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

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INTEREST 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.

Amici are concerned that the use of race and ethnicity by the University of Texas at Austin ("the University") in its admissions policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and are further concerned about the corrosive effect of that violation on American society and the rule of law. Among the harms caused by the University's race and ethnical-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that 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. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

ly-based admissions 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; the increase of racial and ethnic resentment and intolerance in American society; and the continued stigmatization of individuals as "inferior" based on college admissions practices. For these reasons, *amici* urge the Court to overturn the University's policy.

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 seek to classify applicants by crude, inherently ambiguous, and unsound racial and ethnic categories to promote diversity, but which instead promote racial and ethnic stereotyping, can never be narrowly tailored to promote a compelling government interest and therefore cannot survive strict scrutiny.

ARGUMENT

I. RACE AND ETHNICALLY-BASED ADMISSIONS POLICIES ARE CRUDE, INHERENTLY AMBIGUOUS, AND UNSOUND CONSTRUCTS THAT CAN NEVER BE NARROWLY TAILORED TO FURTHER A COMPELLING INTEREST IN DIVERSITY.

A.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination on the basis of race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Classifications of persons according to their race "are subject to the most exacting scrutiny; to pass constitutional muster they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purposes." *Id. quoting McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications, imposed by whatever federal, state, or local governmental action, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests").

In *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), this Court found that the University of Michigan Law School had a "compelling interest in attaining a diverse student body." In the same year that marked the completion of the Human Genome

Project,[2] the Court upheld the Law School's use of race – a concept that has been rejected by science and for centuries has been used to divide, impoverish, oppress, and enslave people – as a "plus" factor weighing in favor of admission. *Id.* at 335-43. In its ruling, the Court assumed that race was a meaningful proxy for diversity without addressing the issue in any direct way. The Court also assumed that race presented a fixed, natural, and unambiguous means of distinguishing between groups of people such that individual Law School applicants could be assigned a particular racial classification and awarded – or not awarded – a "plus" factor based on race. *Grutter* represents only the second time since the adoption of the "strict scrutiny" standard that this Court has validated racial discrimination by government actors in non-remedial circumstances. *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting). The other was *Korematsu v. United States*, 323 U.S. 214 (1944). *Id.*

Following this Court's ruling in *Grutter*, in 2005, the University chose to begin using race in its admissions process, purportedly to achieve greater diversity in its student body. Applicants to the University are now required to complete and submit a standardized "ApplyTexas" application, among other information and materials. Question 7 of the ApplyTexas application, entitled "Ethnicity and Race," first asks applicants, "Are you Hispanic or Latino? (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture

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[2] *See* Press Release, "International Consortium Completes Human Genome Project," (April 14, 2003) http://www.genome.gov/11006929 (visited May 23, 2012).

or origin, regardless of race)."[3] Applicants are asked to answer "yes" or "no."[4] No other ethnicities are referenced.[5] Question 7 then directs applicants to "[p]lease select the racial category or categories with which you most closely identify. Check as many as apply: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White."[6] The accompanying instructions provide no additional guidance, but merely state, "Provide the information regarding your ethnic background and race. The information will be used for federal and/or state law reporting purposes and may be used by some institutions in admission or scholarship decisions."[7]

An applicant's race is referenced "at the front" of his or her admissions file. *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009). Thus, "reviewers are aware of [an applicant's race] throughout the evaluation." *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." *Id.* at 597-98.

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[3] *See* ApplyTexas, "Sample Application," https://www.applytexas.org/adappc/html/preview12/frs_1.html (visited May 23, 2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* ApplyTexas, "Instructions for Completing Your ApplyTexas Application, U.S. Freshman Admission Application," https://www.applytexas.org/adappc/html/fresh12_help.html (visited May 23, 2012).

B.

As the following excerpt from the "Statement on Race" issued by the American Anthropological Association on May 17, 1998 demonstrates, science rejected race as a valid system of classification long ago:

> In the United States both scholars and the general public 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. Evidence from the analysis of genetics (*e.g.*, DNA) indicates that most physical variation, about 94%, lies *within* so-called racial groups. Conventional geographic "racial" groupings differ from one another only in about 6% of their genes. This means that there is greater variation within "racial" groups than between them. . . .
>
> Historical research has shown that the idea of "race" has always carried more meanings than mere physical differences; indeed, physical variations in the human species have no meaning except the social ones that humans put on them. Today scholars in many fields argue that "race" as it is understood in the United States of America was a social mecha-

nism invented during the 18th century to refer to those populations brought together in colonial America: the English and other European settlers, the conquered Indian peoples, and those peoples of Africa brought in to provide slave labor. . . .

As they were constructing US society, leaders among European-Americans fabricated the cultural/behavioral characteristics associated with each "race," linking superior traits with Europeans and negative and inferior ones to blacks and Indians. Numerous arbitrary and fictitious beliefs about the different peoples were institutionalized and deeply embedded in American thought.

Early in the 19th century the growing fields of science began to reflect the public consciousness about human differences. Differences among the "racial" categories were projected to their greatest extreme when the argument was posed that Africans, Indians, and Europeans were separate species, with Africans the least human and closer taxonomically to apes.

Ultimately "race" as an ideology about human differences was subsequently spread to other areas of the world. It became a strategy for dividing, ranking, and controlling colonized people used by colonial powers everywhere. But it was not limited to the colonial situation. In the latter part of the 19th century it was employed by Europeans to rank one an-

> other and to justify social, economic, and political inequalities among their peoples. During World War II, the Nazis under Adolf Hitler enjoined the expanded ideology of "race" and "racial" differences and took them to a logical end: the extermination of 11 million people of "inferior races" (*e.g.*, Jews, Gypsies, Africans, homosexuals, and so forth) and other unspeakable brutalities of the Holocaust.
>
> "Race" thus evolved as a worldview, a body of prejudgments that distorts 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. The myths fused behavior and physical features together in the public mind, impeding comprehension of both biological variations and cultural behavior, implying that both are genetically determined. Racial myths bear no relationship to the reality of human capabilities or behavior. Scientists today find that reliance on such folk beliefs about human differences in research has led to countless errors.[8, 9]

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[8] *See* American Anthropological Association, "Statement of Race" (May 17, 1998), http://www.aaanet.org/stmts/racepp.htm (visited May 23, 2012); *see also* 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 (visited May 23, 2012).

[9] The federal government similarly acknowledges that the various categories of race and ethnicity that it has created for

Although science may have rejected race long ago, law and public policy, and in particular the University's admission policy, have yet to catch up. It is time that they did so. Race has no place in either.

C.

The University's admissions policy seeks to use race and "Hispanic or Latino" ethnicity as proxies for diversity. Writing in dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overturned by Adarand Constructors, Inc.*, 515 U.S. at 227, Justice O'Connor challenged whether the use of race as a proxy for diversity could ever be narrowly tailored.

At issue in *Metro Broadcasting, Inc.* were certain "minority preference policies" – "minorities" being defined as "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American extraction" – that the Federal Communications Commission ("FCC") sought to use to promote "diversity of programming." Justice O'Connor found that the use of race as a proxy for diversity rests on "stereotyping," andso "could not plausibly be deemed narrowly tailored." *Id.* at 617. As Justice O'Connor explained:

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use in the U.S. Census are non-scientific: "The racial categories included in the census questionnaire generally reflect a social definition of race recognized in this country and not an attempt to define race biologically, anthropologically, or genetically." *See* U.S. Census Bureau, "What is Race," http://www.census.gov/population/race (visited May 23, 2012).

> The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints . . . the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.

497 U.S. at 614-15. Justice O'Connor continued:

> The FCC claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that require enhancement. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [he or she is] "likely to provide [that] distinct perspective." The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The FCC's chosen means rest on the premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and demo-

> cratic society. The policies impermissibly value individuals because they presume that persons think in a manner associated with their race . . . The corollary to this notion is plain: Individuals of unfavored racial or ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity. Both the reasoning and its corollary reveal but disregard what is objectionable about a stereotype: The racial generalization does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion.

Id. at 618-620 (internal quotation marks omitted; citation omitted).

There is no meaningful difference between the FCC's use of racial stereotyping to promote "diversity of programming" in broadcasting and the University's use of racial and ethnic stereotyping to promote diversity in its student body. Justice O'Connor's dissent in *Metro Broadcasting, Inc.* applies equally to the University's admissions policy. The University's policy does not promote diversity. It promotes racial and ethnic stereotyping by making generalizations that equate an applicant's race or "Hispanic or Latino" ethnicity with his or her viewpoints, backgrounds, and experiences.

It is irrelevant whether racial and ethnic stereotyping is the result of a quota, a point system, or a

"plus" factor because, as the District Court found, even a "plus" factor "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application." *Fisher*, 645 F. Supp. 2d at 597-98. Obviously, the University must believe that its use of a race or ethnicity-based "plus" factor is meaningful, or it would not use it in its admissions policy. Because the University's use of race and "Hispanic or Latino" ethnicity to promote diversity in its student body rests on stereotyping that equate race and ethnicity with diversity, the policy can never be narrowly tailored to achieve a compelling government interest and therefore cannot survive strict scrutiny.

D.

The use of race and ethnicity as proxies for diversity cannot survive strict scrutiny because it rests on racial and ethnic stereotyping about individuals' viewpoints, backgrounds, and experiences. In addition, the University's admissions policy also cannot survive strict scrutiny because it makes no effort to define the crude racial and ethnic categories that it invokes or otherwise instructs its applicants on how they should self-select their race or ethnicity. Obviously, such endeavors are fraught with difficulties. Nonetheless, this failure makes the University's use of race and ethnicity all the more ambiguous and unsound.

Because race and ethnicity are crude social constructs, not verifiable, scientific facts, they are inherently ambiguous. This inherent ambiguity is

compounded by the ambiguity of applicants self-selecting the race or ethnicity to which they belong in order to gain a "plus" factor towards admission. These dual ambiguities run afoul of the Court's admonition in *Adarand Constructors, Inc.* that "[a]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. at 224. The use of such crude, self-identified, and ambiguous racial and ethnic classifications can never be narrowly tailored to favor one applicant over another.

The University has chosen to use five broad racial categories – "American Indian or Alaska Native," "Asian," "Black or African American," "Native Hawaiian or other Pacific Islander," or "White," and a single ethnic category "Hispanic or Latino" – in its admissions policy. None of these categories are defined or delineated in any meaningful way. Students are left to self-identify their race and "Hispanic or Latino" ethnicity. Unstated is 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," in order to be granted or be denied a "plus" factor. The University does not specify whether an applicant must be a "full-blooded" member of his or her self-identified race or a "full-blooded "Hispanic" or "Latino," or whether 1/2, 1/4, 1/8, 1/16, or 1/32 is sufficient to be granted or denied the "plus" factor. Nor does the University specify whether an actual ancestral link is required

for an applicant to be granted or denied a "plus" factor for race or "Hispanic or Latino" ethnicity, or whether a cultural affinity or some other identification with a particular race or with "Hispanic or Latino" ethnicity is sufficient.

With one important exception, Question 7 from the ApplyTexas application mirrors the 1997 *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* issued by the U.S. Office of Management and Budget ("OMB").[10] Unlike the University, the OMB standards provide cursory definitions of the racial categories that the standards employ.[11]

Equally if not more significant is the fact that the OMB standards were developed to "promote uniformity and comparability for data on race and ethnicity" and to "provide consistent data on race and ethnicity throughout the Federal Government."[12] The OMB standards disavow their use for anything other than statistical compilation:

> Foremost consideration should be given to data aggregation by race and ethnicity that are useful for statistical analysis and program administration and assessment, bearing in mind that the standards are not intended to

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[10] *See* 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/ (visited May 23, 2012).

[11] *Id.*

[12] *Id.*

> be used to establish eligibility for participation in any federal program.[13]

Thus, the OMB standards were not intended to be used in the manner in which the University is using them, much less to satisfy the strict scrutiny of an equal protection analysis.

Turning to the categories themselves, each and every one of them is ambiguous. The fact that Question 7 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.

In addition, according to an April 2012 study by the Pew Hispanic Center entitled "When Labels Don't Fit: Hispanics and Their Views of Identity," only twenty-four percent (24%) percent of Hispanic adults most often identify themselves by the terms "Hispanic" or "Latino."[14] Fifty one percent (51%) say they identify themselves most often by their family's country or place of origin.[15] Twenty one percent (21%) use the term "American" most often to refer to themselves.[16] This share rises to forty percent (40%)

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13 *Id.*

14 *See* 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/, at 9 (visited May 23, 2012).

15 *Id.*

16 *Id.*

among those who were born in the U.S.[17] The study also found that self-identification as "Hispanic" or "Latino" varies depending on which generation of a person's family immigrated to the United States:

> Among first-generation (or immigrant) Hispanics, more than six-in-ten (62%) say they most often use their family's country of origin to describe themselves. Among second-generation Hispanics, the share using their family's country of origin falls to 43%. And among third-generation Hispanics, the share falls to just 28%—less than half that seen among immigrant Hispanics. Not surprisingly, the use of the term "American" increases in a mirror-image pattern. While just 8% of immigrant Hispanics most often call themselves American, that share rises to 35% among second-generation Hispanics and 48% among third-generation Hispanics.[18]

The study concluded that, although federal law requires the U.S. government to categorize and collect data on "Hispanics," the government's "system of ethnic and racial labeling does not fit easily with Latino's own sense of identity." [19]

Also undefined by the University'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 such as

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17 *Id.*

18 *Id.* at 12.

19 *Id.*

the Germans and Italians and persons of Jewish background who immigrated to predominantly Spanish speaking countries in Central and South America and the Caribbean before immigrating to the United States. It also is unclear whether Question 7's reference to South America "or other Spanish culture or origin" includes Portuguese-speaking Brazil.

With respect to the "American Indian or Alaska Native" racial category, the Native Americans Rights Fund acknowledges that "[t]here exists no universally accepted rule for establishing a person's identity as an Indian."[20] While the OMB standards created for data collection purposes define an "American Indian or Alaska Native" as "A person having origins in any of the original peoples of North America and South America (including Central America), and who maintains tribal affiliation or community attachment," Question 7 provides no definition whatsoever.[21] The University's policy is completely silent as to who is entitled to a "plus" factor for being an "American Indian or Alaska Native."

The recent controversy over former Special Advisor to the Secretary of the Treasury and U.S. Senate candidate Elizabeth Warren highlights the

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[20] *See* Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," http://www.narf.org/pubs/misc/faqs.html (visited May 23, 2012).

[21] *See* 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/ (visited May 23, 2012).

multiple ambiguities inherent in the University's reliance on undefined, self-identified, and inherently ambiguous categories of race and ethnicity in its admissions policy. 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.[22] Under the University's policy, an applicant who similarly identified 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 the University comprised of 6,715 Elizabeth Warrens, all identical but for the difference in the race or ethnicity of a single great-great-great grandparent.[23] How much additional diversity would the University have achieved by taking the race and ethnicity of these students into account in the admissions process?

The University 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

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[22] 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/ (visited May 23, 2012).

[23] The University's 2010 freshman class was comprised of 6,715 students. *Fisher*, 645 F. Supp. 2d at 590.

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 the University's use of the term 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." The term "Asian" as anything other than a geographic reference is largely meaningless.

Defining who is "Black" is a deeply sensitive subject, inextricably woven into the history of slavery and segregation in the United States. Perhaps most illustrative is the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Homer Plessy considered himself to be "White," but the State of Louisiana considered him to be "Black" because one of his great grandparents had been from Africa, making him 7/8ths "White" and 1/8th "Black." *Id.* at 541. When Mr. Plessy took a seat in a railroad car reserved for "Whites," he was forcibly ejected and imprisoned in a New Orleans jail for violating a statute requiring "equal but separate accommodations for the white[] and colored races." *Id.* at 540. This Court upheld the constitutionality of the Louisiana statute, noting:

> 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 opin-

> ion 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 (citations omitted). Perhaps because of the deep sensitivity of the subject, the University makes no effort to define what it means by its use of the term "Black or African American" in its admissions policy. However, its 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?

The final category of "White" really appears to mean "None of the Above." As with all of the University's categories for race and its single category of "Hispanic or Latino" ethnicity, this category ignores the multitude of experiences, immigration paths, political histories, and socioeconomic statuses of the millions of immigrants who came to the United States over centuries. It treats as one undefined mass all persons of European ancestry – English, French, German, Greek, Irish, Italian, Czech, Polish, and Russian, to name just a few – regardless of their

often very different backgrounds and personal histories. Using "White" as a single, catch-all category for "None of the Above" puts the lie to the interest of diversity that the University's use of race and ethnicity purportedly promotes.

The University's racial and ethnic categories cannot withstand a moment's scrutiny, much less the strict scrutiny required by the Equal Protection Clause. Ultimately, however, the point is not that the University must adopt a standardized test by which it ascertains and verifies the race or ethnicity of each applicant, but that the crude social constructs of race and ethnicity are too inherently ambiguous to survive strict scrutiny, especially given the mixing of cultures, heritages, and nationalities so prevalent in the backgrounds of many Americans. They can never be narrowly tailored to further a compelling governmental interest.

E.

Other courts have weighed in on the inherent ambiguity of race and ethnicity as well. In 2008, one prominent jurist, the Honorable Jack B. Weinstein of the U.S. District Court for the Eastern District of New York, addressed the issue at length in rejecting the use of racially-based life expectancy tables and related data to find a reduced life expectancy for an "African-American" claimant:

> In the United States, there has been "racial mixing" among "Whites," "Africans," "Native Americans," and individuals of other "racial"

> and "ethnic" backgrounds for more than three and a half centuries. *See, e.g.*, Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* 660 (2008) (Thomas Jefferson fathered children with his "mixed blood" slave Sally Hemings. "[T]he choices the children of Sally Hemings and Thomas Jefferson made would separate their lines forever. Three would live in the white world, and one would remain in the black world."); Gregory Howard Williams, *Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black* (1996) . . . Clear-eyed observers of the American scene scoff at the use of "blood" in characterizing "race." *See, e.g.*, Mark Twain, *Pudd'nhead Wilson* (1894) ("White" and "Black" babies who looked "White" taken home by wrong mothers and raised inadvertently in "wrong 'racial' categories").

McMillan v. City of New York, 253 F.R.D. 247, 249 (E.D.N.Y. 2008) (Weinstein, J.). In a section entitled "'Race' as a Biological Fiction," the Court noted:

> 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.'" *Quoted in* Keay Davidson, *Franz Boas* in 3 American National Biography 83 (1999) . . . *The Concept of Race* xi (Ashley Montagu, ed., 1964) ("the biological concept of race has become unac-

> ceptable to a growing number of biologists"); . . . James C. King, *The Biology of Race* 146 (2d ed. 1981) ("estimates of the proportion of genetic material from white ancestry in American blacks range all the way from a few per cent [sic] to more than 50 percent").

Id. at 249. The Court continued:

> DNA technology finds little variation among "races" (humans are genetically 99.9% identical), and it is difficult to pinpoint any "racial identity" of an individual through his or her genes. International gene mapping projects have only "revealed variations in strings of DNA that correlate with geographic differences in phenotypes among humans around the world," the reality being that the diversity of human biology has little in common with socially constructed "racial" categories.

Id. at 250 (citations omitted).

Another court found that the term "Hispanic" was nothing more than a 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 . . . [I]f an Hispanic man married an admittedly non-Hispanic woman and they had children, the children

> would have to make a decision about whether they would identify themselves as Hispanic . . . [F]actors such as whether the children are living with the father, how they feel about themselves, and the neighborhood where they live would influence whether the children would identify themselves as Hispanic. A person's surname is not a definite indicator. Some last names of persons who may consider themselves Hispanic may not be or may not appear to be of Spanish derivation. Conversely, a woman of admittedly non-Hispanic descent may take her husband's Hispanic surname upon marriage. Suffice it to say that whether 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).

F.

In 1938, Justice Stone proposed a "more searching judicial inquiry" for reviewing government action based on race, thus giving rise to the "strict scrutiny" standard. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In the intervening 74 year period, much has been learned about race, including that it is a crude, inherently ambiguous social construct that has no validity in science. Race and ethnicity-based admissions policies enacted to achieve diversity are unconstitutional because they classify applicants by crude, inherently ambiguous,

and unsound racial and ethnic categories and rest on racial and ethnic stereotyping. They represent a step back from the tremendous advances towards fulfillment of the promise of the Equal Protection Clause that have occurred since *Carolene Products Co.* As the Circuit Court's concurring opinion observed:

> Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary – entitlement. More fundamentally, it assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.

Fisher v. Univ. of Texas, 631 F.3d 213, 265-66 (5th Cir. 2011) (Garza, J., concurring) (internal citations omitted). To fulfill the promise of the Equal Protection Clause, the Court should find that race and ethnicity can never be narrowly tailored to promote diversity in admissions policies and therefore cannot survive strict scrutiny.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the decision of the Circuit Court.

Respectfully submitted,

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