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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

RULES

OTHER AUTHORITIES

(All Internet links below or above were last visited November 2, 2015.)

AMICUS CURIAE STATEMENT OF INTEREST

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 14-981 ("*Fisher v. University of Texas at Austin*", or "*Fisher II*").[2] Amicus wrote a brief[3] in support of Respondents in the previous iteration of *Fisher* ("*Fisher I*"),[4] and herein is following up on that brief, for the sake of "closure" etc. So, to avoid waste of paper (and because all the ideas in the previous brief wouldn't fit in the present brief), those who want a longer version of Amicus' ideas can look at that previous brief online.

That brief has some items of interest, e.g., U.S. government business-development preferences for Hasidic Jewry, *see id.* at 19-20. (By the way, do those preferences raise Establishment Clause- or Free Exercise Clause-related problems? E.g., why do other Haredi Jews—loosely, those who are ultra-Orthodox but not Hasidic *per se*—apparently not get the same affirmative-action benefits that Hasidic Jews get? A puzzle.)

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, see S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

[2] *Abigail Noel Fisher v. University of Texas at Austin, et al.*, 758 F.3d 633 (5th Cir. 2014) (*cert. granted*, 83 U.S.L.W. 3928 (U.S. 2015)).

[3] Br. of Amicus Curiae David Boyle in Supp. of Resp'ts (Aug. 13, 2012), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/11-345_bsac_DavidBoyle.pdf.

[4] *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

Anyway, both *Fisher I* and *II* are controversial, but let us visit an even more controversial case, following the Summary of Argument:

SUMMARY OF ARGUMENT

Some recent cases caution us to be sensitive to how the end, or excessive pruning, of affirmative action could be hurtful to racial minorities and the Nation. There are moderate alternatives to such excess, and a creative Court can incorporate the best ideas of both sides in the dispute.

ARGUMENT

I. *OBERGEFELL*, *VIS-À-VIS* THE INSTANT CASE

A fairly notorious dispute, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), was decided by this learned Court back in June. Part of the Court's wisdom (so to speak) was a "jurisprudence of loneliness", *see id.* at 2600, 2608: e.g., the theory that unless mandatory same-sex legal marriage existed nationwide, a terrible—unconstitutionally execrable, even—loneliness would affect same-sex couples who were already living together unmarried. Whatever the merits of this theory (the four *Obergefell* dissenters saw few such merits, *see, e.g.*, *id.* at 2620 (Roberts, C.J., dissenting)), the theory has some applicability to various issues.

E.g., the loneliness, helplessness, or humiliation of a fetus that is old enough to feel and be conscious of pain could impact the abortion debate; and the loneliness and feeling of injustice in the mind of an innocent person who was framed for a murder and is

about to be executed in an electric chair, could impact the death-penalty debate. If it's lonely for two gays not to legally marry, it may be much lonelier to be fried to death by government execution, limbs twitching and eyes quite literally popping out of your innocent head, you being murdered by the State while seated on an electrified death throne, when you yourself didn't actually murder anyone.

And the theory also has some applicability to affirmative action.[5]

That is, if loneliness is so terrible, that helps make the point that minority students (e.g., black, Latina/o, Native American) should not have to be in tiny or meager numbers at a school, lest they feel isolated or overwhelmed. So it is important that there be a critical mass of minority students at colleges and universities. Or critical masses of various minorities, since African Americans, Mexicans, and Cherokees are not fungible and identical persons or groups. (By the way, "critical mass" probably deserves retirement in favor of some other term, one that doesn't make minorities sound like a lump of deadly plutonium. Maybe "significant group", "confident number", or something else.)

Perhaps the Court's three present Sister Justices could comment on the comfort it brings to be part of a significant group (of an ethnic group, gender group), etc., rather than feeling "lonely", *Obergefell*, *supra*, at 2600 (Kennedy, J.), or isolated. (One of the few downsides of having eight female Justices at

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[5] Naturally, Amicus is not endorsing the *Obergefell* opinion in any way.

Just in case anyone thought he was.

once—as might please Justice Ruth Bader Ginsburg, though she might like nine even better—, would be that the sole male Justice might feel marooned.)

If the Court is perceived to be creating brand-new entitlements for sexual minorities, as in *Obergefell* (undemocratically-mandated same-sex marriage, a type of marriage often seen as benefiting white yuppie urban types rather than rural, traditionalist, poor, or non-white people), and the Court then cuts down on affirmative action which benefits college-underrepresented minorities such as blacks, Latinos, and Native Americans, that could come off as awesomely inconsistent, insensitive and offensive.

II. *WALKER*, *VIS-À-VIS* THE INSTANT CASE

And now is a particularly inopportune time to end, or even gut, affirmative action, seeing the various police-brutality cases of the past few years, and the butchery of black churchgoers in Charleston by white supremacist Dylann Roof. Speaking of that church massacre, some Members of the Court may have decided non-optimally in their *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (135 S. Ct. 2239 (2015)) dissent. The night before the *Walker* opinion—with incredibly ironic and distressing timing—, the Charleston shootings occurred, somewhat disproving the rationale of the *Walker* dissenters, *cf. id.* at 2254-69 (Alito, J., joined by Kennedy, Scalia, JJ., and Roberts, C.J., dissenting), that white supremacy, or its symbolic/historical manifestation in a Confederate flag, was not volatile enough to justify banning from Texas license plates.

(The *Walker* dissent had other problems, of course; on their *de facto* "unlimited free speech on license plates" principle, a wag could put the obscenities "F--- YU" or "F---- ME" on his license plate, and the poor State of Texas could do nothing about it. Said wag could even put a racial epithet like "N---ER" or "P-LACK" on that plate with impunity, too. In fact, since not just words but designs—such as Confederate flags—are (or were) allowed on Texas license plates, why couldn't someone, maybe a member of the Free Love Association, put a photo or highly-lifelike drawing of a "vigorous" sexual orgy between two people—or, heck, among seventeen people plus a goat, a chicken, and a pumpkin patch—on a license plate? per the fascinating "Carte Blanche License-Plate Free Speech" theory.

The Court doesn't even allow unlimited speech itself on its own grounds, by the way; Building Regulation Seven[6] forbids demonstrations, *see id.* So why should any Joe Blow be allowed to put foul-mouthed, racist, or obscene content on his State-issued license plate?? One cringes at such absurdities.)

Walker, of course, relates to Texas, just as the instant case does. The Court sees Confederate flags on Texas license plates as a problem, if Texas believes it to be a problem, *see id. passim*. If Texan minorities' feeling racially intimidated by Confederate license plates is a problem, why wouldn't intimidation of minority students who feel

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[6] *Available at* http://www.supremecourt.gov/publicinfo/buildingregulations.aspx.

vulnerable because of their overly-small numbers at a Texas university, be a problem also?

…Amicus can see someone making a bad argument that State-allowed race preferences at the University of Texas ("UT") are "intimidating" in the way that State-allowed Confederate license plates are. However, that seems pretty weak: no one from UT burned a cross on Abigail Fisher's lawn or told her, "No Whites Need Apply", or anything like that. And affirmative action racially integrates campuses, whereas the Confederates racially segregated society.

III. IMPROVEMENTS THE COURT COULD MAKE WITHOUT ENDING/GUTTING AFFIRMATIVE ACTION OR THE UT POLICY

Amicus generally feels affirmative action should be mended rather than ended. That plays into the strong but imperfect case that UT makes for itself, deserving victory, but maybe some further scrutiny too.

UT's merits brief for itself and other respondents (Oct. 26, 2015) is a very solid brief. But the Petitioner's merits brief (Sept. 3, 2015) also makes some good points, such as, "UT also did not project the date at which it would abandon the use of race in admissions decisions. Instead, UT committed to review its policy in five years. SJA 6a, 15a, JA 448a. No review has been published in the intervening eleven years." *Id.* at 8-9. If what Petitioner alleges, *id.*, is true, that is a real problem. This Court might, say, order UT to produce written reviews of its policy every five years or face serious punishment.

Indeed, Amicus is sensitive to affirmative action being a sensitive issue. One reason he wrote a brief[7] in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), on behalf of the State of Michigan, is that affirmative action may become tiresome enough to the People of a State, that they want to end it, and Amicus supports that democratic right. (Even if the People decide in a way that Amicus himself would not.) On that note, the Court should not end affirmative action, nor "mend" it to the point of gutting it, when local authorities, e.g., the State of Michigan, can deal with the issue themselves.

Amicus urges a spirit of moderation, then: e.g., giving relatively free rein to universities over affirmative action until c. 2028 A.D., the ideal date for affirmative action to cease. If the Court wants to order that all affirmative action must cease after that date, Amicus might not be overjoyed, but he would rather see that 2028 limit rather than a 2016 limit, i.e., if the Court destroyed affirmative action at the end of the October 2015 Term.

There is room for some creative moderation on the part of the Court, drawing on the suggestions of parties and amici to what extent they make sense. For instance, if we look at the Brief *Amicus Curiae* of Jonathan Zell in Support of Petitioner (undated but c. Sept. 2, 2015), we see the interesting idea that students should be allowed to opt out of identifying their race or ethnicity to a college. *Cf.* Boyle *Fisher I*

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[7] Br. of *Amicus Curiae* David Boyle in Supp. of Pet'r (July 1, 2013), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/12-682_pet_amcu_db.authcheckdam.pdf.

Br., "[A] 'check-off', whereby an underrepresented-minority applicant[, such as a daughter of Barack Obama,] may tick a box on the application form and ask not to have his or her ethnicity considered, may be a good idea." *Id.* at 39.

However, when Zell says that colleges should allow students to use a pseudonym to avoid being identified as a member of their ethnic group, *see* Zell Br., *supra*, at 40 n.6, that may go a little far. Someone named Wang Ying Fong might want to label himself or herself pseudonymically as "Winston Worthington IV" or "Jane Mallory Buckingham-Smythe", but someone who lies to get into a college maybe doesn't deserve to get into any college at all.

Another point often raised on Petitioner's side, *see, e.g.*, Zell Br. at 12 (and Amicus would focus on other briefs were there space to do so), is how affirmative action borders on being some satanic plot against Asian-American students. Even if that were true, then an even more satanic plot against Asian-American students is the existence of alumni-child preferences (which massively favor white and wealthy families) at universities. "Legacy" preferences have been around for far longer than affirmative action, and are totally opposite to the goal of diversity. The first order of those interested in justice should be to end those alumni preferences, not affirmative action.

As for holistic admissions processes in general: they are good, if not misused. (One misuse being legacy-child advantages.) Amicus used to perform interviews of applicants to the college he attended himself; and there were many applicants who had

4.0, all A's, grade averages, but who were incredibly inarticulate, unimpressive personally, or sometimes living outside of reality altogether. Amicus recalls one such interviewee, a blond, white football player with a crewcut, who assured Amicus that racism is no longer a problem in American society. But the ghosts of the people slaughtered in Charleston by Dylann Roof might beg to differ.

Interviews should not be used to smoke out certain racial groups; but interviews are useful in seeing what people are like behind the statistics (grades, test scores, football record) which purport to define those people, but often fail to do so accurately. So interviews and other holistic application procedures can be used judiciously, instead of terminated. Much like affirmative action itself.

* * *

Respondents, suitable to this Halloween time of year, draw on the Superman comic-book mythos and call part of Petitioner's ideas a "Bizarro Equal Protection World". UT Merits Br. at 49. Amicus shall not go that far, but does notice something scary in Petitioner's merits brief: "If UT wished to enroll more minority students from affluent communities, it could have eliminated from the PAI calculation the socio-economic and other preferences that operate to their disadvantage." *Id.* at 42. This openly disposes of the chances of less-fortunate or impoverished applicants, and does not seem very sensitive.

And sensitivity can be important, whether towards gays, the poor, or racial minorities. Much of American life has been a perpetual "Halloween" for

racial minorities, whether for long-ago practices like slavery, or recent monstrosities like the Charleston church massacre, or odious things which may come in the near future, such as the destruction of birthright citizenship which various U.S. presidential candidates are promising. In the face of all that, Amicus reiterates that while affirmative action is a fraught and controversial issue, and a practice which must go at some point, that doesn't mean that *now* is the point at which it should go, or at which it should be effectively gutted. If the Court, Providence forbid, plays "Freddy Krueger" and guts *Grutter*,[8] that nightmare may do far more damage, to racial minorities and the American public at large, even than Confederate flags on license plates do.

CONCLUSION

Amicus respectfully asks the Court to uphold the judgment of the court of appeals, with any needed improvements; and humbly thanks the Court for its time and consideration.

November 2, 2015 Respectfully submitted,

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[8] *Grutter v. Bollinger*, 539 U.S. 306 (2003).