NO. 09-50822

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER,
Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *ET AL.*,
Defendants-Appellees

On Remand from the Supreme Court of the United States

AMICUS CURIAE* BRIEF OF SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC

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Supplemental Certificate of Interested Parties

Fisher v. University of Texas at Austin, et al., No. 09-50822

The undersigned counsel of record for *Amicus Curiae* Southeastern Legal Foundation certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

Amicus Curiae

1. Southeastern Legal Foundation

2. Counsel of Record for *Amicus Curiae*, Shannon L. Goessling

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, the undersigned counsel of record states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund preparation or submission of a brief; and, that no person other than *Amicus Curiae* contributed money intended to fund or submit this brief.

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Corporate Disclosure Statement

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, the undersigned counsel of record for *Amicus Curiae* Southeastern Legal Foundation makes the following disclosure:

Southeastern Legal Foundation (SLF) is a non-profit Georgia corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has issued no shares or debt securities to the public. SLF has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in SLF.

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Consent to Filing of *Amicus Curiae* Brief

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, all parties to this appeal have consented to filing this *Amicus Curiae* brief.

Identity and Interest of *Amicus Curiae*

SLF is a nonprofit, public interest law firm and policy center founded in 1976 and organized under the laws of the State of Georgia. SLF is dedicated to bringing before the courts those issues vital to the public interest and in defense and preservation of individual liberties.

SLF represented and argued for petitioners before the United States Supreme Court in, *Ne. Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), and participated at the United States Supreme Court in, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), *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 has also participated as *amicus curiae* in the U.S. Court of Appeals in, *Gratz v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) and *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

Southeastern Legal Foundation respectfully asks this Court to hear their arguments in favor of Plaintiff-Appellant's Petition for Rehearing *En Banc*.

Rehearing *En Banc* Should be Granted

I. The Court erred in finding that the University of Texas at Austin met its burden of proof under a strict scrutiny analysis that its race-conscious admissions program was necessary and narrowly tailored.

The United States Supreme 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."[1] Once the 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.[2] The reviewing court applies an exacting examination to the university's matters of proof and affords it no deference.[3] The panel majority again improperly defers to the University of Texas at Austin's (UT at Austin or the University) contention that its goal of "critical mass" has not been met, without the University defining with clarity "critical mass" or identifying evidence in the record to support its need to use race to reach it.

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1 *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2414-20 (2013).
2 *Id.* at 2421.
3 *Id.*

A. The University failed to demonstrate that no race-neutral alternatives will work 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 Austin; the law is race-neutral.[4] 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% – or 2,529 students – of the students enrolled for the incoming freshman class, including 25.5% African-American and Hispanic.[5] Instead of acknowledging these statistics and concluding the race-neutral TTPL was a workable alternative to a race-conscious admissions program, the panel majority, like the University, takes umbrage with the TTPL.[6] But, as Judge Garza correctly points out in his dissent, neither the wisdom nor the validity of the TTPL is before the Court.[7]

"[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable

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4 Tex. Educ. Code § 51.803 (1997).
5 *Fisher*, 2014 U.S. App. LEXIS 13461, at *29.
6 *Id*. at *9-23.
7 *Id*. at*77(Garza, J., dissenting).

race-neutral alternatives do not suffice."[8] The panel majority erred in concluding the University 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, the University's goal of overall student body diversity or "critical mass."[9]

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

Even if UT Austin could demonstrate that no race-neutral alternatives worked to produce "critical mass," it did not prove that the 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."[10] The race-conscious holistic admissions approach argued by the University 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

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[8] *Fisher*, 133 S. Ct. at 2420

[9] 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, 2014 U.S. App. LEXIS 13461*, at *89-96 (Garza J., dissenting).

[10] *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469. 519 (1989) (Kennedy, J., concurring in part and concurring in judgment).

enrolled using the race-conscious admissions policy.[11] 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. [12] The University produces no evidence nor makes any persuasive argument this small percentage of students affected the diversity of the student body or the University's alleged "critical mass" goal.[13] "[T]he necessity of using racial classifications" is doubtful when racial classifications have a "minimal impact … on school enrollment."[14]

The analysis disfavors UT Austin 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.[15] 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

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11 *Fisher*, 2014 U.S. App. LEXIS 13461, at *97 (Garza, J., dissenting).

12 *See Fisher*, 631 F.3d at 260-61 (Garza, J.).

13 *Fisher,* 2014 U.S. App. LEXIS 13461, at *29.

14 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

15 *Fisher,* 2014 U.S. App. LEXIS 13461, at *29-*30.

statistics demonstrate that UT Austin'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."[16] The percentage increase in African-American and Hispanic enrollees fails to make a constitutionally meaningful impact on the overall student body diversity.[17]

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, the UT Austin race-conscious program has "undeniable" costs that using race imposes without comparable benefits.[18] The panel majority should have concluded that the University 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."[19]

II. The Court should have rejected the University's contention that the minority enrollees under the Top Ten Percent Law do not possess the qualitative attributes that contribute to a diverse student body because no factual predicate was laid for this position.

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16 *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n.6 (1986).

17 *See Fisher,* 2014 U.S. App. LEXIS 13461, at *81-98 (Garza, J., dissenting).

18 *Parents Involved*, 551 U.S. at 734, 745.

19 *Id*. at 734.

The panel majority improperly accepts UT Austin's contention that a race-conscious admissions program is necessary to supplement the TTPL.[20] The University asserts that the TTPL does not enroll the right quality of diverse students, "diversity within diversity," according Judge Garza.[21] This is a new argument for the University; one for which the necessary factual predicate has not been laid.[22] It should have been rejected by the panel majority.

Instead, the assertion which has no basis in the record is accepted wholesale by the panel majority.[23] The University failed to produce evidence about what type of diversity is not represented by the 2,529 minority students enrolled under the TTPL in 2008.[24] Only by defining "diversity within diversity" would UT Austin be able to determine whether the minority enrollees do not add to diversity. The University failed to do so, and again the panel majority should have rejected the argument.

By claiming that the TTPL minority enrollees do not have attributes that contribute to campus diversity or will not be catalysts for change, UT Austin commits the worst offense of stereotyping. The University stereotypes the enrollees by test score and race, ignoring the individual attributes these students

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20 *Fisher,* 2014 U.S. App. LEXIS 13461, at *102 (Garza, J., dissenting).
21 *See Id*. at *98-*101.
22 *See Id.* at *100-*102.
23 *Id*. at *102- *105.
24 *Id*. at *100 -*102.

likely possess and for which non-TTPL applicants are judged: "demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community services, and special circumstances, such as the socio-economic status, family composition, special family responsibilities, the socio-economic status the applicant's high school and race."[25] These conclusions have no basis in the record and should have been rejected by the panel majority.

Conclusion

Southeastern Legal Foundation asks this Court to hear this case *en banc*, reverse the judgment of the district court, and remand with instructions to enter summary judgment for plaintiff.

Dated this the 5th day of August, 2014.

Respectfully submitted,

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[25] *Id. at* *12.

Certificate of Service

I hereby certify that on this 5th day of August 2014, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court via the ECF system and transmitted to counsel registered to receive electronic service. I also caused a true and correct copy of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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Certificate of Compliance

This brief complies with all requirements for form, including the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and Fifth Circuit Rule 32.2, because it contains 1,695 words, excluding the parts of the brief exempted by Federal rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2, and the brief is 7 ½ double-spaced pages. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal rules of Appellate Procedure 32(a)(6) because this brief has been prepared Microsoft Word in a proportionally-spaced typeface in 14-point Times New Roman type.

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