No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL, PETITIONER
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioner in Case 12-682 ("*BAMN*").[2] Amicus wrote a pre-certiorari brief in this case, recommending both certiorari and summary reversal, *see id.* The Court saw fit to grant only the former request; but if the Court does not grant some variant on summary reversal (e.g., deciding the case on the pleadings, sans oral argument) after this point—which it still possibly can—, it should still reverse the court of appeals' decision, and Amicus shall list reasons why.

As mentioned in his previous brief, Amicus has actively addressed issues of alumni-child preferences in college admissions vis-à-vis affirmative action, *see, e.g.*, his amicus brief ("*Fisher* Br.") in *Fisher v. University of Texas at Austin*,[3] *passim*, and his Detroit News opinion article *It's time to end alumni*

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[1] No party or its counsel, nor anyone besides Amicus himself, wrote or helped write this brief or Amicus' previous brief in this case, or gave money to its (their) writing or submission, *see* S. Ct. R. 37. Blanket permission is on record with the Court for *amicae/i* to write briefs. —By the way, Amicus thanks the Court for revising Rule 37, in a way resembling what Amicus had suggested in his January 3, 2013 Motion for Leave to File Brief as *Amicus Curiae* in this case, *see id.* at ii-iii.

[2] *Bill Schuette, Att'y Gen. of Mich., v. Coal. to Defend Aff. Action, Integration and Immigrant Rts. And Fight for Equal. by Any Means Necessary (BAMN), et al.*, 701 F.3d 466 (6th Cir. 2012) (en banc) (*cert. granted*, 81 U.S.L.W. 3539) (U.S. Mar. 25, 2013) (No. 12-682).

[3] 570 U.S. ____ (June 24, 2013).

preferences.[4] Amicus also noted, "Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action . . . means nothing[.]" *Fisher* Br., *supra*, at 26. Amicus also has commentary here on the June 24, 2013 *Fisher* opinion, and other affirmative action-related issues. This is relevant especially since the present case, frankly, may be seen by some as a referendum not just on mandatory affirmative action in Michigan, but on affirmative action in general.

SUMMARY OF ARGUMENT

The Sixth Circuit opinion in *BAMN* is groundless, since the Court essentially decided the relevant issues otherwise in *Grutter v. Bollinger* ("*Grutter*"), 539 U.S. 306 (2003), *Washington v. Seattle School District No. 1* ("*Seattle*"), 458 U.S. 457 (1982), and *Crawford v. Board of Education of Los Angeles* ("*Crawford*"), 458 U.S. 527 (1982). Those opinions are true as they were before, re mandatory affirmative action and States' choices.

Although alumni-child preferences in university admissions are reprehensible, demean the recipients of those preferences, and are tinged with racial and class bias, and the concomitant snobbery and inequity: the wrong from such preferences, does not *ipso facto* make it right to demand mandatory affirmative action in a State. Abolishing the alumni/legacy preferences themselves makes more sense.

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[4] Nov. 15, 2012, at 3B, originally *available at* http://www.detroitnews.com/article/20121115/OPINION01/211150337, now *available at* http://www.oakland.edu/upload/docs/Clips/2012/121115%20-%20alumni.pdf.

Some amici in *United States v. Bond*,[5] another case under Court consideration, offer an interesting and instructive mirror image, though from the political "Right" instead of the "Left", of the "feudal anarchy" that Respondent BAMN would have us follow. Such disorder is to be eschewed.

Fisher and *Shelby County v. Holder*[6] do not help BAMN's case.

Opponents of Michigan's Proposal 2 had plenty of opportunity to win, and could still overturn it, or put up a ballot proposal to ban alumni-child preferences.

Seattle, *supra*, and similar "political-process" cases are valuable safeguards against bigotry and should not be overturned.

Seeking affirmative action in a harmonious, democratic way reflecting Martin Luther King's ideals is different from using affirmative action in a divisive, undemocratic way. King supported Israel; that nation, as a state with racial preference for Jews, is one example of why race preference is not always a bad thing. King may have had a point.

The University of Michigan's awarding hereditary alumni preferences, and its lack of transparency about racial-diversity efforts, are a cautionary tale about how the powerful must frequently be watched by the People, whistle-blowers, and the Courts.

The People, after all, are what the universities, government, and affirmative action are supposed to serve, not the other way around.

ARGUMENT

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[5] 681 F.3d 149 (3d Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158).

[6] 570 U.S. ____ (June 25, 2013).

I. *SEATTLE* AND *CRAWFORD* PRECLUDE MANDATORY AFFIRMATIVE ACTION

The *BAMN* Sixth Circuit opinion, *see* 701 F.3d 466, 470-71, 484-85 (2012), argues that following the 2006 vote of Michiganders in "Proposal 2", 58%-42%, to amend their constitution (adding Section 26 to Article I) to end publicly-granted race and other (e.g., gender) preferences: because it might now be harder to advocate affirmative action than to advocate legacy preferences in colleges (and who is trying to inaugurate legacy preferences right now? A strange hypothetical), this is, at least re public education, an unfair political constraint violating the Fourteenth Amendment's Equal Protection Clause. But this is an extremely strained argument.

Grutter helps disprove that argument, mentioning "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law . . . . Cf. *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ('[T]he States may perform their role as laboratories for experimentation to devise various solutions[.]'"). *Id.* at 342 (O'Connor, J.). So, affirmative action can indeed be "prohibited by state law", *id.* And since the *States* are "laboratories", *id.*, it is illogical that subparts of the State, such as universities, should be allowed to perform "laboratory experiments" when not just the legislature, but the permanent primary sovereign, the People, have amended a State's central legal charter, its Constitution, to prohibit such experimentation. So the Court confirmed, in *Grutter*, that a State's banning race preference is proper and constitutional.

Moreover, the political-process cases BAMN cites to make its point actually hurt the point more than help it. The law here has seemed quite clear for three decades, against the idea of mandatory legality of affirmative action. *Seattle* (June 30, 1982) calls it "evident" that divisions of power among administrative bodies over affirmative action "have nothing to do with the ability of minorities to participate in the process of self-government", 458 U.S. at 480 n.23 (Blackmun, J.).[7] This alone, *see id.*, disproves BAMN's point.

What hurts BAMN's argument even more is a case also from June 30, 1982, and from Justice Harry Blackmun again, *Crawford*, *supra* at 2. Blackmun's words in *Crawford*, since they are from the same Justice who wrote the *Seattle* opinion, and decided on the exact same day as *Seattle*, are one of the best possible interpretive keys of what he meant in *Seattle*.

The Justice offers the Kafkaesque scenario, "[R]uling for petitioners[, who lost,] on a *Hunter* [*v. Erickson*, 393 U.S. 385 (1969), i.e., political-process] theory seemingly would mean that statutory affirmative-action . . . programs never could be repealed[.]" *Crawford*, 458 U.S. at 546-47 (Blackmun, J., joined by Brennan, J., concurring). There, in black and white, Blackmun expresses horror, *see id.*, that misuse of political-process case law could lead to the freakish result that the People could never get rid of affirmative action, since

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[7] So, political-rights cases like *Seattle* are still good law and need not be revisited; they can be kept "in the bag" in case some draconian affirmative-action ban comes one day, e.g., poll-taxing the ban's opponents. Proposal 2 has no such evil feature.

affirmative action would be impervious to repeal. These thoughts of Blackmun, combined with what he said in *Seattle* at 480 n.23 about affirmative action, leave little, or nothing, left of BAMN's case.

However, there is a grain of truth in BAMN's position, since legacy preferences are unjust and disturbing. But does that mean that this Court should grant BAMN's prayer that mandatory affirmative action ensue, just, or largely, because other college-admissions preferences, especially legacy ones, persist?

II. THE UGLINESS OF ALUMNI PREFERENCES DOES NOT LEGITIMATE PERPETUAL AFFIRMATIVE ACTION

"[I]t demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (Kennedy, J.). This must be referring to alumni children given advantages in college admissions due to their parentage, must it not? Well, it actually refers to race, *see id.* at 517, but it should refer just as much to legacy preferences. Or even more to them than to diversity admittees, since the latter are "judged" by being given a few points for what their racial or gender background can add to the entire community in the present and future, but legacy preferences are rewarded for relatively aristocratic ancestry from the

past, and often *de facto* rewarded for being white and rich.[8]

Why, then, should the Nation continue to "demean[ ]", *id.*, and stigmatize alumni children, by allowing admissions preferences for them, especially at public universities? Are they to be viewed forever as spoiled blockheads who couldn't get into college on their own? Does the Nation have some kind of animus towards them? This Court seems to dislike animus, and the stigmatization of alumni offspring through their being judged on ancestry, *see id.*, should end, if the Court wants to be consistent.

And some theorize that legacy preferences should actually be illegal. *See, e.g.*, *Affirmative Action for the Rich: Legacy Preferences in College Admissions* (The Century Found., Inc. (Richard D. Kahlenberg, ed., 2010)) ("Kahlenberg"), at 12-15 (citations omitted), mentioning that the Nobility Clause (U.S. Const. art. I, § 9, cl. 8) should prevent any hereditary privilege given by public universities; and that the Equal Protection Clause, combined or considered with, the Civil Rights Act of 1866 (14 Stat. 27-30) (amended 1991), should forbid discrimination based not only on race, but also on ancestry, period.

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[8] With alumni preferences, we are always, as in nightmare, "borne back ceaselessly into the past." *The Great Gatsby* (directed by Baz Luhrmann; Village Roadshow Pictures et al./Warner Bros. Pictures (2013); based on the 1925 book by F. Scott Fitzgerald). *Gatsby*, *supra*, by the way, has interesting notes, *see id.*, on the corruptive effects of inherited wealth and social status (e.g., the depravity or shallowness of Tom and Daisy Buchanan), and the contempt of the wealthy and powerful toward racial minorities including Jews (Tom Buchanan's various diatribes against those groups).

Also, the tax-deductibility of donations to colleges is questionable either for alumni, who are trying to buy admission for their children, or for the school, which is conferring something of value (the degree, which increases earning power) in exchange for donations, which all thus may not be a true non-profit transaction, *see* Kahlenberg, *supra*, at, e.g., 16-17 (citation omitted).

But Amicus is not asking the Court to *sua sponte* end alumni preferences, but merely asking the Court to reflect on the social good of ending alumni preferences. And the good of not ending the legality of affirmative action nationwide until legacy preferences—and, one hopes, donor preferences, celebrity preferences, and suchlike—are gone forever.

However, what was just said is distinguishable from what BAMN is asking for. And re what they ask for, and what the Sixth Circuit decided, Amicus wonders if others' misinterpretation of some of his words from the past helped cause this mess. After all, his own *Fisher* brief said that affirmative action should not disappear until there were no more alumni or donor preferences in college admissions anywhere, *see id.* at 8, 15. The Sixth Circuit BAMN decision looks like a gross misreading of what Amicus said. It is time to clarify.

Under Amicus' model, *see Fisher* Br. *passim*,

1) each State would decide about affirmative action, and

2) both alumni preferences and affirmative action would eventually disappear.

But under the Sixth Circuit's model, *cf.* 701 F.3d 466 *passim*,

1) a State effectively has no choice to end affirmative action, and

2) both alumni preferences and affirmative action could last *permanently*, maybe propping each other up in a synergistic or collusive way.

So the model that BAMN trumpets, *see id.*, disrespects the People of each State, and does not terminate either of two problematic school-admissions criteria, alumni-child status and racial (or gender) status. Thus, it is not a tenable model for the Nation to follow. In fact, it is a dangerous model reeking of abuse.

If BAMN had argued that affirmative action should be a court-ordered remedy, in order to alleviate the pernicious effects of alumni preferences: even that would be a tall order to ask the courts, but it would make slightly more sense than their current posture, i.e., that the political process itself was somehow distorted by Proposal 2. That posture itself distorts reality, and is a very convoluted, attenuated way to deal with the ugliness of legacy preferences. *Inter alia*, a much simpler remedy would be for courts, or others, to abolish alumni preferences. The "two wrongs make a right" theory that both affirmative action and alumni preferences should last forever in some crazy sort of "mutual balance", is an unappealing idea.

If BAMN and comrades had spent the last seven years attempting to put a proposal on the Michigan ballot to outlaw alumni and donor preferences at

universities, that might have been more helpful to diversity than what they are doing now.

The brief of *amici* Professor Carl Cohen et al. in Support of the Petitioner in this case (undated but c. June 24, 2013) argues that a black student has the same right to ask the University of Michigan for alumni preferences as a white one does, and that there are thousands of black U. of M. alumni, *see id.* at 21.

However, that University already *has had* alumni preferences for a long time; and second, the proportion of black alumni to others, in general, may be small. *Cf., e.g.*, "[A]t the University of Virginia, 91 percent of early decision legacy admits in 2002 were white, 1.6 black, and 0.5 Hispanic." Kahlenberg at 10 (citation omitted). So, the supposed "race-neutrality" of alumni preferences may be honored more in breach than in observance. *Cf.* U.S. Const. amend. XXIV (banning a *prima facie* "race-neutral" poll tax which disproportionately affected minorities and poor whites).[9]

Finally: it is interesting to note that when the "Supreme Court upheld [affirmative action in *Grutter*] in 2003, five of the nine justices or their children qualified for legacy preference." Kahlenberg

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[9] Alumni preferences may have had a racial tint (instead of being "race-neutral") from the beginning: many of them inaugurated around the 1920's had an "additive" racial bias (adding, or preserving, Anglo-Saxons) and also a "subtractive" bias (keeping out Jews or others). These days, legacy preferences may benefit Jews instead of hurting them; but in any case, there was once an ugly racial tinge to such preferences, and this may help make them immoral or illegal.

at 89 (citation omitted). Amicus is not trying to commit *lèse-majesté* by mentioning this; but some frank discussion of power relations in this country can be helpful if we are really interested in achieving justice. Again, Amicus notes that privilege to an alumnus creates animus. Should we tolerate that?

III. *BOND V. UNITED STATES* AS A MIRROR IMAGE OF *SCHUETTE V. BAMN*; OR, FEUDAL ANARCHY VS. THE PEOPLE

But not only is feudal aristocracy (echoed in legacy privilege) a problem; so is feudal anarchy. —In the case of *United States v. Bond*,[10] currently before this Court, Pennsylvania resident Carol Anne Bond used a noxious chemical to injure a woman who had an affair with Bond's husband; though, being perhaps less skilled in causing mayhem than is the fictional secret agent who shares her last name, she caused little more damage than a thumb burn, *see* Br. for Pet'r (May 8, 2013) at 2. Anyway, Bond was charged, *see id.*, with violating a federal law re an international agreement about chemical weapons. This prosecution sounds heavy-handed, perhaps. Then again, in the wake of the Tsarnaev brothers' reign of terror at the Boston Marathon, perhaps it is good for prosecutors to be able to do such things—what if the Tsarnaevs had made it to Times Square in New York with chemical weapons? And should U.S. treaty-making power be gelded because of this one unusual Bond incident?

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[10] *Supra* n.5.

The Brief of Cato Institute ("CI") et al. in Support of Petitioner (May 15, 2013) argues, *see id. passim*, that *Missouri v. Holland*, 252 U.S. 416 (1920) be overturned, since Justice Oliver Wendell Holmes, Jr., there upheld necessary expansion or deployment of federal power if a treaty were made and the power were needed, *see id.* at 432. And CI, notoriously, is suspicious of federal power.

In *Holland*, *supra*, the problem was migratory birds flying over national boundaries, *see id.* But what if, say, those birds were carrying a deadly avian flu, now in 2013, and a State refused to deal with the bird problem, and the birds were killing many people in other countries? Should the federal government really be powerless to deal with this, even sans an enumerated "Bird Power" in the Constitution? It would probably be more sensible for the Government to deal with the birds than for the foreign country to try to invade or take other reprisals.

By contrast, if there were a treaty saying that American parents must now abort children with Down syndrome, for eugenics purposes, this would likely violate the Bill of Rights. Birds may not have many rights, though, and one could argue that the deadly birds impact interstate commerce, etc., so that a wholly *new* federal power was not created by the treaty.

States are sovereigns, but if they are overly irresponsible or disruptive, then a higher authority may have to step in. Otherwise, a sort of feudal anarchy, which our Civil War should have made outdated, takes hold.

(A little, teeny bit of anarchy or chaos is not always bad, and may prevent excessive rigidity in the system. It may be harmless and thought-provoking for Johnny Rotten (John Lydon) of the Sex Pistols punk rock band (1975-78) to scream "Anarchy!" But that is not serious, venomous anarchy such as armed gangs—or armed lone snipers—going around and doing what they want and disregarding law and morals. Or States nullifying federal law. And there is a whiff of "bad anarchy" about overturning *Holland*, or invalidating Proposal 2 in Michigan.)

What CI wants in *Bond* is an octave above, so to speak, what BAMN is asking for in the instant case. One State's holding out from fair or rational policy, and needlessly defying the Government, can make life hellish for everyone. Similarly, colleges' making their own affirmative action policies, like independent dukedoms in despite of State and People, mocks law, order, and democracy, and also may hinder the attainment of a colorblind society at some point.[11]

BAMN is well to the "left" politically, and CI is well to the "right" (in *Bond*, *supra*), but both are well off the mark in terms of federalism and fairness. And Amicus is happy to criticize on the Right or the Left equally. Subunits of a State ignoring the State, or States avoiding fair regulation by the federal Government, both evoke Professor Michael Heller's

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[11] Memorials like "Black History Month" (February), or "Jewish American Heritage Month" (May), may not violate colorblindness, in that they are historical and informational, instead of granting privileges.

"tragedy of the anticommons",[12] his idea that a holdout by one stakeholder can ruin property rights for all the other stakeholders. And tragedy is best avoided.

So, just as *Missouri v. Holland* should not be overruled, neither should Michigan's Proposal 2 be.

IV. *FISHER* AND *SHELBY* HURT BAMN'S CASE

And last week was not a good week for BAMN's theories on why Proposal 2 should be overturned. First, in *Fisher*, the Court "toughened up" the standards for affirmative action, *see id. passim*. That ethos, limiting affirmative action,[13] is the opposite

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[12] *See* Wikipedia, *Tragedy of the anticommons*, http://en.wikipedia.org/wiki/Tragedy_of_the_anticommons (as of 7:02 GMT, Apr. 26, 2013).

[13] Though not limiting it, or criticizing it, as much as some would like. E.g., Justice Clarence Thomas, concurring, claims that the "73 *amici* briefs for racial discrimination" (!!!) in *Fisher* did not really address the problem of academic mismatch, *id.*, slip op. at 17. However, Amicus' own *Fisher* brief mentioned academic mismatch, *see id.* at 37; offered tutoring or remedial classes (such as college athletes often receive) as ways to help students not quite as prepared as average students, *see id.* at 27-28; and mentioned the importance of students' free agency in choosing whether to attend a harder college, or an easier one where high grades might be easier to get, *see id.* at 37-38. If someone chooses to risk being in the bottom of the class at exclusive Yarvton University, rather than being valedictorian at Joe Schmo Community College, perhaps that student should be allowed to take the risk. Sometimes small fish in big ponds end up better than big fish in small ponds, so to say.

Then again, some think that things were toughened too much. Justice Ruth Bader Ginsburg, dissenting, finds difficulty with the putative amorphousness or evasiveness of race preferences that are not locked down into something rigid (e.g.,

direction from the mandatory, thus expanded, affirmative action BAMN seeks. Second, in *Shelby*, the Court gave more deference, *see id.*, to individual States to determine how to deal with alleged race discrimination, and effectively lessened federal supervision (e.g., federal "preclearance" of State voting measures) over what States do in that field. (The Court overturned Section 4(b) (42 U.S.C. § 1973b(b) (amended 2008)) of the Voting Rights Act of 1965, *Shelby*, slip op. at 24, including the formula which allows Section 5 (42 U.S.C. § 1973c (amended 2006)) of that Act to operate.) Thus, BAMN's case, which was perched on a cliff in the first place, may be in full flight over the cliff now.

V. PROPOSAL 2'S OPPONENTS DID NOT LACK POLITICAL POWER

This case, naturally, would not be here if Proposal 2 had not passed, 58% to 42%. Amicus himself was in Michigan in 2006, and voted against Proposal 2; but it won, and that was that, he thought. And it was something of an uphill struggle for the proposal's proponents, too. *See, e.g.*, PR Newswire, *One United Michigan Stepping Up Campaign*

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a 20-point bonus for being a racial minority), *see Fisher*, slip op. at 3. While the more strictly-defined preferences may seem more honest and aboveboard, though: they are also more rigid, to the point of counterproductiveness. For example, if there is not a rigid bonus for being African-American, then the school may decline to offer such a bonus, or lower the level of it from the "maximum strength" available. And in the case of President Obama's two daughters, for example, it may be a very good thing not to offer them that bonus. So the *Grutter* and *Fisher* majorities' upholding of a holistic, flexible bonus for race (or gender) preferences is proper, despite Ginsburg's concerns.

Activities, Jan. 20 (presumably 2006),[14] mentioning, *see id.*, that over 100 prominent organizations under the umbrella organization One United Michigan, plus both the Democratic and Republican Michigan gubernatorial and U.S. senatorial candidates that year, publicly opposed Proposal 2. *See also* Ballotpedia,[15] revealing, *see id.*, that Proposal 2's opponents spent over 2 and ½ times as much money as proponents did, i.e., c. $4.9 million vs. c. $1.86 million. With that lavish funding, and powerful organizational support, there may still be plenty of resources left to overturn Proposal 2 the regular way: by popular vote, not by the courts.[16]

See U.S. Const. art. IV, § 4, "The United States shall guarantee to every State . . . a Republican Form of Government", *id.*, i.e., a democratic republic where the people reign. But the Sixth Circuit opinion largely precludes majoritarian democracy.

VI. *SEATTLE* AND *HUNTER* SHOULD BE UPHELD

Majoritarianism is not always sacrosanct, of course, *see, e.g.*, *Seattle* and *Hunter* (overturning ballot measures for their racist abuse of political process). However, the June 24, 2013 brief for Respondent, Eric Russell ("Russell Br."), claims, *see id. passim*, that *Seattle* and *Hunter* should be

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[14] http://www.prnewswire.com/news-releases/one-united-michigan-stepping-up-campaign-activities-59989087.html.
[15] *Michigan Civil Rights Amendment, Proposal 2 (2006)*, http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006) (as of June 25, 2013, at 14:28 GMT).
[16] Amicus is for affirmative action, and would not mind seeing Proposal 2 ended…but only by the will of Michigan's people.

overturned. But this would be an extreme over-reaction to the extreme claims of BAMN.

The Russell Brief conjectures that *Hunter* would have been resolved as it was even without the political-process doctrine, *see* Russell Br. at 32-33. However, this is conjecture, *see id.* Moreover, *Seattle*, especially considered in light of *Crawford*, has a large "escape vent" that allows absurd results like permanent affirmative action to be avoided, as discussed *supra* at 5-6. Thus, it was better-written and more sensible than the Russell Brief believes.[17]

When things are not broken, perhaps they should not be "fixed". Petitioner Schuette explains well that *Seattle* and *Hunter* do not mandate affirmative action, *see* Br. for Pet'r (June 24, 2013) at 17-24, and that should help guide this Court to decide not to overturn *Seattle* and *Hunter*.

In *Fisher, see id.*, slip op. at 9, 12, the Court declined to overturn *Grutter*, since the parties did not ask for it to be overturned. Similarly: in this case, *BAMN*, Petitioner is not requesting the overturning of *Seattle* and *Hunter*, so they should not be overturned, especially since they do not deserve to be. If some "clarification" or "updating" of either *Seattle* or *Hunter* is needed, that would be

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[17] Also claimed, *see* Russell Br. at 3-4, 15, is that *Seattle* violates the spirit of *Washington v. Davis*, 426 U.S. 229 (1976), since the latter case claims that to violate equal protection, a supposedly race-neutral law must have a discriminatory purpose, *see id.* at 240. The problem with the Russell Brief's notion is that *Seattle* itself distinguishes *Davis*, *supra*, *see Seattle*, 458 U.S. at 485-86 (noting that in *Hunter*, the statute dealt with race in a way hurting minorities as minorities, so used race to distort the political process; thus, *Davis* is not applicable). So it may be too late to complain that *Seattle* does not follow *Davis*.

preferable to overturning either case. After all, even if affirmative action should not be permanent, measures to prevent segregative legislation, such as the Fifteenth Amendment, should always have a place in American life.

VII. MARTIN LUTHER KING, ISRAEL, AND LOVE AND HATE IN AFFIRMATIVE ACTION

Martin Luther King himself may have agreed both with affirmative action and with ending it. *See, e.g.*, his book *Why We Can't Wait* (Signet Classic 2000) (1963, 1964), ch. 9, "The Days to Come": "No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America. . . . Yet a price can be placed on unpaid wages[,] in the form of a massive program by the government of special, compensatory measures[, resembling] a settlement[.]" *Id.* at 127.

Note that King, *see id.*, approves a form of "race preference" (reparative measures for blacks), but also an endpoint, and "closure", since a "settlement", *id.*, implies that the special measures will not be perpetual. Reparations are different from affirmative action, but there are some similarities too.

Thus, those who think affirmative action is intrinsically "racist" and "evil" might have King to contend with, *see id.* Also, as noted in *Fisher* Br. at 18, Amicus has noted few opponents of affirmative action screaming for Israel to cease existence just because Israel gives race preferences to Jews, which could be considered affirmative action.

See, e.g., Rabbi David Hoffman, *Zionism is not a 'settler-colonial undertaking'*, The Mail & Guardian

(South Africa), June 28, 2005,[18] "In its essence, Zionism is not a 'settler-colonial undertaking' but a national programme of affirmative action. . . . [I]f the Jews are the only people who are to be denied their right to a nation state, then anti-Zionism is anti-Semitism." *Id.*

On that note, compare Martin Luther King's letter to Dr. Maurice N. Eisendrath, Sept. 29, 1967,[19] "Israel's right to exist as a state of security is uncontestable. . . . Peaceful solutions[, not] military measures[,] can provide a permanent solution . . . . SCLC [Southern Christian Leadership Conference] has expressly, frequently and vigorously denounced anti-semitism and will continue to do so", *id.* at 1, 2 (pages unnumbered), with BAMN, *The Victory of the Palestinian Struggle is Within Reach*, Dec. 17, 2012,[20]

> In face of the Zionist regime of genocidal intimidation and massacre, . . . over and over young women and men have fought with sticks and rocks and bricks against tanks and the advance [sic] weaponry the US has always provided the Zionist military machine. . . .
>
> . . . .
>
> . . . [T]he American imperialists and the Zionist rulers will never agree to

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[18] *Available* under "Zionism Commentary" *at* http://www.zionismontheweb.org/Zionism_is_not_a_settler-colonial_undertaking.htm.

[19] *Available* on the King Center website *at* http://www.thekingcenter.org/archive/document/letter-mlk-dr-eisendrath#.

[20] http://www.bamn.com/social-justice/the-victory-of-the-palestinian-struggle-is-within-reach.

> anything other than a Palestine as a subservient client state to Israel . . . .
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> . . . .
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> . . . The Arab and Islamic governments that claim to support Palestine must arm the Palestinians. This is the only way to prevent Zionist atrocities and place the Palestinian people once and for all on the road to victory.
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> . . . .
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> **In solidarity with the people of Palestine—**
>
> **Our Blood Is Your Blood!**
>
> London and Detroit, 24 November 2012
>
> Movement For Justice/By Any Means Necessary

Id. BAMN has a First Amendment right to its opinion, but its article above raises interesting questions about its support of affirmative action. If Israel and Zionism comprise affirmative action (for Jews), why would BAMN, as a "Coalition to Defend Affirmative Action", oppose them, *see The Victory of the Palestinian Struggle is Within Reach*, *supra*?

Additionally, one reason for affirmative action is to strengthen our Nation's military, *see, e.g.*, *Grutter*, 539 U.S. at 331 (noting how American officer corps needs to be both diverse and selective). But for BAMN, Americans are apparently "imperialists", *Victory of the Palestinian Struggle*, *supra*. This raises the interesting question of whether 1) the arms that BAMN calls to be given Palestinians

against the "Zionist regime of genocidal intimidation and massacre", *id.*, 2) might actually be turned against American soldiers—including minorities who entered the officer corps by way of affirmative action—, in case the American military helps Israel in the future? Fascinating, to put it mildly.

Cf. also Mich. Daily, *Sectarian sojourn: BAMN must work well with others or take Trotskyite philosophy elsewhere*, Sept. 27, 2001[21] (recommending that BAMN, despite its Trotskyism, cooperate civilly with other parties).

If affirmative action involves "bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought", *Grutter*, 539 at 395 (Kennedy, J., dissenting), then perpetual affirmative action despite the People's vote to end it may not fulfill that harmonious goal. (Opposition to Zionism, *see Zionism is not a 'settler-colonial undertaking'*, *supra* (positing Zionism as affirmative action for Jews), may not promote harmony or respect either.)

(Speaking of Jews and affirmative action: Ron Unz, *The Myth of American Meritocracy: How corrupt are Ivy League admissions?* The American Conservative, Nov. 28, 2012,[22] notes that despite the "dramatic collapse in Jewish academic achievement" in recent years, "based on factors of objective academic performance and population size, we would

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[21] http://www.michigandaily.com/content/sectarian-sojourn-bamn-must-work-well-others-or-take-trotskyite-philosophy-elsewhere.

[22] http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/.

expect Asians to outnumber Jews by perhaps five to one [at certain colleges;] instead, the total Jewish numbers across the Ivy League are actually 40 percent higher. This implies that Jewish enrollment is roughly 600 percent greater relative to Asians", *id.* So, is some form of (legacy?) "affirmative action" for Jews, or "reparation" for colleges' former exclusion of Jews, going on, *cf. id.*? If so, that would seem to militate against ending affirmative action for others, e.g., blacks, Latinos, and Native Americans, lest inequity or favoritism appear to result.)

In short, harmony, equity, kindness—which is usually a virtue—, and historical context, may all be of value in considering affirmative action, and how, where, and how long it takes place.

VIII. KEEPING AN EYE ON MICHIGAN

However, mixed with the kindness etc., there should also be due skepticism and scrutiny. As Amicus has mentioned, *Fisher* Br. at 34-35, he had to pay c. $1560 to get some accurate information, under the Freedom of Information Act, about the controversial, now-defunct "Wolverine Scholars Program" which let applicants with high grades apply to Michigan Law School, but only if they had not taken the LSAT before an admissions decision: a strange burden to put on applicants.[23]

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[23] *See* Elie Mystal, *The Life and Death of the Michigan 'Wolverine Scholars' Program*, Above the Law, Nov. 17, 2011 at 12:55 p.m., http://abovethelaw.com/2011/11/the-life-and-death-of-the-michigan-wolverine-scholars-program/, for some intriguing details.

The requested information, *available at* http://tinyurl.com/WoScFOIA, shows on page 4 of an April, 2009 Decision and Recommendation of the ABA Accreditation Committee (p. 33 of the PDF), "A third goal of the program is to increase student diversity. Under Michigan law, race may not be taken into account . . . [E]liminating the LSAT as a factor in admissions decisions removes a potential impediment to minority admissions[.]" *Id.* The problem is that the University had never told the public, to Amicus' knowledge, that the Program was a racial diversity program.[24] This does not seem to fulfill a public school's duty of candor to the taxpayers who fund it. *Cf. Grutter*, discussing U. of M. "faculty members [who] were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities", 539 U.S. at 393 (Kennedy, J., dissenting).

So, even if the Program did not violate the law, *see id.*, it should have been made transparent to the People from the beginning, especially since in Proposal 2, they had shown suspicion of "racial diversity" efforts. If the University "forgets" to tell the truth (unless questioned under FOIA and paid over $1500) about a "race-neutral" program, how easily can it be trusted to tell the truth about a race-preferential program like affirmative action? Thankfully, the courts are here to keep an eye on Michigan and other universities, *see, e.g.*, *Fisher*.

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[24] One also wonders how thoughtful the "increase diversity" effort really was, since the Program essentially excluded the University of Michigan-Dearborn and -Flint campuses, which may have relatively less-affluent and more-minority student bodies than the Ann Arbor campus.

It is also disturbing that even after being deprived of affirmative action, the University did not do away with alumni preferences. Despite posing as defenders of diversity, the school handicaps diversity by allowing preferences to that predominantly white and wealthy pool. One almost wonders if affirmative action was just a "beard" or distraction in the first place, to let the school continue with legacy preferences, and possibly similar preferences, e.g., for big donors. *See Grutter*, "Were this Court to . . . forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case." 539 U.S. at 368 n.10 (Thomas, J., dissenting). (Amicus believes, though, that legacy preferences should be attacked directly, instead of through the circuitous means of abolishing affirmative action and hoping that that will end legacy preferences; that strategy didn't work at the University of Michigan.)

Although the argument for mandatory legal affirmative action is the kind of hollow argument that could give civil rights lawyers a bad name, universities, too, may get a bad name if they "hide the ball", even through neglect instead of malice, on race- or gender-diversity issues. Hopefully Amicus' citing the FOIA *supra* will remind universities to behave well, since they can always be found out.

* * *

With our Nation's birthday later this week, one remembers that around the time of the Whiskey Rebellion, George Washington noted, "If the laws are to be trampled upon with impunity, and a minority .

. . . is to dictate to the majority, there is an end put, at one stroke, to republican government."[25] While the lower court's *BAMN* decision may not literally let a minority dictate to a majority, it does void the will of the majority, in highly inappropriate fashion. To overturn Proposal 2 "by any means necessary" does not comport with our great Nation's rule of law. Nor does it respect the People; and this disrespect will not help hasten the time when "in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty." (Martin Luther King, Letter from Birmingham Jail, Apr. 15, 1963)

CONCLUSION

Amicus respectfully asks the Court to reverse the court of appeals' judgment, in relatively summary fashion if appropriate, so upholding *Grutter*, *Seattle*, and *Crawford*; and humbly thanks the Court for its time and consideration.

July 1, 2013 Respectfully submitted,

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[25] *Available at George Washington: A National Treasure* (Smithsonian Inst.), http://georgewashington.si.edu/life/chrono_presidential.html.