No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as 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. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case is important to Cato because it implicates the Institute'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 real judicial review, not the deferential lip service to strict scrutiny of the court below.

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[1]Pursuant to Rule 37.2(a), all parties received at least 10 days' notice of the *amicus curiae's* intent to file, and letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari because the court of appeals refused to faithfully execute this Court's remand order that it "assess whether the University [of Texas at Austin] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher v. Univ. of Tx. at Austin*, 133 S. Ct. 2411, 2421 (2013) ("*Fisher I*"). Rather than apply strict scrutiny to determine the validity of the University's racial classification of its applicants, the court of appeals deferred to the University's assertion that its "holistic review" program, which considers race, is carefully calibrated to attain a necessary measure of "qualitative" diversity in its student body.

It is not. Even accepting the University's post-hoc "qualitative" diversity justification, "the record is devoid of any specifically articulated connection between the University's diversity goal…and its race-conscious admissions process." App. 85a (Garza, J., dissenting). In fact, the record shows that the University uses race in an *ad hoc* fashion, entirely divorced its stated justification.

And the record actually understates the gulf between the University's actions and its asserted purpose. While claiming to evaluate applicants on their academic and personal achievements, as well as race, the University actually admitted substantial numbers of students who were flagged by its presi-

dent for special treatment, regardless of their "holistic" scores. Its own report on this hitherto secret track of "holistic review" concludes that race and ethnicity were an "important consideration" in these decisions, which resulted in the admission of students with scores and achievements substantially below those of other applicants. In other words, the University uses race in ways that are precisely contrary to its stated aims, confirming that its newly minted "qualitative" diversity rationale is a pretext.

That conclusion is further confirmed by the University's public comments on this litigation. University President Bill Powers explained in a published article that consideration of race is important to attain demographic parity, overcome societal discrimination, and combat misperceptions regarding the University's reputation—all of which are forbidden purposes. Notably absent from his discussion was any mention of what the University's legal filings claim is its overriding purpose: "qualitative" diversity.

The Fifth Circuit failed to see through the University's pretext because it ignored the requirement of the Court's broader equal-protection jurisprudence that a "strong basis in evidence" must support the necessity of a governmental entity's use of racial classifications. Absent such a showing, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A.*

Croson Co., 488 U.S. 469, 493 (1989). Correcting this error is crucial to prevent the University's pretextual approach from becoming a model for other schools seeking to circumvent the Equal Protection Clause.

ARGUMENT

I. The University's "Qualitative" Diversity Rationale Is a Sham

This Court made clear in its prior decision in this case that "strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Fisher I*, 133 S. Ct. at 2421. Yet the opinion below is bereft of "close analysis" of the evidence concerning the University's use of race in admissions. Instead, the lower court simply declared itself "persuade[d]" by the University that "use of race is necessary to target minorities with unique talents and higher test scores to add the diversity envisioned by *Bakke* to the student body," App. 48a—in other words, to achieve what the University described below as "diversity within diversity."[2] But that has never been the way the University uses race.

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[2] *See, e.g.*, Supplemental Brief for Appellees 47, *Fisher v. Univ. of Tx. at Austin*, No. 09-50822 (5th Cir. Oct. 25, 2013).

A. There Is No Evidence That the University's Use of Race Comports with Its Asserted Diversity Rationale

The general contours of the University's admissions system are as follows: The bulk of students (81 percent in 2008) are admitted pursuant to the Top Ten Percent Law, which grants automatic admission to any public state college to all students in the top 10 percent of their class at high schools in Texas. App. 3a. The remaining in-state applicants are subject to "holistic review," which considers applicants' "Academic Index" and "Personal Achievement Index" scores. App. 4a. The AI score is based on standardized test scores, class rank, and high school coursework. App. 5a. The PAI score is based on the average score for two essays and a "personal achievement score," which is based on a "holistic review" of various factors, including race. *Id*. Applicants are then selected, major-by-major, on the basis of their combined AI and PAI scores. App. 6a.

This use of race, the lower court concluded, acts "to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to [the University's] academic mission." App. 46a–47a. Left unsaid was how, exactly, admissions reviewers use race to achieve that fairly specific goal.

The answer is that they don't. In deposition testimony submitted at the summary-judgment stage, the only thing the University's admissions repre-

sentatives would say regarding the way the University uses race is that they value a "sense of cultural awareness." Pls.' Mot. Summ. J., Ex. 4 ("Bremen Dep."), *Fisher v. Univ. of Tx. at Austin*, No. 08-cv-263 (W.D. Tex. Jan. 23, 2009), at 30. That distinctive phrase—"cultural awareness"—appears a dozen times in the testimony of the University's admissions consultant, *id.* at 30, 32, 41, 45, 46, 60, as well as repeatedly in the testimony of the University's associate director of admissions, who is responsible for admissions policy. Pls.' Mot. Summ. J., Ex. 5 ("Ishop Dep.") at 57, 61. In fact, it is the only evidence the district court was able to muster when it sought to describe how the University actually uses race in evaluating applications. App. 280a. And no other evidence speaks to the question. For example, the University does not train its application readers on how specifically to use race in evaluating applications. Bremen Dep. at 29–30, 49–50.

The record also shows that the University has no idea whether its use of race actually furthers its stated purpose. In fact, the University purports to have no measurement of—and no way of finding out—how many students have been admitted due to its consideration of race or who these students might be. Pls.' Mot. Summ. J., Ex. 8 ("Walker Dep.") at 39, 45; Ishop Dep. at 64. Indeed, its director of admissions testified that consideration of race could not be dispositive as to any particular student. Walker Dep. at 45. *See also* App. 80a n.19 (Garza, J., dissenting) ("When asked whether any one factor in the PAI cal-

culation could be determinative for an applicant's admission, Dr. Bruce Walker, Vice Provost and Director of Admissions, stated 'no.'").

On the other hand, its admissions director also believed that the University's "use of race in admissions decisions is indispensible to increasing minority enrollment." Walker Dep. at 57. But what numbers there are indicate otherwise. In fact, the University's consideration of race has a negligible impact on the racial composition of the student body.[3]

If all of this seems like an unpromising way to advance the University's avowed goal of achieving "diversity within diversity," that's because it is. There is simply no evidence in the record that the University's use of race has anything to do with what it says it's trying to accomplish. Just as the City of Richmond's "random inclusion of racial groups" in its minority-preference program "strongly impugn[ed]

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[3] "[A]ssuming the University gave race decisive weight in each of [the] 58 African-American and 158 Hispanic students' admissions decisions" in 2008's "holistic review" process—which would be unconstitutional, *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)—"those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman." App. 250a (Garza, J., concurring). And assuming that race was determinative in fully 25 percent of decisions—still more than the minor role described by the University—consideration of race would have yielded only 15 additional black students (0.24 percent of in-state students) and 40 additional Hispanic students (0.62 percent). App. 251a (Garza, J., concurring).

[its] claim of remedial motivation," 488 U.S. at 506, so too does the University's *ad hoc* use of race in admissions impugn its claim to pursue "qualitative" diversity.

B. The Exposure of the University's Secret Race-Conscious Admissions Program Confirms That Its Claimed Diversity Rationale Is a Sham

It turns out that "*ad hoc*" doesn't even begin to do justice to the arbitrariness of the University's use of race with respect to its stated goal. A recent investigation into admissions practices conducted at the University's request reveals that its "holistic review" process can be and is regularly overridden through application "holds" placed at the request of the University's president—an aspect of the system that the University withheld from the public, the petitioner, and the courts presiding over this litigation. *See generally* Kroll Inc., University of Texas at Austin – Investigation of Admissions Practices and Allegations of Undue Influence, Feb. 6, 2015 ("Kroll Report").[4]

Although data is not available from 2008—due to the University's failure to preserve it—the president placed "holds" on about 150 to 300 in-state applicants each year from 2009 to 2014. Kroll Report at 54. In general, these holds were imposed for political

[4] Available at https://www.utsystem.edu/sites/utsfiles/news/assets/kroll-investigation-admissions-practices.pdf.

reasons, "based on requests from Texas legislators and members of the Board of Regents." *Id.* at 41. In a number of these instances, the president acted to override the "holistic review" process, causing favored applicants to be "admitted over the objection of the Admissions Office." *Id.* at 28. The president also acted to influence other admissions decisions more subtly; in particular, "there was frequent pressure placed on the Admissions Office to admit certain applicants." *Id.* at 39.

The unsurprising result of these efforts was to put a brick on the scale in favor of applicants supported by the president. Of the 1,140 in-state applicants over the six-year period whose applications were subject to presidential "holds" and who did not qualify for automatic admission under the Top Ten Percent Plan, 842 were admitted to the University—for an admissions rate of 72 percent. *Id.* at 58. By comparison, the admissions rate for all in-state applicants undergoing "holistic review" is a paltry 15.8 percent. U.T. Austin Admissions Inquiry (2014), Att. D, at 1.[5] This difference is particularly remarkable in light of the fact that only 6 percent of the students admitted with the president's support had above-average academic scores. Jon Cassidy, Kroll Ignored

[5] Available at https://www.utsystem.edu/sites/utsfiles/documents/inquiry/ut-austin-admissions-inquiry/admissions-report-attachments.pdf.

Hundreds of Weak UT Applications, Watchdog.org, Feb. 18, 2015 (analyzing Kroll Report data).[6]

The University's investigation found that race was a central consideration in many of these admissions decisions. Out of the 1,384 admissions files subject to presidential "holds," investigators conducted detailed reviews of 73 corresponding to applicants who were admitted "despite grades and test scores substantially below the median for admitted students." Kroll Report at 60. They found that, "[i]n approximately 29%, or 21 of the 73 files reviewed, the contents of the files suggest that ethnic, racial, and state geographical diversity may have been an important consideration." *Id.* at 62. Another 11 files identified "multiple factors that may have contributed to the decision to admit, including political and alumni connections, ethnic and racial diversity, a high PAI, or slightly more borderline grades and test scores." *Id*. These admissions decisions, the report observes, "demonstrate[] a commitment to ethnic and racial diversity." *Id*. at 29.

Thus, far from playing a minor role as a "factor of a factor"—as the court below assumed, Pet App. 45a, 51a—"diversity" played a role in 30 to 44 percent of these admissions decisions. Based on this sample, it is possible, even likely, that consideration of race through presidential "holds" results in more admis-

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[6] Available at http://watchdog.org/200584/kroll-hundreds-ut/.

sions than it does through the ordinary "holistic review" process.

But the presidential "hold" system is entirely arbitrary, subject to no rules, guidelines, oversight, or accountability. Until this year, its very existence was a secret.[7] How it works—assuming that there is any consistent methodology—is still a secret. The president has said only that he makes admissions decisions with only the "best interests of the university" in mind. *Id*. at 28. But the investigation found that the president's admissions decisions were often based on "factors other than individual merit." Kroll Report at 63. The president's decisionmaking process cannot be studied or reconstructed, other than through statistical analysis of the results, because "written records or notes of meetings" regarding the president's decisions "are not maintained and are typically shredded." *Id*. at 13. The one thing that "has been made clear [is] that final admissions decisions are the prerogative of President Powers." *Id*. at 28. In short, the University routinely bypasses its "holistic review" process to shunt applicants into a secret admissions system that places enormous weight on race in an entirely arbitrary fashion, without any attempt or even ability to further the University's stated "qualitative" diversity goal.

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[7] The president and his chief of staff actually failed to mention the "hold" system in a prior admissions review, and "it appears by their material omissions they misled the inquiry." Kroll Report at 14.

The disconnect between the University's avowed purpose in using race and its actual use of race in the admissions process proves that its "qualitative" diversity rationale is a pretext. By all indications, the University's use of race is calibrated more to serve its political interests—in particular, as the University's investigation found, to bolster its "legislative influence," Kroll Report at 62—than to achieve "diversity within diversity."

II. The University Openly Flouts *Bakke* and *Grutter*

Any question regarding the pretextual nature of the University's stated "diversity within diversity" rationale was put to rest in the immediate wake of the decision below. Its president, Bill Powers, took to the pages of the *National Law Journal* to celebrate its win. Bill Powers, Why Schools Still Need Affirmative Action, National L.J., Aug. 4, 2014, Lexis Doc. ID 1202665526678. What he said—and what he didn't say—are remarkably revealing. The article's title is "Why Schools Still Need Affirmative Action." Powers identifies four reasons.

The first is diversity. The University, he writes, considers six "holistic" factors—"socioeconomic status of the family, single-parent home status, the language spoken at home, family responsibilities, examples of overcoming adversity, cultural background, and race and ethnicity"—and "[d]iversity in all of these areas is important."

The second is improving the University's reputation. "[T]here is still historical baggage to overcome, he writes, and "U.T.'s reputation as a basically white school still hampers recruiting of minority students."

The third is racial balancing. Powers asks when the day will arrive that "considering race will be unnecessary." Whatever the answer to that question—he, like the University in this litigation, makes no attempt to answer it, *see* App. 82a (Garza, J., dissenting)—he does say that it is "certain" that "it has not arrived yet" because "[t]he share of U.T. Austin students who are Hispanic or African-American is still vastly smaller than that of the population at large."

And the fourth is remedying societal discrimination. University administrators, he explains, "need to consider the effect our admissions practices have on our society as a whole." To that end, one concern he identifies is that "education and income levels for Hispanics lag considerably behind that for Anglos."

Three of the four reasons identified by Powers are plainly inconsistent with Justice Powell's controlling opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), as well as *Grutter v. Bollinger*, 539 U.S. 306 (2003). As to racial balancing, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). *See also Grutter*, 539 U.S. at 323 (approving *Bakke's* rejection of "an unlawful interest in racial balancing"). Likewise,

remedying societal discrimination is out. The Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Bakke*, 438 at 307 (opinion of Powell, J.). *See also Grutter*, 539 U.S. at 323–24 ("such measures would risk placing unnecessary burdens on innocent third parties"). And it cannot seriously be argued that the University's interest in its reputation is anywhere near so compelling as to authorize it to treat people differently because of their race. *Bakke*, 438 U.S. at 299 (opinion of Powell, J.); *Grutter*, 539 U.S. at 326.

That leaves diversity. But conspicuously absent from Powers's analysis is any discussion of the "diversity within diversity" concept that the University successfully advocated in the court below. Nor is any mention made of the Top Ten Percent Plan or the purported need to "patch[] the holes" that it purportedly leaves in the University's "ability to achieve the rich diversity that contributes to its academic mission." App. 46a–47a.

Instead, as Powers explains it, racial diversity seems to consist of little more than admitting more "Hispanic or African-American" students, so that their share approaches "that of the population at large." Even on the assumption that this might be a permissible purpose under *Grutter*, it's not the one that the University asserted below and that the

court of appeals accepted, and it's certainly not advanced by using race in a way that has a negligible impact on minority admissions, as the University claims to do.

In sum, President Powers's statements confirm the pretextual nature of the University's "qualitative" diversity rationale and demonstrate the University's disregard for the Court's controlling precedents on racial classification by government.

III. Review Is Essential To Enforce Strict Scrutiny and Prevent Circumvention of the Equal Protection Clause's Limitations on Use of Race

The Court of Appeals did not recognize that the University's stated purpose was pretext because it failed to heed this Court's admonition that its "broader equal protection jurisprudence…applies in this context," *Fisher I*, 133 S. Ct. at 2418, including the requirement that a "strong basis in evidence" support the necessity of a governmental entity's use of racial classifications. *See, e.g.*, *Croson*, 488 U.S. at 500; *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Had the lower court held the University to that standard, the pretextual nature of its diversity rationale would have been as plain as day. Indeed, the concerns that motivate this requirement—racial neutrality, individual dignity, and accountability—apply with special force to public universities' use of racial classifications to achieve "diversity," a vague and potentially limitless goal that may provide cover for politically motivated or invidious discrimination.

Certiorari is warranted to ensure that other schools do not follow the University's example and use diversity pretexts to circumvent the Equal Protection Clause's limitations on use of race by government.

"'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.'" *Croson*, 488 U.S. at 505 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting)). To that end, the Court's precedents require that the necessity of racial classifications be supported by a "strong basis in evidence," not just generalized assertions of interest. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.); *Croson*, 488 U.S. at 500; *Ricci v. DeStefano*, 557 U.S. 557, 582–83 (2009).

Most importantly, this strong-basis-in-evidence requirement enables a court to exercise its independent judgment as to whether racial classification is truly necessary. The "presumptive skepticism of all racial classifications" prohibits a court "from accepting on its face" a government's conclusion that such classification is necessary. *Miller*, 515 U.S. at 922 (citation omitted). Uncritical acceptance of the government's asserted interest "would be surrendering [the Court's] role in enforcing the constitutional limits on race-based official action." *Id.* This the Court

"may not do." *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

A strong basis in evidence is also necessary to demonstrate, in objective terms, that the use of racial classifications by government actually furthers a legitimate interest. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. Thus, the requirement of a factual showing of necessity "'smoke[s] out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*

As particularly relevant here, the strong-basis-in-evidence requirement allows courts to determine whether racial classifications are narrowly tailored. Under strict scrutiny, racial classifications are "constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326. Indeed, "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.* at 333 (quoting *Croson*, 488 U.S. at 493). Absent a precise delineation of the government's compelling interest—and, in particular, the necessity of employing racial classifications—it may be "im-

possible to assess" whether the use of racial classifications "is narrowly tailored" to fit that interest. *Croson*, 488 U.S. at 507. *See also* App. 67a (Garza, J., dissenting) ("[A]bsent a meaningful explanation of its desired ends, the University cannot prove narrow tailoring under its strict scrutiny burden."). In short, no court can possibly evaluate the relationship between race-conscious remedies and their purpose when that purpose is adduced only in the most general terms.

Such review is especially important when the government's asserted interest in considering race is to advance diversity. Diversity is particularly susceptible to abuse as a pretext for illegitimate purposes. In the remedial context, the Court has had little difficulty determining when remedial purpose has been employed as a pretext for other ends, by focusing on evidence of prior discrimination and the lingering effects of such discrimination—both relatively straightforward factual inquiries. *E.g., Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007); *Croson*, 488 U.S. at 499–500. By contrast, as the decision below demonstrates, evaluating the necessity of racial preferences to accomplish a diversity goal is a more complex inquiry. Universities' views of the meaning of diversity, its specific benefits, and the proper means of achieving it may differ; diversity programs operate on more complex statistical terrain than remedial efforts targeting a discrete number of racial groups; and courts may not simply look backwards at histor-

ical evidence to assure themselves that a firm basis exists for the use of racial classifications.

Absent clear and specific evidence of the need to consider race, it is impossible to distinguish invidious racial balancing or other forbidden ends from permissible diversity-related preference, so long as a university espouses a diversity interest and provides some measure of individual consideration. *See* Ian Ayres & Sydney Foster, Don't Tell, Don't Ask: Narrow Tailoring After *Grutter* and *Gratz*, 85 Tex. L. Rev. 517, 543 (2007). This risk is not hypothetical: "Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'" *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (quoting Peter Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Policy Rev. 1, 34 (2002)).

Only a clear accounting—in the form of strong evidence showing a need for racial preferences in light of the institution's circumstances and goals—can guard against the risk that a diversity program, even one (like that here) justified using language from *Bakke* and *Grutter*, may in fact operate "as a cover for the functional equivalent of a quota system," *Bakke*, 438 U.S. at 318 (Powell, J.), or as an expression of racial politics.

Accordingly, the Court should grant certiorari to enforce this essential requirement of the strict-scrutiny inquiry and to definitively confirm the uni-

formity, across different factual contexts, of the Court's equal protection jurisprudence. *See Fisher I*, 133 S. Ct. at 2418.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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