No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Abigail Noel Fisher,

Plaintiff–Appellant,

v.

University of Texas at Austin, *et al.*,

Defendants–Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:08-cv-00263-SS
The Honorable Sam Sparks

Brief of the Cato Institute as *Amicus Curiae* in Support of the Appellant Urging Rehearing

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Supplemental Statement of Interested Parties
***Fisher v. University of Texas at Austin*, No. 09-50822**

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that he is aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation and that the Cato Institute has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

/s/ Andrew M. Grossman
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Interest of the *Amicus Curiae*

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. This case implicates Cato's longstanding belief that all citizens should be treated equally before the law and that, accordingly, government's use of racial and ethnic classifications must be strictly circumscribed. Such classifications are, at the very least, in tension with the equal-protection and due-process guarantees of the Fifth and Fourteenth Amendments. Their use must therefore be subject to searching judicial review, consistent with the Supreme Court's equal-protection jurisprudence and in particular, its opinion in this case. Cato previously filed briefs in support of the Appellant in this Court and in the Supreme Court.[1]

Introduction and Summary of Argument

The Court should grant rehearing to conform its decision in this case with its body of jurisprudence applying strict scrutiny to racial classifications

[1] All parties to this appeal have consented to the filing of this *amicus curiae* brief. No person or entity other than *amicus* or its counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission.

by government. *See* Fed. R. App. P. 35(a)(1). "'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.'" *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Until the "sordid business" of "divvying us up by race" is prescribed, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J.), it is incumbent on this Court to ensure that the University "demonstrate **with clarity** that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary…to the accomplishment of its purpose," *Fisher*, 133 S. Ct. at 2418 (quotation marks omitted and emphasis added).

The panel decision cannot be reconciled with this Court's strict-scrutiny jurisprudence and the Supreme Court's remand order. In other contexts where the Court applies strict scrutiny, it has consistently struck down race-conscious programs where the government failed to articulate a clear and unambiguous interest on which the narrow tailoring of the program at issue could be measured or where race-neutral programs had made meaningful progress towards meeting that interest. *E.g.*, *W.H. Scott Constr. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206, 218–19 (5th Cir. 1999) (minority business set-aside programs); *Walker v. City of Mesquite*, 169 F.3d 973, 984–87 (5th Cir. 1999) (minority housing set-asides); *Dean v. City of Shreveport*, 438 F.3d 448, 454–58

(5th Cir. 2006) (hiring of minority firefighters); *Police Ass'n of New Orleans Through Cannatella v. City of New Orleans*, 100 F.3d 1159, 1168–69 (5th Cir. 1996) (assignment of minority police officers). Yet, if the panel decision is allowed to stand, it will upset this Court's strict-scrutiny jurisprudence in a variety of fields and contexts, sanctioning the use of racial classifications in circumstances where the Court has rejected them in the past. For that reason and others, rehearing is warranted.

Reasons for Granting the Petition for Rehearing

1. "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In reversing the panel's prior decision in this case, the Supreme Court specifically held that strict scrutiny of racial classifications in university admissions programs is no different than strict scrutiny of racial classifications in other contexts. *See Fisher*, 133 S. Ct. at 2420–21. Such scrutiny, it emphasized, is an issue for "judicial determination," requiring that "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal," without the benefit of any judicial "deference." *See id* at 2419–20. This is because "[r]acial classifications are simply too pernicious to

permit any but the most exact connection between justification and classification." *Adarand*, 515 U.S. at 219, 229, 236 (quotation marks omitted).

For the University to seriously contend that a "critical mass" of black and Hispanic students is necessary to advance its interest in student diversity, it therefore must explain—"with clarity"—what exactly a "critical mass" is and why the University currently lacks it. *Fisher*, 133 S. Ct. at 2418. Only then can the Court possibly determine whether the University's means of achieving that goal through granting preferential admission to certain black and Hispanic students is narrowly tailored to those ends.

2. Outside of the panel decision in this case, the Fifth Circuit has consistently applied strict scrutiny in that manner. In *W.H. Scott Const. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206 (5th Cir. 1999), for example, this Court affirmed a decision challenging the City of Jackson's policy of setting a 15 percent goal for minority city construction subcontracts. The city argued that its policy was justified as a means of remediating past discrimination in city contracting, an interest that the Supreme Court has held in the government contracting context to be compelling, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988), and that is therefore analogous to the University's stated interest in promoting diversity. But the city's policy failed strict scrutiny because it did not clearly support the interest in remedying contract

discrimination, relying on evidence regarding general prime contracting to justify set-asides in construction subcontracting. *See W.H. Scott*, 199 F.3d at 218. This failing was sufficiently great that this Court did not even find it necessary to consider the issue of narrow tailoring; the city's claimed compelling interest was simply not sufficiently defined and supported. *Id.* at 219.[2]

The panel decision here cannot be reconciled with *W.H. Scott*. Rather than require that the University even roughly define what quanta of black and Hispanic students is necessary to further its diversity goals—a particularly meaningful task given the significant black and Hispanic presence on campus resulting from Texas's successful "Top Ten" plan—the University was allowed to skate on vacuous platitudes about "critical masses," "tipping points," "upper bands," and the like. *See, e.g.*, Slip Op. at 52 (Garza, S.J., dissenting). But if interests so vacuous they read like a parody of a Thomas Friedman column were all that strict scrutiny required, then the City of Jackson's generalized conclusions about discrimination in past city contracting—which

[2] *See also Police Ass'n of New Orleans Through Cannatella v. City of New Orleans*, 100 F.3d 1159, 1167–69 (5th Cir. 1996) (holding that New Orleans' pattern of promotions and transfers of black police officers to better reflect the city's racial composition may have been pursuing a valid goal but that the policy failed strict scrutiny because, among other reasons, the city failed to clearly and meaningfully characterize any past discrimination, frustrating the court's inquiry into whether the program was narrowly tailored for that purpose).

no party seriously disputed in *W.H. Scott*—would have sufficed as a compelling government interest for the City's specific subcontracting set-aside.

3. Nor is the panel's treatment of narrow tailoring consistent with circuit precedent. *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999), is instructive. That case concerned a district court's administration of a consent decree requiring that new public housing units be constructed in predominantly white neighborhoods as a result of the Dallas Housing Authority's historic practice of preventing black persons from moving into white neighborhoods—the type of past discrimination that potentially justifies race-conscious remedial action. The Court considered such factors as the Dallas Housing Authority's race-blind procurement of thousands of additional Section 8 public housing units and the fact that the Dallas Housing Authority and other defendants had already "begun making race-neutral, good faith, and effective efforts to remedy the wrongs of the past." 169 F.3d at 984–87. At bottom, "[b]ecause there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, the provision of the court's remedial order calling for the construction or acquisition of units of public housing in 'predominantly white' areas is unconstitutional." *Id.* at 987.[3]

[3] *See also Dean v. City of Shreveport*, 438 F.3d 448, 457–58 (5th Cir. 2006) (holding that even where Shreveport presented sufficient evidence of past discrimination in hiring of firefighters potentially to merit race-conscious

The panel decision cannot be reconciled with *Walker*. It is more than fair to say that an approach like Texas's "Top Ten" law is a "promising, non-racially discriminatory way" to achieve the goal of diversity in either admitted or enrolled students at the University. That program led to combined black and Hispanic enrollment of 21.5 percent, *see* Slip Op. at 14, much as the Dallas Housing Authority's race-blind housing voucher program had increased the number of black families living in predominantly white areas by 27 percent, *Walker*, 169 F.3d at 984. Moreover, the *Walker* Court noted that other race-neutral measures like "increased funding," "more mobility counselors," and "higher fair market exception rents" potentially could increase the effectiveness of the race-neutral program—much like the University potentially could increase the effectiveness of its race-blind admissions program through increased outreach at economically-depressed schools and to minority high-school students. *Id.* at 985. After all, if "a nonracial approach…could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race." *Fisher*, 133 S. Ct. at 2420 (quotation omitted).

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remediation program, narrow tailoring was not satisfied where the city did not prove that there was a mismatch between the current qualified applicant pool and the number of black firefighters); *Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex.*, 19 F.3d 992, 995 (5th Cir. 1994) (rejecting "broad" race-conscious remedy where "the knowledge to narrow it seems readily available").

Conclusion

For the foregoing reasons, the Court should grant the petition for rehearing, apply strict scrutiny consistent with the Supreme Court's remand order, and hold the University's racial classification scheme unconstitutional.

Respectfully submitted,

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Certificate of Service

I hereby certify that I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system on August 5, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also caused one true and correct paper copy and one true and correct electronic copy of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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Dated: August 5, 2013

/s/ Andrew M. Grossman
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