No. 15-8049

# In the Supreme Court of the United States

DUANE EDWARD BUCK, PETITIONER
*v.*
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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.

Amicus has filed briefs with the Court on race issues, as in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2016 U.S. LEXIS 4059 (June 23, 2016), and on life-and-death-related issues, as in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2016 U.S. LEXIS 4063 (June 27, 2016). In the instant case, race issues and life/death issues meet each other head-on, so Amicus feels he may have something to contribute to the conversation, before the Court makes a horrible mistake and lets an American be killed by the State just because he is black.

## SUMMARY OF ARGUMENT

While it was never right to kill somebody because he is black: to do so in 2016, decades after the 1960's Civil Rights Movement, is especially perverse.

*Buck v. Bell*, 274 U.S. 200 (1927), another case beginning with "Buck", has symbolic resonance with the tainted case against Duane Buck; and it should one day be overturned, with its embrace of "hereditary pollution" that resembles the race prejudice against Buck.

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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.

Symbolism and expressive harm are indeed important here, as in the race- and expressive-harm case of *Bush v. Vera*, 517 U.S. 952 (1996).

The Court and some of its past Members, from the beginning, have often shown great disregard for racial equality and fairness, which sad tradition of contempt should be reversed.

As a hypothetical comparison, we may imagine how the public and courts would and should react if Americans who happened to be of certain other backgrounds besides African-American, were punished *because* of those backgrounds.

America's ability to criticize unjust executions in other countries may be crippled if the Court allows Buck to be executed for being black.

Some very learned persons remind us that maybe the death penalty should be found unconstitutional, period, except in the case of absolute, self-defending necessity.

The sagas of Robert Alton Harris and Rodney King show that the death penalty may be fruitless, or even counterproductive, in discouraging crime and murder.

Race-selective and gender-selective abortion—especially considering the "adult abortion" looming for Petitioner because he is black—tend to be condemned by the same logic supporting Petitioner in this case.

The whole is at least the sum of its parts, and maybe more, in regard to the various factors which

add up to show that Petitioner's case is truly extraordinary and worthy of his request for relief.

The dissenting Justices in *Fisher*, *supra*, might possibly imagine a special duty to reverse the lower courts here, since those Justices felt that judging someone by his race is such a terrible thing.

Considering African Americans to be inherently criminal is a vile illusion which continues today, decades after Duane Buck's initial trial. It must end.

The Holocaust, lynching, and other lessons, real-life or literary, remind us that we must never let race be an excuse to kill anyone in America, or elsewhere, again.

## ARGUMENT

### I. AMERICA SHOULD HAVE LEARNED BY NOW, NOT TO KILL PEOPLE BECAUSE THEY'RE BLACK

> My conscience won't let me go shoot . . . . some darker people [in Vietnam] for big powerful America. . . . They never called me n[ ]ger[.]

Muhammad Ali, *in* Ilias Khidr, *No Viet Cong. Called Me N[ ]ger* (brackets not in original), YouTube, https://www.youtube.com/watch?v=vd9aIamXjQI, Nov. 11, 2014. (The quote is more commonly rendered as, "No Vietcong ever called me n--ger.") This punchy observation, *supra*, from one of America's greatest athletes (recently deceased, RIP) offers, in six memorable words, extra reason to be

suspicious of the State of Texas' desire to kill petitioner Duane Edward Buck because, or even partially because, he is black. The black heavyweight boxer and conscientious objector Ali was hesitant to fight in the Vietnam War, for reasons including the pervasive racism he and other Afro-Americans had to deal at with home. Why fight Ho Chi Minh, many black Americans reasoned, when he wasn't the one burning a cross on their lawn or making them drink at a segregated water fountain?

And here, in 2016, not 1966 during the Vietnam War and the Civil Rights Movement under Martin Luther King and others, Petitioner faces death because . . . he is black. Is this "equal justice under law"? Not so much.

In fact, the madness of inflicting death on Duane Buck brings up another Buck, that is, Carrie Buck in the infamous case of *Buck v. Bell*, *supra* at 1, which we now briefly discuss.

## II. THE COURT SHOULD OVERRULE *BUCK V. BELL*, IN LINE WITH PREVENTING OTHER ABSURDITIES SUCH AS KILLING BLACKS FOR THEIR BLACKNESS

Symbolism is important, and if this contest of Duane Buck versus Lorie Davis for his very life is resolved against him and his skin color, people may be comparing that evil result to *Buck v. Bell* for ages. —In clarifying its jurisprudence, the Court should always be on the lookout for absurdities, since, as Voltaire noted, "Those who believe absurdities will commit atrocities." (*Questions sur les miracles* (1765)) And the absurdity, the very idea that someone could ever be sterilized against their will,

as in *Buck v. Bell*, flies in the face of the reproductive freedom defended in *Hellerstedt*, *supra* at 1.

Here is some of *Buck v. Bell*'s absurdity:

> It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.

*Id.* at 207 (Holmes, J.). Amicus has long wondered why Oliver Wendell Holmes, Jr., has maintained a stellar reputation over the decades, despite his Hitleresque opinion in *Buck v. Bell*. This Court should correct not only the errors of the lower courts in the instant case, but, at some point, also correct Holmes' errors and overturn *Buck v. Bell*. (If the Court wants to rename the Holmes Garden after the suffering victim Carrie Buck, they will not find Amicus complaining about that, either.)

Indeed, Holmes' language *supra* about "degenerate", "unfit . . . kind", and "generations of imbeciles" has the same stench as the "blackness-is-bad" idea of hereditary worthlessness and vice that we find in the instant case. Holmes' attitude was bad enough that it even inspired the Nazis in their depredations, *see* Wikipedia, *Buck v. Bell*,

https://en.wikipedia.org/wiki/Buck_v._Bell (as of 6:28 GMT, July 26, 2016). Dr. Quijano's wild mouthings about "blacks tending towards crime" remind us of Dr. Josef Mengele and the pseudo-scientific claptrap against Jews or others that he spouted at Frankfurt's infamous "Insitut für Erbbiologie und Rassenhygiene" (Institute for Hereditary Biology and Race Hygiene), or at the death camps, under the Third Reich.

Hitler was not fond of blacks; as the 2016 Summer Olympics come up, we remember how he treated black American champion Jesse Owens. The Court should not decide the instant case in a way that would please the ghost of Hitler.

## III. SYMBOLISM, EXPRESSIVE HARM, BUCK, AND THE FRAUGHT CURRENT RACIAL SITUATION IN THE NATION

There is other, relevant symbolism in this case too. And symbolism is not a nullity: offensive symbolism can hurt, since words, not only sticks and stones, can hurt, especially if the State is wielding the words. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), which, *see id.*, rightly allowed Texas to exclude the hated Confederate flag from State-issued license plates. *See also, e.g.*, *Bush v. Vera*, *supra* at 2 (expressive harm from racially-charged statute establishing a strangely-shaped voting district).

*Walker*, *supra*, reminds us that Texans are not inherently racist themselves—since they were decent enough to ban a racist license plate—, and that Texas is a great State. However, "even Homer

nods", and in the instant case, Texas is not being sensitive enough as to how Buck's blackness is being held against him, to the point of death.

For all we know, maybe even his name, "Buck", is being held against him, subconsciously. Whether it is or not, "Buck" has a horrible symbolism in our Nation's history, *see, e.g.*, Lingomash, *Slang meaning of Buck/Buck N[ ]ger*, 2016, http://lingomash.com/slang-meanings/59257/slang-meaning-of-buck-buck-nigger,

> Buck/Buck N[ ]ger means: This word has been used since the 17th century to refer to a male Negro [sic] - no matter whether slave or not.
>
> . . . .
>
> Meaning of BUCK
>
> BUCK means: Buck is American derogatory slang for a young male Indian or Negro. [sic] . . .

*Id.* (brackets not in original) For the Court to treat Duane Buck as a "Buck", *id.*, would be a spectacularly bad idea.

This is especially so considering the fraught racial climate in this country, with five police officers being murdered in Dallas (RIP) at a Black Lives Matter rally recently, and various black victims (RIP) of some police officers who were not living up to their high and noble calling. If the Court wants to ignore the bad omens *supra*, such as Buck's very name being usable as a racial slur against him, and decides he should die because of his color: that may help this Nation descend into an even more hellish

maelstrom of racial tension and death than before. It would be advisable to avoid this, surely.

## IV. THE SUPREME COURT HAS A LOT TO ANSWER FOR IN TERMS OF PREJUDICE AGAINST AFRICAN AMERICANS

And, not even mentioning *Dred Scott v. Sandford*, 60 U.S. 393 (1857), or *Plessy v. Ferguson*, 163 U.S. 537 (1896), for the moment: the Court's Members themselves have much else to answer for in terms of the way they have treated race. For example, the "Great Chief Justice" was not so great at showing justice in his own life: he was a slaveowner, *see* Wikipedia, *John Marshall*, https://en.wikipedia.org/wiki/John_Marshall (as of 22:43 GMT, Aug. 3, 2016). Although Marshall was, *see id.*, a leader in the movement to send slaves back to Africa (Liberia), perhaps considered "humane" for the time: still,

> In 1825, as Chief Justice, Marshall wrote an opinion in the case of the captured slave ship *Antelope*, in which he acknowledged that slavery was against natural law, but upheld the continued enslavement of approximately 1/3 of the ship's cargo (although the remainder were to be sent to Liberia). In his last will and testament, Marshall gave his elderly manservant the choice either of freedom and travel to Liberia, or continued enslavement under his choice of Marshall's children.

*Id.* (citations omitted) The latter incident, giving the "option" between either Liberia or the Hobson's choice of letting the slave choose which child of Marshall he wanted to be enslaved by (!!), seems mildly unimaginative; how about just plain freedom, but somewhere in the United States? or free passage to the place of the slave's choice, such as England? And why didn't Marshall just free the slave before Marshall died? The slave might have liked that.

Marshall is widely admired, and rightly; but on race issues, John Marshall was no Thurgood Marshall, so to speak. (And re the names of Justices, Amicus notes that there were Justices named Black, Blackmun, or White: but, to Amicus' knowledge, nobody ever used those *names* to kill a Justice—including Hugo Black—, whereas Duane Buck is being killed *because he is* ***Black***.)

As well, Oliver Wendell Holmes, Jr. (visiting him again) was not above using the "n-word", *see* Thomas D. Russell, *Oliver Wendell Holmes to Emily Hallowell, 16 November 1862, Mark De Wolfe Howe, ed. Touched With Fire; Civil War Letters and Diary of Oliver Wendell Holmes, Jr., 1861-1864 (Cambridge: Harvard University Press, 1946).*, House of Russell, "American Legal History — Russell", *last modified* Nov. 18, 2009, http://www.houseofrussell.com/legalhistory/alh/docs/holmesletter.html, where Holmes spews, "At dark (rainy) struck a n[ ]ger hut, but no road, & here we are", *id.* (brackets not in original) He could, as a man of his time, have said something slightly less offensive (if still offensive), such as "hut of our dusky brethren from far Afric's sunny clime", but did not, instead

choosing to use the "n-word". The more shame to him, and to any institution associated with him.

The late Justice Antonin Gregory Scalia (RIP), who is dearly missed even by those who didn't always agree with him, nevertheless sometimes said things that could be considered less than sensitive:

> JUSTICE SCALIA: I'm just not impressed by the fact that -- that the University of Texas may have fewer. Maybe it ought to have fewer. And maybe some -- you know, when you take more, the number of blacks, really competent blacks admitted to lesser schools, turns out to be less. And -- and I -- I don't think it -- it -- it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible. I just don't think --

*Fisher*, *supra* at 1, Tr. of Oral Arg. at 67-68 (Dec. 9, 2015), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_onjq.pdf. But those last four words, *id.* at 68, may be precisely the problem: that, literally, Scalia "just didn't think" when he said what he said, and thereby caused needless pain.

But what Scalia said is not as bad as what Dr. Quijano said. If we took Quijano's deranged opinions seriously, that would be reason to get rid of Justice Clarence Thomas from the Court, since by Quijano's reckoning, Thomas might "commit some crime" in his position, just because of his racial background.

But Thomas should stay, Quijano is wrong, and Duane Buck should receive relief from this Court.

## V. A HYPOTHETICAL: IMAGINE MEMBERS OF OTHER RACES PUNISHED BECAUSE OF THEIR RACE

If any readers somehow do not understand yet how bad it would be, and look, for the Court to deny Petitioner relief: how much would the Court, or America, tolerate it if, say, an Italian or Jewish or Chinese person were targeted similarly?

We cherish Italian Americans—some of whom are or have been on the Court—, but some occasional Italians have coincidentally been in the Mafia or other organized crime entities, and have often been unjustly stereotyped as such. So if there were Gino Calabresi, a sinister-looking Connecticut gangster who coincidentally happened to be Italian, would it be tolerated if he were convicted of a crime, or had his sentence increased, on the racist theory that "Italians tend to commit organized crime"? One suspects not.

Or, while we cherish Jewish Americans—some of whom are or have been on the Court—, some occasional Jewish persons have coincidentally been committed financial fraud or bank-related criminal activity, and have often been unjustly stereotyped as such. So if there were Marnie Badoff, a dishonest banker who coincidentally happened to be Jewish; would it be tolerated if she were convicted of crimes, or had her sentence increased, on the racist theory that "Jews tend to commit financial crimes"? That

would probably not tickle public opinion in a good way.

Similar examples abound. If a Chinese-American, Charlie Chang, were coincidentally an opium dealer, should a ludicrous "Chinese tend to deal opium" theory be used to punish him or increase his punishment? That would be a pipe dream unworthy of any civilized justice system.

So if the hypothetical ethnics mentioned *supra* should not be treated as if their skin is a sin, or as if their race makes them reprobates, neither should petitioner Buck be so mistreated.

## VI. DENYING DUANE BUCK JUSTICE MAY HURT AMERICA'S CREDIBILITY IN CRITICIZING UNJUST EXECUTIONS IN OTHER COUNTRIES

Speaking of multiple ethnic groups and nationalities: America's foreign policy is also implicated by the instant case. —Foreign nations sometimes criticize America's applications of the death penalty, but sometimes our Nation criticizes abuses of the death penalty elsewhere. *See, e.g.*, Tracy McVeigh & Martin Chulov, *US warns Saudi Arabia's execution of prominent cleric risks inflaming sectarian tensions*, The Guardian (London), Jan. 3, 2016, 6:25 a.m., https://www.theguardian.com/world/2016/jan/02/suadi-arabia-cleric-execution-unrest-predicted-shia-areas (U.S. State Department questions Saudi killing of Shiite cleric Nimr al-Nimr).

But if the Court and the Nation allow someone to be executed because of ""evidence"" that being Black predisposes you towards depravity, what credibility will America have when asking other nations to refrain from executing people? That might be a literal example of "the pot calling the kettle black"; and other nations will feel we have no credibility in criticizing them about death-penalty issues, since we cannot even fairly impose the death penalty ourselves. The Court should not needlessly allow America to be mocked and lose credibility in foreign affairs.

## VII. THE COURT SHOULD CONSIDER ABOLISHING THE DEATH PENALTY, PERIOD, EXCEPT FOR CASES OF *PER SE* OR *DE FACTO* SELF-DEFENSE BY THE STATE

While we are discussing the death penalty re Buck, though, one might as well discuss the death penalty in general. One hears there is a movement on the Court and elsewhere to dispense with the death penalty, and this is likely a good thing. One key problem with the death penalty is its irreversibility: if an innocent person is somehow killed, say, because he was deliberately framed by some hoodlums, or because an inept DNA technician made a false identification of him as being the culprit in a murder, it is difficult to bring the person back to life.

There are many other problems with the death penalty as well, so that some thoughtful minds have urged abolishing it except in cases of dire need:

> [Re] the death penalty[,] there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. . . .
>
> It is clear that, for these purposes [public order, safety, rehabilitation] to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.

St. Pope John Paul II, *Evangelium Vitae* § 56 (1995), *available at* http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html. In other words, *see id.*, the death penalty would be basically limited to unavoidable self-defense. But killing Duane Buck does not seem to meet that criterion.

*See also* another John Paul, i.e., a John Paul Stevens well-known to the Court,

> In 2008, two years before he announced his retirement, Justice Stevens . . . said that he now believed

> the death penalty to be unconstitutional.
>
> . . . .
>
> In a detailed, candid and critical essay[, Stevens] wrote that personnel changes on the court, coupled with "regrettable judicial activism," had created a system of capital punishment that is shot through with racism, skewed toward conviction, infected with politics and tinged with hysteria.

Adam Liptak, *Ex-Justice Criticizes Death Penalty*, N.Y. Times, Nov. 27, 2010, http://www.nytimes.com/2010/11/28/us/28memo.html?_r=0.

The two John Pauls *supra* speak some real wisdom. When maybe the whole idea of the death penalty (except in extreme need) is becoming rickety and unsupportable, it would be strange for the Court to buck this wholesome, lifesaving trend and accede to someone not just being killed by the State, but killed because he is black.

## VIII. THE DEATH PENALTY MAY ACTUALLY BE COUNTERPRODUCTIVE: ROBERT ALTON HARRIS AND RODNEY KING

As noted *supra* at 7-8, letting Buck die could cause horrible racially-tinged violence in this country. More generally, the violence of the death penalty can be infectious in any case. —Amicus has wondered for some decades about whether the execution of Robert Alton Harris in California in 1992 may have helped cause the Rodney King riots a little while later and thus produce a negative result,

instead of the supposed "positive result" that death-penalty advocates claim that executions produce, e.g., dissuading people from committing murder.

Amicus, a Californian, remembers viewing the various spectacles *supra* and *infra* on television or in person that April long ago:

> Harris was executed on April 21, 1992, in the gas chamber at San Quentin State Prison—the first execution in California in 25 years.
>
> . . . .
>
> Harris' execution is specifically remembered for his peculiar choice of final words (recorded by Warden Daniel Vasquez): "You can be a king or a street sweeper, but everybody dances with the grim reaper[.]"

Wikipedia, *Robert Alton Harris*, https://en.wikipedia.org/wiki/Robert_Alton_Harris (as of 12:41 GMT, June 21, 2016). So after a civilized respite of a quarter-century from the State of California killing people, the killing machine started up again, *see id.* Is it coincidental that eight days later, when there was a huge miscarriage of justice, i.e., when a jury refused to convict four police officers who beat Rodney King, that there was a massive riot, and scores of killings, in Los Angeles and also riots elsewhere? Amicus wonders.

In any case, Harris' execution certainly didn't seem to *deter* the Los Angeles rioters from killing people; maybe it even encouraged them to "rage against the machine" of a State they saw as unjust.

So, justice for Rodney King, Duane Buck, and everyone else is not to be ignored or treated cavalierly. We all—unless the "Rapture" or such occurs—have to meet the "grim reaper", as Robert Alton Harris noted, *id.* But to have the State itself play the Grim Reaper, and especially using race as a reason to kill, is extremely questionable by civilized standards, especially if the death penalty can't even achieve its supposed "positive" goals.

## IX. A QUICK NOTE ON RACE- AND GENDER-SELECTIVE ABORTION

Speaking of inability to achieve goals: Amicus shall quickly note that while abortion rights are supposedly in the interest of women's autonomy and dignity, race-selective and gender-selective abortions impugn the autonomy and dignity of preborn persons who are killed precisely because of their race or gender. (Thus, race- or gender-selective abortions do not really achieve goals of autonomy or dignity.) If, as Amicus argues, Buck's color shouldn't be held against him to the point of death, it makes sense that in the womb, race or gender (or other qualities) shouldn't be allowed to be the cause of deaths either.

One could make broader assertions, e.g., that those who are against the death penalty should also be against abortion, and vice versa. (There are things for both doctrinaire Democrats and doctrinaire Republicans to get irritated about there.) But for now, Amicus shall just make some brief comments on *Hellerstedt*, *supra* at 1: while the Court found that the laws under discussion there did not promote women's health, still, Amicus wonders if more evidence could have been sought, or if some

beneficial parts of the laws in question could have been severed off and saved, as aptly noted by the dissent of Justice Samuel Alito joined by Chief Justice John Roberts and Justice Clarence Thomas, *see id.*, 2016 U.S. LEXIS 4063 at, e.g., **95, **113-**118,**150-**160. This might have taken more work by the Court; but if we really value the lives and health of women and others, it might have been worth it. Similarly, it may take some time and thought to pick carefully through the procedural brambles in the instant case and see that Buck should be given the requested relief from the "adult abortion" that Texas wants to perform on him, but it is worth it to do so.

## X. PETITIONER'S COUNSEL HAS ABLY SHOWN REASON TO GIVE BUCK RELIEF: "THE WHOLE IS AT LEAST THE SUM OF ITS PARTS" RE CRUCIAL FACTORS, ETC.

Fortunately, Amicus does not need to explain the "procedural brambles" of the instant case too much, since Petitioner's able counsel has already done so, *see* Merits Br. for Pet'r (July 28, 2016) *passim*. Truly, this case is not just "exceptional", but even bizarre (racism; broken promises; spectacular incompetence by defense counsel; aberrancy of Fifth Circuit procedures compared to those of the Fourth and Eleventh Circuits; etc.), well justifying the issuance of a Certificate of Appealability.

In particular, re the District Court failing to do a holistic analysis, *see id.* at 54-55, one could say that that Court failed to realize that a whole is at least the sum of its parts, and maybe more. To take a bunch of separate factors and say they're each

individually insufficient, fails to consider the gestalt of the whole, or even to add the factors together, which is common sense.

Imagine if someone said, "Since one sole Member of the Supreme Court cannot issue a majority Opinion of the Court, the Court as a whole cannot do so, since no individual Justice can do so." But that is pure applesauce, as Justice Scalia used to say. When you add up members of the Court, a majority of them, when banded together, are allowed to issue a majority opinion, Amicus believes. Similarly, even if somehow no one factor in Buck's case proves extraordinary circumstances, a bundle of all, or even some, of the factors, may prove that the circumstances are extraordinary indeed.

## XI. THE *FISHER* DISSENT SHOULD BE ESPECIALLY WARY OF HOLDING BUCK'S RACE AGAINST HIM

One "extraordinary" feature of the dissent in *Fisher v. Univ. of Texas at Austin* last June, written by Justice Alito and joined by the Chief Justice and Justice Thomas, was the concern professed for unjust racial discrimination and the misuse of stereotypes. E.g., "Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race", 2016 U.S. LEXIS 4059 at **115-**116; "In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head", *id.* at **85. Amicus is pleased to see such pronounced distaste for discrimination and stereotyping.

That being so, it may look quite appropriate for the *Fisher* dissent to be in the forefront of support for Petitioner in the instant case. About the worst form of racial prejudice, or "discriminat[ion] on the basis of race" or "relying on stereotypes", *id.* at **116, **85, imaginable is to kill somebody because of his race. Conversely, if the *Fisher* dissenters were to allow Buck's execution because he is black (whether any forthcoming words from the Court or its Members say that literally or not), that would seem to contradict what they said in *Fisher*. A word to the wise, so to speak.

(By the way, though Amicus agrees with the Court majority, not the dissent, in *Fisher*, the dissent has some laudable points, e.g., concern about the noxious influence of "alumni child" or "legacy" advantages, *see id.* at **107-**109, and Amicus wishes to credit them for that. Those advantages give undeserved credit to privileged applicants because of their heredity, just as, conversely, Buck is being slated for death because of his inherited background, about which he could do nothing.)

## XII. STATE STEREOTYPING OF BLACKS AS VIOLENT IS NOT SOME GHOST FROM THE PAST, BUT CONTINUES RIGHT NOW

By the way, the malign spirit of Buck's upcoming potential death-by-stereotype, based on Quijano's absurd testimony back in the 1990's, is not some isolated incident from the previous millennium; recently in Austin, Texas—where the lessons from *Fisher* about the joy of racial diversity have apparently not been learned yet—, we see this terrifying incident:

> A newly released video . . . shows a black woman being slammed to the ground and arrested by police during a traffic stop. In the police car, the woman and Patrick Spradlin, one of the police officers, has [sic] a conversation about racism. 'Let me ask you this, why are so many people afraid of black people?' he says, 'I can give you a really good idea of why it might be that way: violent tendencies'[.]

AP, *Austin police officer: black people have 'violent tendencies' – video*, The Guardian (London), July 22, 2016, 9:26 p.m., https://www.theguardian.com/us-news/video/2016/jul/22/austin-police-black-people-violent-tendencies. So Duane Buck's case is not from a world that is gone with the wind; the disease of racism continues as we speak, and the Court should help cure the disease.

If the Court fails to do so, the consequences could be unspeakable.

* * *

> When human lives are endangered, when human dignity is in jeopardy[, w]herever men or women are persecuted because of their race, religion, or political views, that place must – at that moment – become the center of the universe.

Elie Wiesel, *Elie Wiesel - Acceptance Speech*, Nobelprize.org (Dec. 10, 1986), *available at*

https://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-acceptance_en.html.

Elie Wiesel (RIP) was sensitized to the horror of prejudice, due to his experience with the stench of the crematoria at Auschwitz. But African Americans have had their unwanted crematoria too, if not as formalized and mechanized as those of the Third Reich, as we see in this image of a century ago:

Fred Gildersleeve, *File:Lynching of Jesse Washington, 1916 (cropped).jpg* (a.k.a. "*A photograph of the lynching of Jesse Washington in progress*"), May 15, 1916, *available at* https://commons.wikimedia.org/w/index.php?curid=21705499 (as of 7:28 GMT, Sept. 28, 2012).

Buck's life is "endangered [and] persecuted because of [his] race", Wiesel Nobel Acceptance Speech, *supra*, so we should center our attention on ways to save it.

Black life matters. Just as all life matters. If it is unconstitutionally abusive and injurious to dignity that, say, a gay couple might have to move to another State to get a marriage license, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), then it is probably safe to say that killing someone because he is black is at least as unconstitutionally foul and undignified.

If anyone on the Court ever wanted to play Atticus Finch from Harper Lee's *To Kill a Mockingbird* (1960), this is the time. Buck's color of skin is not a bad thing; the real "darkness" here is in a not-entirely-distinguishable-from-Nazi-esque legal process that would kill him because of his color. There is a real stench not just of lynching, but also of Auschwitz, in the very idea of executing Duane Buck because of the melanin level in his epidermis. So, while Amicus is no Faulkner, he notes this August that we could use some light from the Court, this Court which has not always provided the light they should have. Petitioner and people of good will look forward to the Court providing that light.

## CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court of appeals; and humbly thanks the Court for its time and consideration.

August 4, 2016 Respectfully submitted,

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