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 *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

Paul J. Orfanedes
Chris Fedeli
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW, Ste. 800
Washington, DC 20024
(202) 646-5172
cfedeli@judicialwatch.org
porfanedes@judicialwatch.org

Counsel for Amici Curiae

Dated: March 12, 2015

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT.....2

REASONS FOR GRANTING THE PETITION 3

I. The Fifth Circuit Decision Violates Both the Constitution and this Court's 2013 Ruling in this Case 3

II. This Case Presents an Important and Recurring Question Regarding the Use of Race in College Admissions Which This Court Must Resolve 14

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

Adarand Constructors v. Pena,
515 U.S. 200 (1995) 4

Fisher v. Univ. of Texas,
133 S. Ct. 2411 (2013)..... *passim*

Fisher v. Univ. of Texas,
758 F.3d 633 (5th Cir. 2014) 4

Fisher v. Univ. of Texas,
645 F. Supp.2d 587 (W.D. Tex. 2009) 5, 8, 9

McMillan v. City of New York,
253 F.R.D. 247 (E.D.N.Y. 2008) 11

Plessy v. Ferguson,
163 U.S. 537 (1896) 12, 13

United States v. Ortiz,
897 F. Supp. 199 (E.D. Pa. 1995) 7

OTHER AUTHORITIES

American Anthropological Association,
"Statement of Race" (May 17, 1998),
http://www.aaanet.org/stmts/racepp.htm 9, 10

American Anthropological Association, "Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting" (Sept. 1997), http://www.aaanet.org/gvt/ombdraft.htm 10

ApplyTexas, "Sample Application," https://www.applytexas.org/adappc/html/preview12/frs_1.html 5

Complaint, *Students for Fair Admissions v. University of North Carolina*, filed in U.S. District Court for the Middle District of North Carolina, Nov. 17, 2014, available at http://studentsforfairadmissions.org/wp-content/uploads/2014/11/SFFA-v.-UNC-Complaint.pdf 16

Gail Sullivan, "Harvard University targeted by affirmative action opponents," Nov. 19, 2014, Washington Post, available at http://www.washingtonpost.com/news/morning-mix/wp/2014/11/19/affirmative-action-opponents-just-targeted-the-big-one-harvard-university/ 15

Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton*, Houghton Mifflin Co. (2005) 15

Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News*, (May 3, 2012), http://www.cbsnews.com/8301-503544_162- 57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/.....8

Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," http://www.narf.org/pubs/misc/faqs.html 7, 8

Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/.....11

Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), http://www.pewhispanic.org/2012/04/04/when- labels-dont-fit-hispanics-and-their-views-of-identity/ 6, 7

U.S. Census Bureau, "What is Race," available at http://www.census.gov/population/race 13

INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

The decision by the U.S. Court of Appeals for the Fifth Circuit raises important issues of constitutional law that should be addressed by this Court. In particular, *amici* are concerned that the Fifth Circuit's ruling, if allowed to stand, will serve to increase racial polarization and resentment in this country, needlessly perpetuating a destructive focus

---

[1] Pursuant to Supreme Court Rules 37.2 and 37.6, *amici curiae* state that all parties have been notified of the filing of this brief, letters reflecting blanket consent have been filed with the Clerk, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

on "racial" issues and prolonging the misconception that race is a valid or legitimate concept. *Amici* argue that, ultimately, the only mention of race in the law should be its prohibition. Any divergence from this principle must be extraordinarily narrow, and for remedial purposes only.

The Fifth Circuit's decision to again uphold the University of Texas at Austin's ("UT" or "University") race-conscious admissions policy is at odds with this Court's decision in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). *Amici* are concerned about the corrosive effect that affirming race-conscious government activity has on American society and the rule of law. Among the harms caused by the Fifth Circuit's decision upholding UT's policy are: the further enshrinement of the intellectually impoverished concept of race into law; the perpetuation of a culture of racial and ethnic politics in American public life; and the increase of racial intolerance in American society.

For these and other reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Human race and ethnicity are inherently ambiguous social constructs that have no validity in science. Invoking race and ethnicity to promote diversity relies on racial and ethnic stereotyping of individuals' viewpoints, backgrounds, and experiences. Admissions policies such as the policy enacted by the University, which seeks to classify applicants by

crude, inherently ambiguous, and arbitrary racial and ethnic categories to promote diversity, but instead encourage stereotyping, can never be narrowly tailored to further a compelling government interest. They do not survive strict scrutiny. For these and other reasons, the Petition presents matters of great public importance that should be decided by this Court.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Decision Violates Both the Constitution and this Court's 2013 Ruling in this Case

UT's admissions program fails strict scrutiny because it relies on crude, inherently ambiguous, and arbitrary racial and ethnic categories in pursuit of an undefined "critical mass" of diversity. This Court's opinion in *Fisher* established that using even allegedly benign racial discrimination in search of diversity is subject to exacting strict scrutiny. *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2421 (2013) ("*Fisher*") ("Strict scrutiny must not be strict in theory but feeble in fact."). The Fifth Circuit failed to apply this high standard.

Rather than undertake a rigorous analysis of the University's use of race and ethnicity to choose between applicants for admission, the Fifth Circuit merely excused UT's failure to satisfy *Fisher*. It credited UT's "critical mass" diversity target, which was never defined, is largely undefinable, and therefore cannot be narrowly tailored to further a compel-

ling governmental interest. *Fisher v. Univ. of Texas,* 758 F.3d 633, 654 (5th Cir. 2014) ("*Remand Opinion*"); *Id.*, Judge Garza dissent at 661.

UT's "critical mass" standard was only the tip of the iceberg. In upholding UT's policy, the Fifth Circuit found that UT – and presumably other colleges and universities in the Fifth Circuit – may use race and ethnicity not only in pursuit of an undefined "critical mass" of diversity, but also "in its search for holistic diversity." *Remand Opinion*, 758 F.3d at 659. Like "critical mass," this "holistic diversity," or "diversity within diversity" as Judge Garza referred to it in his dissent, was also undefined. *Remand Opinion*, Judge Garza dissent, 758 F.3d at 669. As Judge Garza wrote, these abstractions are "too imprecise to permit the requisite strict scrutiny analysis." *Id.* And as Petitioner demonstrates, they are too vague to ever be narrowly tailored. *See* Petition For Writ Of Certiorari, No. 14-981, filed Feb. 10, 2015, at pp. 13, 18, 22-27.

The unintelligibility of UT's "critical mass" diversity target is only compounded by the ambiguity of UT's underlying policy of allowing applicants to self-select their race or Hispanic/Non-Hispanic ethnicity in order to gain a "plus" factor towards admission. The policy fails strict scrutiny because it is not "narrowly tailored." *Adarand Constructors v. Pena,* 515 U.S. 200, 227 (1995) ("[R]acial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling government interests."). Because racial and ethnic categories are crude, inherently ambiguous, and arbitrary

social constructs, especially when reliant on self-identification, their use in college admissions can never be "narrowly tailored" for purposes of strict scrutiny.

Following the Supreme Court's ruling in *Fisher*, the Fifth Circuit was required to evaluate whether UT's racial admissions program survived strict scrutiny based on the existing record of this case. *Fisher*, 133 S. Ct. at 2421. A closer review of that record shows that UT's system of racial classifications is extraordinarily simplistic. Applicants to UT are required to complete and submit a standardized "ApplyTexas" application. In question number 7 of the application, applicants are asked for a yes or no answer to the question, "Are you Hispanic or Latino? (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race)."[2] Applicants are then directed to "select the racial category or categories with which you most closely identify," choosing one or more of "American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White." *Id.* The District Court concluded that, "even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application." *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 597-98 (W.D. Tex. 2009).

---

[2] ApplyTexas, "Sample Application," available at https://www.applytexas.org/adappc/html/preview12/frs_1.html (visited Feb. 20, 2015).

UT's reliance on five broad racial categories and a single ethnic category to achieve "holistic diversity" is not narrowly tailored. Students must self-identify their race, but it remains unclear what makes one applicant a "Hispanic or Latino," an "American Indian or Alaska Native," an "Asian," "Black or African American," a "Native Hawaiian or Pacific Islander," or simply "White." UT does not specify whether an applicant must be a "full-blooded" member of his or her self-identified race or ethnic group, or whether 1/2, 1/4, 1/8, 1/16, or even 1/32 is sufficient to be granted or denied the "plus" factor.

The fact that the UT admissions application offers only one possible choice of ethnicity – Hispanic or Latino – is particularly problematic. Obviously, this single ethnic category does not begin to recognize or encompass the tremendous diversity of cultures, languages, religions, and heritages of the human race. Also undefined by UT's policy is whether the terms "Hispanic" and "Latino" refer to persons of full or partial Spanish ancestry only, or also to persons of other European ancestry. For instance, many ethnic Germans, Italians, and Jews migrated to predominantly Spanish-speaking countries in Central and South America and the Caribbean before immigrating to the United States. It also is unclear whether the UT admissions application reference to South America "or other Spanish culture or origin" includes Portuguese-speaking Brazil.

In addition, according to an April 2012 study by the Pew Hispanic Center, only twenty-four percent (24%) percent of Hispanic adults self-identify by the

terms "Hispanic" or "Latino."[3] Fifty one percent (51%) say they self-identify by their family's country or place of origin, and twenty one percent (21%) use the term "American" most often to refer to themselves. *Id.* The study concluded that this "system of ethnic and racial labeling does not fit easily with Latino's own sense of identity." *Id.* And at least one court has found that the term "Hispanic" is itself *nothing more* than self-identification:

> [W]hether or not a person is an Hispanic is not a biological characteristic but a psychological characteristic as to how one identifies himself or herself. It is not simply whether one has some Spanish ancestry or whether one speaks Spanish as a first language… A person's surname is not a definite indicator… [W]hether a person is Hispanic in the final analysis depends on whether that person considers himself or herself Hispanic.

United States v. Ortiz, 897 F. Supp. 199, 203 (E.D. Pa. 1995).

With respect to the "American Indian or Alaska Native" category, the Native Americans Rights Fund acknowledges that "[t]here exists no universally accepted rule for establishing a person's identity as

---

[3] Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), available at http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/.

an Indian."[4] UT's policy is completely silent as to who is entitled to a "plus" factor for being an "American Indian or Alaska Native."

This definitional problem was highlighted in the controversy over Senator Elizabeth Warren during her 2012 campaign for Senate. Based on nothing more than "family lore" and "high cheek bones," Ms. Warren claimed, perhaps quite sincerely, that she was 1/32nd Cherokee and therefore a Native American and a minority.[5] In response, many people predictably expressed doubt that classifying Senator Warren as a "Native American" based on a system of racial self-identification made any sense, much less served a legitimate purpose.

Under UT's policy, an applicant who, like the Senator, identifies herself as an "American Indian" based on "family lore" and "high cheekbones" would gain a "plus" factor toward admission, but an identical applicant without this same "family lore" or "high cheek bones" (or who was unaware that one of her 32 great-great-great grandparents happened to be Cherokee) would not. Imagine a freshman class at UT comprised of 6,715 Elizabeth Warrens, all identical but for the race or ethnicity of a single great-great-great grandparent. *See Fisher v. Univ. of*

---

[4] Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," available at http://www.narf.org/pubs/misc/faqs.html (visited Feb. 20, 2015).

[5] Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News* (May 3, 2012), available at http://www.cbsnews.com/news/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/.

Texas, 645 F. Supp. 2d at 590 (there were 6,715 students in UT's 2010 freshman class). How much additional "holistic diversity" would UT have achieved by deciding to admit these hypothetical Elizabeth Warrens based at least in part on their self-identification with a particular race or ethnic group? Should UT have denied them admission in favor of applicants who are 1/16th Native Hawaiian/Other Pacific Islander or 1/8th Hispanic? What "critical mass" of diversity would result?

The Senator Warren controversy illustrates an important point made by the American Anthropological Association ("AAA") – that racial categories are generally too crude to convey accurate and useful information about individuals and groups.[6] Rather, the primary effect of routine reliance on crude racial categories is to perpetuate misinformation and irrational beliefs about others:

> "Race" thus evolved as a worldview, a body of prejudgments that distorts our ideas about human differences and group behavior. Racial beliefs constitute myths about the diversity in the human species and about the abilities and behavior of people homogenized into "racial" categories.

---

[6] American Anthropological Association, "Statement on 'Race,'" (May 17, 1998) available at http://www.aaanet.org/stmts/racepp.htm (Americans "have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups.").

Id. The AAA even has recommended that the government phase-out its use of racial categories in order to achieve the goal of eventually eliminating racial discrimination.[7]

UT makes no effort whatsoever to define the term "Asian," which just as commonly refers to the four billion human beings who inhabit the largest and most populous continent on Earth as it does to a single race of people. It lumps together the two most populous countries on the planet, China and India, each of which has more than a billion people and a multitude of languages, cultures, and religions. It is unclear whether UT's use of the term "Asian" includes applicants who are or whose ancestors were of full or partial Near or Middle Eastern origin, including persons of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered "White."

Defining who is a member of the "Black" race is a divisive, problematic, and highly sensitive subject, inextricably woven into the history of slavery and segregation in the United States. Like the self-identified racial categories "American Indian," "White," or "Asian," it too is ambiguous. In 2008, a

---

[7] American Anthropological Association, "Response to OMB Directive 15," (Sept. 1997) available at http://www.aaanet.org/gvt/ombdraft.htm. ("[T]he effective elimination of discrimination will require an end to such categorization, and a transition toward social and cultural categories that will prove more scientifically useful and personally resonant for the public than are categories of 'race.'").

U.S. District Court addressed this ambiguity, rejecting outright the use of race as a factor in damage calculations. The Court observed:

> Franz Boas, the great Columbia University Anthropologist, pointed out that "[e]very classification of mankind must be more or less artificial;" he exposed much of the false cant of "racial" homogeneity when he declared that "no racial group is genetically 'pure.'"… [T]he reality [is] that the diversity of human biology has little in common with socially constructed "racial" categories.

McMillan v. City of New York, 253 F.R.D. 247, 249-250 (E.D.N.Y. 2008).

The federal government has been unable to define race or racial groups with any precision. It last tried to adopt regulations to codify human races and ethnicities in 1997, defining them geographically based on continent or country of origin.[8] This approach is obviously problematic and fraught with imprecision. How many generations must a person's ancestors have lived, worked, married, and raised families in the United States before his or her continent or country of origin becomes North America or the United States? Who gets to be the arbiter of a person's continent or country of origin? Do we simply "know it when we see it," and, if so, can

[8] Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/.

government action based on such crude categorizations ever satisfy the Equal Protection Clause?

The Court's own history highlights the inherent inequality and offensiveness of government differentiations on the basis of "race." In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld Homer Plessy's conviction for violating Louisiana's Separate Car Act, which required separation of train passenger by race. Mr. Plessy acknowledged that one of his great grandparents was from Africa, making him 1/8th "Black" and 7/8ths "White." *Id.* at 541. In addressing Mr. Plessy's "blood line," the Court observed:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, others that it depends upon the preponderance of blood, and still others that the predominance of white blood must only be in the proportion of three fourths.

Id. at 552. Even the *Plessy* Court recognized the arbitrariness of racial classifications, finding that "it may undoubtedly become a question of importance whether, under the laws of Louisiana," Mr. Plessy "belongs to the white or colored race." *Id.*

Today, UT relies on "self-identification" to determine a person's race or Hispanic/Non-Hispanic ethnicity.[9] While UT's approach has the benefit of avoiding the offensive and intrusive blood line inquiries of the *Plessy* era, it nonetheless results in a process that is arbitrary, imprecise, and inherently unequal.

Perhaps understandably in light of this history, UT makes no effort to define what it means by its use of the term "Black or African American" in its admissions policy. Nor for that matter does it define any of its racial categories. The failure to do so further highlights the inequality that its use of race creates. If two applicants are of both European and African ancestry, but one applicant self-identifies as "Black" and the other applicant self-identifies as both "Black" and "White," do both applicants receive the same "plus" factor? If one applicant self-identifies as "Black" and the other, like Mr. Plessy, self-identifies as "White," should the latter applicant be denied the "plus" factor?

Almost any governmentally approved use of "racial classifications" – crude, ambiguous social constructs that rely on the arbitrary self-identification of hundreds of millions of individual Americans – is sure to fail the "narrowly tailored" component of strict scrutiny. Ultimately, the only way to treat the illegitimate concept of race is to absolutely prohibit

---

[9] U.S. Census Bureau, "What is Race," http://www.census.gov/topics/population/race/about.html (visited Feb. 20, 2015) ("The Census Bureau collects racial data . . . based on self-identification.").

its use as a basis for government decisions affecting individuals or groups of individuals. Conveniently, such a prohibition is precisely what the Constitution already requires.

II. This Case Presents An Important and Recurring Question Regarding the Use of Race in College Admissions Which This Court Must Resolve

A fundamental question posed by this case is: may universities use crude, self-identified, arbitrary racial and ethnic categories in selecting the students they admit, or may they only use such (generally) prohibited classifications when all other attempts to achieve diversity fail? In other words: are race conscious college admissions policies of first or last resort? As the Fifth Circuit's opinion demonstrates, this question will continue to be the subject of much litigation until it is resolved conclusively by this Court. The Fifth Circuit's distortion of the Court's decision in *Fisher* shows that what the law needs right now is clarity, not further refinement and evolution through lower court decisions that may or may not reach this Court in several years' time.

Pending federal litigation over the racial admissions policies of Harvard and the University of North Carolina further demonstrates why *certiorari* is warranted now. The Harvard lawsuit demonstrates how race conscious admissions breed racial animosity, because the result of Harvard's policy is that it excludes otherwise qualified applicants based on

their racial background – in this case, "Asians."[10] This result is the same one that Harvard's racial policies achieved as far back as the 1940s, only in those days Harvard was seeking to minimize the presence of otherwise qualified Jewish students on campus. At that time, with the influx of eastern European Jewish immigrants to the United States, elite colleges found that admissions based solely on traditional definitions of academic excellence would result in classes that were overwhelmingly Jewish.[11] Harvard's de-emphasis of academic merit in favor of diversity injured Jewish students at the time, just as today's policies injure Asian students.

The lawsuit against the University of North Carolina demonstrates that colleges and universities are loathe to comply with the Court's decision in *Fisher*. As UNC explained in an amicus brief submitted to this Court, UNC has determined that it can achieve complete "diversity" without using race-conscious admissions, but it prefers not to do so because it would not be able to pick and choose the right kinds

---

[10] Gail Sullivan, "Harvard University targeted by affirmative action opponents," Nov. 19, 2014, Washington Post, available at http://www.washingtonpost.com/news/morning-mix/wp/2014/11/19/affirmative-action-opponents-just-targeted-the-big-one-harvard-university/.

[11] Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton*, pp. 77, 86, Houghton Mifflin Co. (2005).

of "diverse" students it would most like to have.[12] It is unlikely that the lower courts will be able to resolve these lawsuits without a clear response from this Court to the Fifth Circuit's opinion, which casts substantial doubt on what the Court meant in *Fisher*.

Even more importantly, the Harvard and UNC lawsuits demonstrate that the harms of racial animosity and resentment described throughout this brief will continue unabated until the Court clarifies the law on racial admissions practices. This fact militates in favor of granting certiorari and against waiting several years for other cases to make their way through the courts so the law can "evolve," as might be preferable in other areas of law.

---

[12] *See* Complaint, *Students for Fair Admissions v. University of North Carolina*, filed in U.S. District Court for the Middle District of North Carolina, Nov. 17, 2014, ¶¶ 78-83, available at http://studentsforfairadmissions.org/wp-content/uploads/2014/11/SFFA-v.-UNC-Complaint.pdf.

CONCLUSION

Amici respectfully request that the Court grant the Petition.

Respectfully submitted,

Paul J. Orfanedes
Chris Fedeli
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW, Ste. 800
Washington, DC 20024
(202) 646-5172
cfedeli@judicialwatch.org
porfanedes@judicialwatch.org

Counsel for Amici

March 12, 2015