the Fifth Circuit disregarded this Court's Equal Protection Clause jurisprudence and deferred to the University despite no evidence supporting its use of race.

Just as strict scrutiny must not be "strict in theory, but fatal in fact," it also "must not be strict in theory but feeble in fact." *Fisher I*, 133 S. Ct. at 2421. In *Fisher I*, this Court made clear that "[s]trict scrutiny does not permit a court to accept a school's

assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id*. Ignoring this Court's Equal Protection Clause jurisprudence and explicit instruction to analyze the evidence, on remand the Fifth Circuit improperly accepted not just the University's contention that its race-conscious program is necessary to add diversity to its student body, but also the contention that its program is narrowly tailored to accomplish that goal. In particular, the Fifth Circuit did not question the fit between the program and the University's desire to "promot[e] the *quality* of minority enrollment – in short, 'diversity within diversity.'" *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 636, 669 (5th Cir. 2014) (Garza, J., dissenting). In doing so, the Fifth Circuit did exactly what this Court told it not to do and once again, failed to apply a strict scrutiny analysis.

A. There is no evidence that the University's use of race comports with its asserted rationales to reduce demographic disparities and increase classroom diversity.

The Top Ten Percent Law, passed by the Texas General Assembly in 1997, mandates that any student graduating in the top 10% of his Texas high school class be offered admission to the University; the law is race-neutral. Tex. Educ. Code § 51.803 (1997). The Top Percent Law was considered a success with the percentage of African-American and Hispanic students rising from 18.6% in 1996 to 21.4% in 2004. Pet. App. 102a. In addition, the grade-point

averages and retention rates of minority students at the University were higher in 2004 than 1996. Dr. Larry Faulkner, *The "Top 10 Percent Law" is Working for Texas* (Oct. 19, 2000), *available at* https://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html (last visited Aug. 24, 2015). Applicants not admitted under the Top Ten Percent Law are subject to "holistic review" which considers race as one of the factors. Pet. App. 5a.

In the district court, the University argued that its consideration of race was needed to increase minority enrollment to pursue a compelling educational interest in reducing demographic disparities and increasing diversity in small classrooms. Pet. App. 290a-294a. Ignoring an absence of evidence, the lower court concluded that the University's use of race acts "to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its inability to achieve the rich diversity that contributes to [the University's] academic mission." Pet. App. 46a-47a.

Indeed, the *only* evidence in the record explaining how the University uses race is deposition testimony of University representatives stating the University uses race in that it values a "sense of cultural awareness." Pls.' Mot. Summ. J., Ex. 4 ("Bremen Dep."), *Fisher v. Univ. of Tex. at Austin*, No. 08-cv-263 (W.D. Tex. Jan. 23, 2009), at 30; *see also* Pls.' Mot. Summ. J., Ex. 5 ("Ishop Dep.") at 57, 61. That is the only evidence that comes close to supporting how the

University uses race in evaluating applications. Pet. App. 280a.

Further, the deposition testimony of the University's admissions officers "specifically indicates that race could *not* be a factor in any applicant's admission" to one of the University's competitive academic departments. *Fisher*, 758 F.3d at 672 (Garza, J., dissenting) (emphasis in original). No evidence was presented, and SLF is unaware, of any singular relevant perspective originating from a student's race that a student might contribute to a class in math, physics, chemistry, or astronomy. "If race is indeed without a discernible impact, the University cannot carry its burden of proving that race-conscious holistic review is necessary to achieving classroom diversity (or, for that matter, any kind of diversity)." *Id*. Likewise, if there is no such perspective, then the University's goal of classroom diversity in those courses is doomed to failure on the narrow objective of creating diversity in educational experience by introducing alternative minority viewpoints.

Not only is the record void of evidence describing how the University uses race, it also lacks any basis in evidence to connect the University's stated desire to create diversity with its determination that consideration of race was "essential" and the means chosen to achieve its goal. As previously noted, the Top Ten Percent Law substantially increased racial diversity in the student body prior to implementation of the challenged race-conscious measures, albeit not so much or so uniformly distributed as the University

administrators would have preferred. As Judge Garza observed, the effects of the University's program in addition to the gains under the Top Ten Percent Law are effectively unquantifiable. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 259 (5th Cir. 2011) (Garza, J., concurring specially) (The University's claim that it has not achieved a critical mass "is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields."). Without any way to tell whether the University's race-conscious program has an effect, there is no justification to defer to its "educational judgment," which the University never even attempted to support with evidence (as was offered in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

B. There is no evidence that the University's use of race comports with is asserted rationale of "qualitative" diversity.

Unable to support its justifications for its race-conscious admissions program with any evidence, the University abandoned them and raised, for the first time on appeal, its "qualitative" rationale. As Judge Garza explained on remand, the University now contends "that its race-conscious holistic review allows it to select for 'other types of diversity' beyond race alone, and to identify the most 'talented, academically promising, and well-rounded' minority students." *Fisher*, 758 F.3d at 669 (Garza, J., dissenting). The University claims that such "change-agents" are necessary to "debunk stereotypes." *Id*. Setting aside

for the moment the hypocrisy of the University's statements, the University offers *no* record evidence to substantiate its asserted need for "qualitative" diversity.

The University failed, and continues to fail, to produce any evidence during any phase of this nearly decade long litigation to substantiate an interest in "qualitative" diversity or "diversity within diversity." The University could not, and cannot, justify its improper post hoc rationale with studies or any evidence showing that it failed to meet an interest in "qualitative" diversity. Nor can the University point to any facts in the record indicating that it even evaluates the student-body as a whole for indicia of qualitative diversity – evidence required to establish a need to use a race-conscious program.

As Judge Garza notes, the University fails to explain how the "strikingly small" number of special minority admittees "contributes to its 'critical mass' objective." *Id.* at 668 (Garza, J., dissenting). Further, the University has not identified any "concrete targets for admitting more minority students possessing these unique quality-diversity characteristics." *Id*. at 669. Without such a target, there is no way to tell when the University has reached its goal. *Id*.; *cf. Wygant*, 476 U.S. at 275 ("[T]he role model theory . . . has no logical stopping point."). Finally, the University has no support for the proposition that the necessary "change-agent" qualities are not already present in the Top Ten enrollees. As Judge Garza notes, "The University does not assess whether Top Ten Percent

Law enrollees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes." *Fisher*, 758 F.3d at 669 (Garza, J., dissenting). In short, the University presented the courts little more than a bowl of mush, which is impossible to review for narrow tailoring.

Recognizing the lack of evidence and ignoring this Court's guidance on remand, the Fifth Circuit decided to create its own evidentiary record. In violation of the rules of appellate procedure, the Fifth Circuit conducted a *sua sponte* survey of Texas school districts' data on racial composition, test scores and educational outcomes. Its consideration of its own survey "ventures far beyond the summary judgment record." *Id.* at 670 n.15. The Fifth Circuit should have reviewed only the record before it and in doing so, it should have rejected the University's new and latest attempt to justify its unconstitutional race-conscious program because there is no basis in evidence, let alone a strong basis, to support its "qualitative" diversity.

The Fifth Circuit's survey is not just improper, it fails to lead to the conclusions it drew. Its "discussion of numerous 'resegregated' Texas school districts is premised on the dangerous assumption that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish a meaningful campus diversity." *Id.* at 670. Such judicial

assumptions are not evidence, nor do they constitute a strong basis in evidence for the University.

III. The Fifth Circuit's deference to the University's race-conscious admissions program, despite no supporting evidence, promotes racial stigmas and illegitimate uses of race.

The University commits the worst offense of stereotyping by claiming that the Top Ten Percent Law minority enrollees from underprivileged or majority-minority high schools lack the attributes that contribute to campus diversity or will not be catalysts for change. The "strong basis in evidence" requirement not only enables courts to exercise independent judgment, it also limits racial stigmas and stereotyping and helps "smoke out" illegitimate uses of race like the University's admissions program. *See Croson*, 488 U.S. at 493 (plurality op.) (the requirement of a factual showing of necessity "'smoke[s] out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."). By disregarding this Court's Equal Protection Clause jurisprudence and accepting the University's "qualitative" diversity argument despite *no* basis in evidence, the Fifth Circuit undermined the Equal Protection Clause and put the right to equal protection under the law in grave danger.

"The Constitution abhors classifications based on race" because "every time the government places

citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part)). "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Rather than promote inclusiveness and cross-racial understanding, they may bring about the perverse result of "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J.).

The "strong basis in evidence" test ensures that government entities wishing to use racial classifications can only do so within the bounds of the Equal Protection Clause and prevents over inclusiveness in race-conscious policies. In failing to require the University to establish any basis in evidence, the Fifth Circuit assumed "that minorities admitted under the [Top Ten Percent Law] do not demonstrate 'diversity within diversity' – that they are somehow more homogeneous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Fisher*, 758 F.3d at 669-70 (Garza, J., dissenting). The Fifth Circuit blindly accepted the University's stereotyping of enrollees by test score and race,

ignoring the following individual attributes these students likely possess and for which non-Top Ten Percent Law 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, it unconstitutionally "embraced the very ill that the Equal Protection Clause seeks to banish" and "the very stereotyping that the Equal Protection Clause abhors." *Id*. at 670 (Garza, J., dissenting).

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, Abigail Fisher, Southeastern Legal Foundation respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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