No. 11-345

# 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 THE SOUTHEASTERN LEGAL FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER


SHANNON LEE GOESSLING
*Counsel of Record for Amicus Curiae*
AMY LABREESKA MACRINA
SOUTHEASTERN LEGAL FOUNDATION, INC.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org
amy@southeasternlegal.org

JOHN J. PARK, JR.
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
(678) 347-2208
jjp@sbllaw.net


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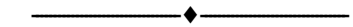
## INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation, Inc. (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 federal Circuit Courts and the Supreme Court of the United States. In particular, SLF advocates for a color-blind interpretation of the Constitution. To that end, SLF has participated in litigation all over the country, including in this Court, in such cases as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Ne. Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), and *Adarand v. Mineta*, 534 U.S. 103 (2001).

SLF supports Petitioner's reasons for reversing the decision below. SLF writes separately to further emphasize the necessity of requiring any governmental entity seeking to engage in race-conscious activity – even one of higher education and regardless of whether the activity is intended as a remedy against past

[1] 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. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

discrimination or to promote future diversity – to demonstrate that the activity is necessary and is narrowly tailored to address the perceived problem. SLF believes that the strong basis in evidence standard or an equally rigorous burden can and should be applied to all governmental classifications based on race. Requiring a showing of a strong basis in evidence is especially significant when the program at issue is intended, as is the University of Texas at Austin's (UT) program, to promote "diversity." Unless such a showing is required, universities will effectively have carte blanche to engage in race-conscious selections and activities, which is inconsistent with the Fourteenth Amendment, this Court's jurisprudence, and SLF's advocacy for a color-blind Constitution.



## SUMMARY OF ARGUMENT

Since this Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), it has been the law that "*all* racial classifications, imposed by *whatever federal*, *state*, *or local governmental actor*, must be analyzed by a reviewing court under strict scrutiny." *Id*. at 227 (emphasis added). But that maxim has not prevented numerous governmental entities from testing this Court's resolve to carefully scrutinize their attempts at classification of individual persons according to race. For innumerable reasons, accompanied by limitless energetic justifications, through creative legal and political acrobatics, new

devices to categorize people by race seem to be an unending source of diversion for governmental entities of all types.

The Fourteenth Amendment in design and in application has served to guarantee racial equality from its conception. Certainly, the somber history and purpose behind American jurisprudence regarding equality of all races is well known to this Court and need not be catalogued here. However, given the more recent attack on Abigail Fisher's rights to equal protection as a result of UT's race-conscious admissions program and the corrosive nature of the theory espoused to support it, some retrospection of this Court's reasoned pronouncements on race-conscious governmental action is in order.

"All racial classifications" is a set that requires little clarification. When persons are distinguished, preferred, rejected, elevated, diminished, sorted, labeled, recognized, etc., according to their race, by a government actor, strict scrutiny and its attendant elements must be applied. *Id.* The first question upon review, then, is whether review will be "strict scrutiny" or not. When that question is answered in the affirmative, elements – "necessity," "compelling interest," "narrow tailoring" – can be rolled out in turn to be probed by a reviewing court.

But UT wants to avoid strict scrutiny in its definitive form, and to create a crevice in which other governmental entities will inevitably seek to escape it, by leading the Court to accept that "deference" to

its self-defined "mission," including the efforts it will take to achieve it, is equivalent to exercising meaningful judicial review. In fact, deference to any person or institution's self-described internal goal is unremarkable and need not implicate this Court's duty and purpose to interpret the law. UT can believe fervently that diversity, of any kind and to any degree, will help reach its goals, and this Court or any other fact finder may accept, defer to, or laud that belief, so long as unconstitutional authority is not claimed. What the Court must not do is allow itself to be convinced that no further engagement is required when racial classifications have been imposed by a governmental actor.

Universities, executive agencies, indeed any governmental institution composed of expert personnel, will be naturally disposed to crave autonomy from judicial oversight to select and to implement programs of their choosing, whether or not they implicate a protected class – or perhaps, especially if they do. Up to and including *Grutter v. Bollinger,* 539 U.S. 306 (2003), the check on that impulse has been that, if race-conscious measures were included in such programs, the government had the burden to show that its means and ends were constitutionally sound. UT has chosen, deliberately upon *Grutter's* publication, to test whether this Court would untether even a small segment of government – "higher education" – from those constraints altogether under the guise of "deference."

There is no reason for this Court to abandon or to lessen the burdens on governmental actors under

strict scrutiny. The same searching review applied to all other governmental entities for all other race-conscious programs may easily be and should be applied to educational institutions for their "diversity" initiatives. The Fifth Circuit was under no compulsion from the precedents of this Court to substitute "deference" for an acknowledgment that strict scrutiny is applicable to UT's admissions and student placement program. Having acknowledged that strict scrutiny is required, the Fifth Circuit should have demanded a showing from UT commensurate with that exacted from any other governmental entity.

## ARGUMENT

### I.

### This Court should review the predicate for race-conscious programs designed to promote diversity in education with the same rigor as that applied to programs designed to remedy the effects of constitutional or statutory violations.

In SLF's view, strict scrutiny should be applied to all race-conscious programs, and the diversity rationale offered by UT is subject to more searching judicial scrutiny than the Fifth Circuit gave it.

As Justice Powell observed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), race-conscious steps do not serve as a remedy for past

discrimination unless "judicial, legislative, or administrative findings of constitutional or statutory violations" against affected groups have been made. 438 U.S. at 307 (Powell, J.).

> After such findings have been made, the governmental interest in preferring members of the injured groups, at the expense of others is substantial, since the legal rights of the victims must be vindicated.
>
> . . . [T]he remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.

*Id*. Significantly, the challenged UT program bestows benefits on minority students who have not been found to have suffered a legally cognizable injury. In addition, any oversight comes from UT administrators, not an unbiased fact finder.

Race-conscious programs designed to create "diversity" are in many ways necessarily different from "remedial" measures. For one thing, UT, rather than any judicial, legislative, or administrative entity, decided its program was necessary and defined its scope. But "necessity" and "tailoring" are constitutional prerequisites for race-conscious governmental activity that must not be left to individual government actors without oversight. To illustrate, here UT decided that its program was "necessary" *after* a federal court had declared its previous race-conscious program unconstitutional and the Texas Legislature had created a successful race-neutral alternative that

made significant impacts in producing racial diversity at UT.[2]

This Court has rejected the position that diversity is "simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means," and has instead recognized that some governmental interests in diversity are "compelling" and that particular means may, in some cases, be tailored narrowly enough to achieve such interest without running afoul of constitutional equal protection guarantees. *Grutter*; *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (quoting Brief for Petitioner at 17-18, 40-41). But recognition by this Court of the potential for government to meet its burden under strict scrutiny as to a particular stated interest in diversity does not equate to negating the burden for any governmental entity that relies upon a concept – "diversity" – to supply its compelling interest. Inasmuch as this Court scrutinizes remedial race-conscious measures by governmental entities, it should likewise be critical of so-called diversity programs, since "diversity" has not become any more bounded, defined, or definite in the years since *Grutter* and *Gratz*.

Indeed, the validity of "diversity" as a goal sufficient to justify race-conscious programs is not unlimited. In *Adarand v. Pena (Adarand)*, for example, this

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[2] *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); *see also* Brief of Petitioner at 4-5, *Fisher v. University of Texas at Austin, et al.*, No. 11-345 (May 21, 2012).

Court reversed *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), to the extent that *Metro Broadcasting* endorsed application of intermediate scrutiny for so-called "benign" racial classifications. 515 U.S. at 225. The *Metro Broadcasting* decision had upheld FCC policies that considered race in the interests of "enhancing broadcast diversity." 497 U.S. at 567. *Adarand* re-asserted the general principle that the most searching scrutiny applies to all racial classifications used by governmental entities. 515 U.S. at 223. In addition, *Gratz* demonstrates that not all invocations of "diversity" in the higher education context will pass constitutional muster under strict scrutiny, if narrow tailoring is not demonstrated.

The Court should also be wary of "diversity" as a blanket justification for race-conscious programs because such programs vindicate an interest that is redolent of interests and justifications for intervention that this Court has previously rejected. *See Bakke*, 438 U.S. 265; *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986). The goal of UT is to attain an undefined "critical mass" of underrepresented minority students, which is apparently more than the 21.4% of all freshman students that those minorities represented when race-conscious measures were re-introduced. *See Fisher v. University of Texas*, 631 F.3d 213, 243 (5th Cir. 2011). Furthermore, UT wishes to redistribute that critical mass of minority students among its undergraduate programs because, under the Top 10% plan, they showed an apparently distressing tendency to cluster in certain programs. *Id*. at 240 ("It is evident that if UT is to have diverse interactions, it needs minority students who are

interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.").[3]

UT hopes that one effect of its race-conscious program will be to "produce graduates who are capable of fulfilling the future leadership needs of Texas." *Fisher*, at 237. The Fifth Circuit commented, "[t]his objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workplace is especially important." *Id*. But, this "diversity emphasis" sounds uncomfortably close to the kind of "faces-in-places" rationale for race-conscious action which Justice Powell rejected in *Bakke* and this Court denounced in *Wygant*. In *Bakke*, the University of California (UC) suggested that reserving places in its Medical School for minority students would, among other things, help increase "the number of physicians who will practice in communities underserved." 438

[3] It is unclear how UT will cure what appears to be a voluntary sorting phenomenon, and that obscurity further illustrates that UT has not fully established the necessity and scope of its program. *See City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 503 (1989) (finding minority contractors may make different "career and entrepreneurial choices" from others). Furthermore, if commentators who point to a mismatch effect, such as *amici* Stuart Taylor and Richard Sander, are correct, the perceived problem cannot be cured by UT through its racial balancing of particular programs and classes, without some coercion of practically every student at UT. *See Amicus Curiae* for Richard Sander and Stuart Taylor, Jr., in support of Petitioner, *Fisher v. University of Texas at Austin, et al.*, No. 11-345 (Oct. 19, 2011).

U.S. at 306. Justice Powell concluded that "there is virtually *no evidence in the record* indicating that [UC's] special admissions program is either needed or geared to promote that goal." *Id*. at 310 (emphasis added). In other words, UC was attempting to substitute invocation of "diversity" for a strong basis in evidence revealing a "narrowly tailored" "compelling interest," and the Court rejected that proxy.[4] Likewise, UT has not presented evidence to establish that its own special admissions program is needed or geared to promote "leadership" or "collaboration with members of racial groups" among its students. In particular, no evidence has been presented that leadership and collaboration cannot be inculcated from within undergraduate programs of the students' own choosing. Nevertheless, even if UT had presented such evidence, those goals have not been held to be "compelling interests" under any strict scrutiny analysis to date.

Moreover, *Bakke* also rejected the "underserved communities" rationale based upon reasoning from the opinion of the California Supreme Court, which had identified race-neutral ways of accomplishing UC's purported goal. *Id*. As that court stated,

> [A]n applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary

[4] Similarly, in *Wygant*, this Court rejected the notion that a race-conscious layoff policy adopted by the school board would provide "role models" for minority children. 476 U.S. at 269.

> professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage.

*Id*. at 311 (quoting *Bakke v. Regents*, 18 Cal. 3d 34, 56, 132 Cal. Rptr. 680, 695, 553 P.2d 1152, 1167 (1976)). Likewise, continuing to allow college students at UT to choose their own programs of study based on interest and skill, without deferring to a particular formula of racial balance preferred by administrators, is more likely to result in desirable role models of all races. This seems particularly so in a setting such as UT, where more than 75% of entering freshman are scholars who graduated in the Top 10% of their high school class, which demonstrates as well as any other evidence on record their aptitude for leadership, achievement, and comprehension.

UT does not claim it seeks to correct something in the same way a remedial plan does, despite the fact that it has used "diversity" as a euphemism for some problem it perceives exists. In UT's view, a Top 10% race-neutral plan apparently does not bring enough minority students to the University or plant them into the right classrooms. In SLF's view, UT's concern with manufacturing race-centric "leadership" edges toward trying to resolve an issue as sprawling as societal discrimination, which has not been demonstrated by UT as to the affected students or the population served by its graduates.

Of course, this Court rejected the pretext of societal discrimination as justification for race-conscious activity by governmental entities long ago. In *Bakke*,

Justice Powell astutely observed that such a sweeping rationale would change a remedy for specific injuries into "a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." 438 U.S. at 310.[5] *Wygant* goes even further:

> [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. *In the absence of particularized findings*, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

476 U.S. at 276 (emphasis added).[6] Certainly, "diversity" at the level of particular programs of study or classrooms is amorphous and timeless in its ability to affect future student bodies at UT, since the catalog of

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[5] The City of Richmond, Virginia's, affirmative action plan for subcontracting on city construction projects in *Croson* demonstrates the wisdom of Justice Powell's concern. That plan gave preferential treatment to, among others, Spanish-speaking, Oriental, Indian, Eskimo, and Aleut controlled subcontractors, even though there was "*absolutely no evidence* of past discrimination" against them in Richmond. *Croson*, 488 U.S. at 506 (emphasis in original).

[6] *See also Bakke*, 438 U.S. at 307 (Powell, J.) (The goal of "redress[ing] . . . specific instances of racial discrimination" is "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.").

courses offered, the number of total students as well as students of any particular race, and the trends in student preferences for particular programs or classes presumably change regularly.

In *Grutter*, Justice Scalia, concurring in part and dissenting in part, noted:

> [I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated.

539 U.S. at 346 (Scalia, J., concurring in part and dissenting in part).[7] Justice Scalia no doubt described the experience of many motivated Top 10% students at UT who out-paced their peers despite inadequate or unequal educational opportunities at underserved or minority high schools and earned a spot at UT. Forcing those students into contrived settings of program or classroom "diversity" neither corrects the

[7] In *Croson*, this Court compared the claim in *Bakke* that "discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions" to an "amorphous" claim of past discrimination in an industry, finding both insufficient to support "an unyielding racial quota." 488 U.S. at 499.

deficiencies of their previous education nor rewards their relative achievements. Instead, it will result in forcibly sorting capable students out of self-selected programs in which they might excel.

Put simply, there is no reason, either established by UT or discernible in the controlling precedents of this Court, not to apply strict scrutiny to university programs that seek increased diversity in the same way that it is applied to remedial programs or indeed to "*all* racial classifications, imposed by whatever federal, state, or local governmental actor." *Adarand*, 515 U.S. at 227. No race-conscious programs should be found constitutional unless they are supported by a strong basis in evidence showing the government's compelling interest and a narrowly tailored means of achieving it. *Id.*

## II.

### The Fifth Circuit's deference to UT's declaration of necessity for classroom diversity to achieve its educational mission exceeds the holistic approach approved under strict scrutiny in *Grutter*.

Given the degree to which the Fifth Circuit purported to rely on *Grutter v. Bollinger*, SLF believes it is important to clarify the limitations of what this Court held in that case. *Grutter* is the only holding on race-conscious governmental action in which this Court has deferred to the decisionmaker regarding the necessity of its action. *See Parents Involved in*

*Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 765 (2007) (Thomas, J., concurring). Arguably, since the Court simultaneously rejected the University of Michigan's (UM) undergraduate race-conscious program, *see Gratz*, 539 U.S. 244, a university law school or similar entity is the only decisionmaker which has been offered such deferential consideration by the Court, such that "good faith" regarding its determination may be "presumed" absent "a showing to the contrary." Nonetheless, the Fifth Circuit's decision in *Fisher* represents an expansion of *Grutter* that stretches the treatment of "diversity" as a compelling interest.

In *Grutter*, this Court stated that it would defer to the school's "educational judgment" that a racially diverse student body was "essential to its educational mission." 539 U.S. at 328. The Court said that its consequent recognition of diversity as a compelling interest was "informed by our view that attaining a diverse student body is at the heart of the Law School's institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id*. at 329 (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)). Even so, such deference is not unlimited, but is only "a degree of deference to a university's academic decisions, within constitutionally prescribed limits." 539 U.S. at 328.

Deference to UT's "educational judgment" in the case of Abigail Fisher's claim against the University is misplaced. In *Grutter*, the UM Law School's admissions program had an effect that was linked to

the Law School's goal of achieving an experience-diverse student body to foster dynamic education. But, UM Law School's comparatively modest goal of introducing a mix of perspectives into its student body is much narrower than UT's scheme to mandate a particular mix of racial diversity in specific classrooms, demonstrating that UT's concept of diversity reaches far more widely than the *Grutter*-approved program ever purported to.

Significantly, in *Grutter*, without UM's consideration of race, its student body might have looked noticeably different, which was established by expert testimony. One expert testified that membership in preferred minority groups was "an extremely strong factor" in the law school's admissions decisions and that applicants from preferred minority groups received "an extremely large allowance" in their favor. *Id*. at 320. Another testified that, without the program, preferred minority students would have been only four percent of the student body instead of 14.5 percent. *Id*. According to that expert, "a race-blind admissions system would have a 'very dramatic,' negative effect on underrepresented minority admissions." *Id*. (quoting App. to *Grutter* Pet. 223a). Thus, there was at least arguably a strong basis in evidence to connect the school's desire to create diversity with its determination that consideration of race was "essential" and the means chosen to achieve its goal.

The same cannot be said of the University of Texas. The Top 10% plan had already substantially increased racial diversity in the student body prior to implementation of the challenged race-conscious

measures, albeit not as much or as uniformly-distributed as UT administrators might prefer. Judge Garza observed, the effects of the University's program in addition to the gains under the Top 10% plan are effectively unquantifiable. *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially) (The University's claim that it has not achieved 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 UT's program has an effect, there is no justification to defer to its "educational judgment," which UT has not attempted to support with expert testimony or other evidence, as was offered in *Grutter*. Further, Judge Garza's point is well taken, that the program's effect is as likely to be insignificant as not, rendering the essential link between goal and remedy broken from the outset. *See id*. at 260-63.

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 there is no such perspective, then UT's goal of classroom diversity in those subjects is doomed to failure on the narrow *Grutter* objective of creating diversity in educational experience by introducing alternative minority viewpoints. Moreover, as the Petition shows, classroom diversity as measured by mere demographic head-counts decreased even as minority enrollment was increasing under the Top 10% plan from 1996 to

2002. Pet. at 10, n.9.[8] No evidence has been presented to explain the reduction, which leaves open myriad possibilities such as UT's own failure to fragment diluted class sections or to offer more class sections in particular subjects targeted to underrepresented demographics.

This Court should also be uncomfortable with UT's race-conscious admissions program due to its expansive scope. In contrast with *Grutter*, which involved an entering law school class of 350 students, UT takes in some 7,000 freshmen each year. Three-quarters of them are admitted through the prestigious Top 10% plan, yet UT wants to redistribute those demonstrably motivated students by micromanaging them into seats in racially diverse classrooms. In other words, UT apparently subordinates their value as self-determined scholars to their value as placeholders for their respective race in some undefined aesthetic ideal. SLF would also characterize it as heavy-handed – and thoroughly unjustified – social engineering.

Notwithstanding the expansive scope of UT's program, it has some inconsistent self-imposed limits, which call into question both the "necessity" and the

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[8] In 2002, even after the Top 10% plan had produced greater diversity by the numbers in the entering class, 4,448 of the 5,631 classes the University offered (or 70 percent) had zero or one African-American student, and 1,689 (or 30%) had zero or one Hispanic student. *Fisher*, 631 F.3d at 260 (Garza, J., concurring specially).

"tailoring" of the race-conscious scheme. First, the schools of architecture and fine arts at UT, as well as some honors programs, are on a separate admissions track that includes "special portfolio, audition, and other requirements." *Fisher*, 631 F.3d at 266, n.25 (Garza, J.). In those programs, "aptitude is essential." *Id*. However, UT displays no particular concern about "diversity" in those programs, despite having concluded elsewhere that diversity is "necessary" for producing positive education outcomes for Texas' multicultural population. 631 F.3d at 231. If UT's stated mission to produce future leaders by means of manually-assembled classroom diversity is to be given deference, it is a fair question to ask why graduates from its most prestigious and selective programs are not subjected to the same mission. Similarly, there appears to be no concern about diversity in UT's athletic departments, from which leaders and role-models for underrepresented minorities as well as women on college campuses often find their first platform of influence. In short, UT's consideration of race in some contexts but not all undermines any appeal to deference for its conclusion that the challenged admissions programs is either "necessary" or "narrowly tailored" to achieve its stated goal and makes some students more equal than others.

## III.

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

The "strong basis in evidence" test originated in Justice Powell's plurality opinion in *Wygant*. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (citing *Wygant*, 476 U.S. at 277). Thereafter, the standard was applied in *Croson* and *Ricci*. But, even where this Court did not explicitly require a strong basis in evidence in those cases, its review of race-conscious governmental action was no less searching. This Court's holdings in the context of government employment and contract awards – which, like public education, comprises a distinct field of governmental activity that is occupied by government but routinely delegated to industry "experts" – are fully applicable to governmental entities of higher education. A brief review of this Court's holdings from *Wygant* through *Ricci* will show how *Grutter* fits in – and how UT's program does not.

Initially, SLF notes that the Fifth Circuit's distinction of "backward looking" remedial programs from "forward looking" programs intended to increase diversity lacks support in this Court's jurisprudence. The linear orientation of a race-conscious program, remedial or diversity-based, makes no difference because all race-conscious programs are evaluated under strict scrutiny. 515 U.S. at 227. In addition, so-called "backward looking" remedial programs such as minority set-asides have forward looking effects because they govern future subcontractors' awards. In fact, they seek to correct and to avoid the sins of the

past by contriving diversity in the future. Such programs were declared unconstitutional in *Croson* and *Adarand*.

In *Wygant*, this Court held that a layoff provision favoring minority teachers with less seniority over non-minority teachers with greater seniority violated the Equal Protection Clause. The school district claimed the program helped provide minority students with "role models." But the court found that the "role model theory" lacked a "logical stopping point" and therefore was not narrowly tailored. *Id.* at 275. The plurality went on to hold that the school district could not justify the program as a remedy for past discrimination without "a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 277.

Three years later, in *Croson*, this Court found that Richmond, Virginia's, minority set-aside plan requiring prime contractors on city projects to award thirty percent of their subcontracts to "minority business enterprises" violated the Equal Protection Clause. Because the program reserved thirty percent of each project's funding for subcontractors chosen by race, strict scrutiny was required. 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." 488 U.S. at 493. By engaging in a "searching judicial inquiry into the justification" offered by the City, the Court could distinguish between "benign" or "remedial" classifications and classifications "in fact motivated

by illegitimate notions of racial inferiority or simple racial politics." *Id.*

Applying strict scrutiny, this Court in *Croson* rejected both the "factual predicate" offered to support the plan and the trial court's findings. The factual predicate failed because it was too "generalized" and lacked boundaries. *Id.* at 498. The trial court's findings failed to provide the necessary "strong basis in evidence" required to support race-conscious governmental action. This Court emphasized, "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id.* at 500 (emphasis added). The City's program was also overbroad in that it benefitted minorities with no history of discrimination in the Richmond market.

In 1995, three years after *Croson*, *Adarand* held: "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test. . . ." 515 U.S. at 237. This Court instructed the Tenth Circuit on remand to "address the question of narrow tailoring . . . by asking, for example, whether there was 'any consideration of the use of race-neutral means,'" and consider "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Id.* at 237-38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

In *Gratz*, this Court concluded that UM's undergraduate admissions scheme unconstitutionally used

race as a selection criterion in a way that was not narrowly tailored to its stated goal of promoting diversity. In order to be found constitutional, this Court explained, the program at issue had to undergo "a most searching examination" to establish a "most exact connection between justification and classification." 539 U.S. at 270. The *Gratz* program failed this test because of its inflexibility; 20 "points" on their admissions applications were automatically given to underrepresented minority applicants, with the only criterion for those points being a factual determination of "whether an individual is a member of one of these [underrepresented] minority groups." *Id*. at 270-71. The 20 point bonus was enough to guarantee that "virtually every qualified underrepresented minority applicant is admitted." *Id*. at 273.

In 2007, this Court held that the race-conscious public school student assignment plans of Seattle, Washington, and Jefferson County, Kentucky, were not narrowly tailored to serve a compelling interest and were, as a result, unconstitutional. *Parents Involved*, 551 U.S. 701. Neither plan was aimed at remedying the effects of past discrimination; rather, the districts wanted to use race to "balance" student populations at the high schools in Seattle and at elementary schools in Jefferson County, respectively – in other words, to manually create "diversity." This Court declined to expand *Grutter* beyond the unique law school context to elementary and secondary schools, and concluded that, "[i]n design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as

illegitimate," 551 U.S. at 726, since the plans were held to "work backward" to approximately reflect the racial demographics of the community. *Id.* at 729. Furthermore, this Court pre-figured the very premise challenged by Abigail Fisher when it stated: "[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end." *Id.* at 733.

The programs challenged in *Parents Involved* ultimately had a small effect. In Seattle, during the 2000-2001 year, only 52 students were assigned to a school they did not prefer and to which they would not otherwise have been assigned. In Jefferson County, the guidelines accounted for only about three percent of the assignments. *Id.* at 734. This Court observed, "[t]he minimal impact of the districts' racial classifications on student enrollment casts doubt on the necessity of using racial classifications." *Id.* at 735. Moreover, neither district showed that it had "considered methods other than explicit racial classifications to achieve their stated goals." *Id.*

*Ricci v. DeStefano* involved the application of Title VII of the Civil Rights Act of 1964 rather than the Equal Protection Clause, but, this Court explained, "[o]ur cases discussing constitutional principles can provide helpful guidance in this statutory context." *Ricci*, 129 S. Ct. at 2675. It went on to "adopt" the strong basis in evidence standard "as a

matter of statutory construction," *id.*, demonstrating that all racial classifications by governmental entities are subjected to strict scrutiny, in whatever form, under whatever legal authority, and by whatever type of entity is creating the classifications.

Accordingly, any racial classification for whatever purpose should be required to satisfy strict scrutiny's requirements of "necessity" and "tailoring." The caliber of inquiry in each of the foregoing cases is the same: they all involved a searching judicial inquiry. The University and the Fifth Circuit are bound by those requirements as well.

As Judge Garza observed, the deference given to UM Law School in *Grutter* and to "public university administrators" generally is "unusual." *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially). Indeed, in all other contexts, this Court's review of race-conscious actions has been anything but deferential. "[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. The strong basis in evidence test, on the other hand, is an objective one. That trait alone elevates it above the non-standard of "deference" to transitory educational administrators and would-be social engineers.

## IV.

**Institutions of higher education are not immune from the obligation to show a strong basis in evidence.**

The Fifth Circuit rejected the contention that it should apply the strong basis in evidence test in reviewing the constitutionality of UT's program. It dismissed reliance on cases like *Wygant*, *Croson*, and *Ricci*, which support application of strong basis in evidence review, as "backward-looking" and irrelevant to the kind of "holistic" consideration that was used in a supposedly "forward-looking effort to obtain the educational benefits of diversity." *Fisher*, 631 F.3d at 233. Instead, the court said, "*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment." *Id.*

SLF disagrees with the suggestion that a university need not have a strong basis in evidence to support the consideration of race in an attempt to create or increase diversity. Rather than being treated as carte blanche for the universities, as the Fifth Circuit treated it, *Grutter* should be viewed within this Court's " . . . well-established framework for assessing equal protection challenges to express racial classifications. . . . " *Parents Involved*, 551 U.S. at 735. That framework requires strictest scrutiny, under which

the government bears the burden of showing that its race-conscious action was "narrowly tailored" to serve a "compelling interest." *Adarand*, 515 U.S. at 227. Just because *Grutter* allowed for deferential treatment of the UM Law School's determination that a holistic consideration of race would further its mission of diversity does not establish that federal courts must affirm any declarations by education administrators that either their programs or their missions satisfy the rigors of strict scrutiny. Indeed, such an inherently judicial determination is emphatically the province and duty of the judiciary. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The thing which distinguishes *Grutter* is that it is the "only" instance in which this Court has deferred to the decisionmaker. *See* 551 U.S. at 765 (Thomas, J., concurring).

The well established framework appurtenant to strict scrutiny entails a rigorous review of the necessity and tailoring of race-conscious activities, even when universities undertake them. In several cases, *Wygant*, *Croson*, and *Ricci*, this Court looked for a strong basis in evidence. In *Adarand*, it called for "detailed examination, both as to ends and means." 515 U.S. at 236. In *Gratz*, it held that the use of race in a university's undergraduate admissions program was not narrowly tailored toward achieving the goal of racial diversity, and in *Parents Involved*, it did the same for elementary and secondary schools. Thus, both before and after *Grutter*, this Court has demanded that the need for and the scope of race-conscious programs be justified, even in the education

context. Indeed, *Grutter* itself does not undercut the need for justification by a governmental entity seeking to impose race-conscious programs to achieve diversity, despite over-reaching conclusions to the contrary from UT and the Fifth Circuit.

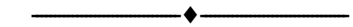
In *Gratz*, this Court responded directly to suggestions first offered by Justice Ginsburg in dissent, to the effect that its decision would force universities that wanted to continue to use race-conscious selection schemes to resort to "winks, nods, and disguises." 539 U.S. at 305 (Ginsburg, J., dissenting). This Court found Justice Ginsburg's suggestions remarkable for two reasons:

> First, they suggest that universities . . . will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

*Id.* at 275, n.22.

Subsequently, in *Parents Involved*, this Court linked *Grutter* to the rest of its jurisprudence regarding racial classifications in education, noting, "[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance. . . ." 551 U.S. at 723. Accordingly, this Court made it clear that its narrow tailoring analysis was the same in *Grutter* as it was in

*Gratz* and *Parents Involved*. In other words, there are limits to the deference that universities can expect.



## CONCLUSION

The University of Texas at Austin has not carried its burden under strict scrutiny to establish the strong basis in evidence required to sustain the constitutionality of its race-conscious efforts to increase diversity. The University's dissatisfaction with the results achieved through its Top 10% plan indicates that an underrepresented minority population of 21.4% at UT is by some measure too low for administrators. Yet, increasing that percentage through the use of race-conscious selection methods edges toward the racial balancing that was categorically condemned in *Parents Involved* and *Croson*.

The University's program fails strict scrutiny because its effect is neither traceable to the consideration of race nor significant. As Judge Garza observed, UT's "refus[al] to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields" makes it hard to say that the program has a measureable impact. *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially). Even the Fifth Circuit majority could not tie the recorded increase in preferred minorities admitted at UT to its race-conscious program. "Because of the myriad programs instituted, it can be difficult to attribute increases in minority

enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide." *Id.* at 226.

In addition, UT's program fails strict scrutiny because it lacks a foreseeable logical stopping point.[9] The Fifth Circuit said that it would not approve the University's plan "in perpetuity," *Fisher*, 631 F.3d at 246, but no sunset date similar to Justice O'Connor's twenty-five-year expiration on holistic evaluation of law student diversity in *Grutter* was included in the court's opinion. With "deference" rather than a strong basis in evidence as the purported check on perpetual racial discrimination by governmental entities, educational institutions will have self-renewing license to redefine goals and revise the means used to achieve them – which essentially is license to discriminate against Abigail Fisher and others, based on their race, without scrutiny from this or any other federal court. SLF believes "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," 551 U.S. at 748, and the time to begin is now.

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[9] Some government officials may prefer that no stopping point be imposed. U.S. Attorney General Eric Holder, when questioned about Abigail Fisher's predicament, wondered of race-conscious governmental action, not "when will it end?" but "at what point do we start the clock?" and posited that the need for diversity initiatives may not ever cease. Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action a Low*, http://www.columbiaspectator.com/2012/02/24/holder-talks-financial-crime-affirmative-action-low (last visited May 29, 2012).

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the decision below.

Respectfully submitted,

SHANNON LEE GOESSLING
*Counsel of Record for Amicus Curiae*
AMY LABREESKA MACRINA
SOUTHEASTERN LEGAL FOUNDATION, INC.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org
amy@southeasternlegal.org

JOHN J. PARK, JR.
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
(678) 347-2208
jjp@sbllaw.net