No. 20-1199

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* FORMER ATTORNEY GENERAL EDWIN MEESE III IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Honorable Edwin Meese III served as the Seventy-Fifth Attorney General of the United States. Previously, Mr. Meese was Counsellor to the President. He is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation.

During his tenure as Attorney General, the Department of Justice routinely submitted briefing in cases addressing the constitutionality of race-based government action. As questions about the proper application of the Fourteenth Amendment to race-based admissions return to the Court, Mr. Meese offers the following to aid the Court's analysis.

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than the counsel below contributed the costs associated with the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

One-hundred and twenty-five years ago, Justice Harlan took a lone stand against his brethren and proclaimed that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In his view, "all citizens are equal before the law." *Id.* And in words that encapsulate our Nation's granite foundation, the "Great Dissenter" declared that, because "[t]he law regards man as man," it must "take[] no account of his surroundings or of his color." *Id.*

Six decades later, the Court unanimously embraced the view that the Fourteenth Amendment is irreconcilable with government action that treats individuals differently based on their race or ethnicity. In *Brown v. Board of Education*, the Court held that black school children, by "reason of . . . segregation," had been "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment," 347 U.S. 483, 495 (1954) ("*Brown I*"), and turned the Nation toward "achiev[ing] a system of determining admission to the public schools on a nonracial basis," *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955) ("*Brown II*"). In so doing, the Court responded to the *Brown* Plaintiffs' "fundamental contention" that "no State has any authority . . . to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown v. Bd. of Educ.*, O.T. 1952, No. 8, p. 7 (cited in *Parents*

Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2006)).[2]

This Court's decision in *Grutter v. Bollinger* broke ways with this principle when it held that "the use of race as a factor in student admissions" does *not* violate the Fourteenth Amendment. 539 U.S. 306, 311, 343 (2003). This holding was met with fierce criticism by four Justices, and it has not aged well; indeed, *Grutter* cleared the path for the discrimination of Harvard's Asian-American applicants described throughout the Petition for Certiorari. *See* Pet. for Cert. at 12-17. Besides these critiques, *Grutter* suffers from another deficiency—it makes no attempt to connect its holding to the meaning of the Fourteenth Amendment as understood by the generation that ratified it.

Nor could it. As originally understood, the Fourteenth Amendment means that "legally enforceable civil rights are the same for all . . . persons . . . without distinction on the basis of race [or] color." Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 993 (1995) [hereinafter "McConnell, *Originalism*"]. Support for this principle is found throughout the debates underlying the Civil Rights Act that evolved into the Fourteenth Amendment, the Fourteenth Amendment itself, the post-ratification Civil Rights Act, and the constitutional

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[2] *See also Parents Involved*, 551 U.S. at 772 n.20 (Thomas, J., concurring) (quoting Juris. Statement in *Davis v. Cnty. Sch. Bd.*, O.T. 1952, No. 191, p 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action."); Tr. of Oral Arg. in *Briggs v. Elliott*, O.T. 1953, No. 2 etc, p 50 ("[T]he state is deprived of any power to make any racial classifications in any governmental field.")).

conventions of the Southern States seeking readmission to the Union.

Justice Harlan's *Plessy* Dissent was thus correct as an original matter. So too was *Brown*. *Grutter*, however, not so. Because *Grutter* is irreconcilable with the Fourteenth Amendment's original meaning, the Court should grant certiorari and overrule it.

REASONS FOR GRANTING THE WRIT

I. THE FOURTEENTH AMENDMENT RENDERS THE CONSTITUTION COLORBLIND.

The unique (and uniquely dramatic) circumstances that sparked the Fourteenth Amendment are lost on no one. To accurately interpret the Amendment's meaning, that context is paramount. A few points are thus worth mentioning.

First, the Fourteenth Amendment simultaneously shrank the States' power (through Section 1[3]) while augmenting the federal government's enforcement authority (through Section 5[4]). The Court recognized this during the Fourteen Amendment's ratification era,[5] as well as in more contemporary times.[6] Indeed,

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[3] *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[4] *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

[5] *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1872) (stating that Reconstruction Amendments granted "additional powers to the Federal government" and added "additional restraints upon those of the States"); *Ex parte Va.*, 100 U.S. 339, 345 (1879) (stating that Thirteenth and Fourteenth Amendments "were intended to be . . . limitations of the power of the States and enlargements of the power of Congress").

[6] *See, e.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490-91, (1989) ("The Civil War Amendments themselves worked a

until 1954, it was not clear that the Equal Protection principle of the Fourteenth Amendment applied to the federal government at all. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Fourteenth Amendment's original understanding, then, is informed less by federal government allowances and more by the attempts the federal government made to eradicate discrimination at the State level.

Second, the principles eventually enshrined in the Fourteenth Amendment were sown first in the Civil Rights Act of 1866 ("1866 Act"). Because of (1) uncertainty about Congress's authority to pass the 1866 Act and (2) fear that a subsequent Congress would unravel it, the Thirty-Ninth Congress preserved the Act's tenets by constitutionalizing them. For that reason, the debates surrounding the 1866 Act necessarily inform the original understanding of the Amendment itself.

And third, the Fourteenth Amendment was proposed and ratified during a time in which trust in the Southern States was at its nadir. Consequently, concerns regarding enforcement of the Fourteenth Amendment were at their apex. So, the debates over *subsequent* legislation devised to enforce the newly minted Fourteenth Amendment are particularly relevant for understanding the Amendment's original

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dramatic change in the balance between congressional and state power over matters of race. . . . [T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.").

meaning. Of utmost consequence are the discussions underlying the Civil Rights Act of 1875 ("1875 Act").

A. The debates over the 1866 Act and the Fourteenth Amendment itself show that the Framers understood the Amendment to require race neutrality.

As originally introduced in the Thirty-Ninth Congress, the 1866 Act conveyed the general principle that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). "No discrimination . . . on account of race," naturally, suggests race neutrality, a fact not lost on opponents of the 1866 Act. Indeed, Senator Edgar Cowan believed that the bill, as first drafted, would forbid school segregation; Representatives Michael Kerr and Andrew Rogers expressed similar sentiments in the House.[7] *See* McConnell, *Originalism*, at 959. Others still noted that the bill would prohibit anti-miscegenation laws.[8] *Id*.

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[7] Although James Wilson, the Chairman of the House Judiciary Committee, suggested that the Act would not apply to juries or to schools, this turned on his narrow construction of the term "civil rights or immunities." *See* McConnell, *Originalism*, at 959. This narrow construction, however, does not suggest that the Act required something less than race neutrality in the areas to which it would apply. *See id*. at 962.

[8] An unfortunate reality is that these statements were often provided as warnings or lamentations by opponents of the 1866 Act. *See* McConnell, *Originalism*, at 959. That those opposed to

Before its enactment, the anti-discrimination provision cited above was stricken from the 1866 Act. But what was lost in the statute was restored in the Fourteenth Amendment. Although *the Act*, as passed, did not prohibit "discrimination in civil rights or immunities," Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866), *the Fourteenth Amendment*, in its stead, provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," U.S. CONST. amend. XIV, § 1. And although some have suggested that the change from "civil rights or immunities" to "privileges or immunities" was deliberate,[9] Senator Lyman Trumball, who introduced the 1866 Act in the Senate, "specifically equate[d] the terms," while "supporters linked both the substance of the 1866 Act and the meaning of the new Privileges or Immunities Clause of the Fourteenth Amendment to the rights protected under the Privileges and Immunities Clause of Article IV."[10] McConnell, *Originalism*, at 958.

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racial equality also construed the terms of the 1866 Act as mandating race neutrality, however, underscores that *both* sides of the debate understood that the terms of the 1866 Act, if passed, would require race neutrality.

[9] *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

[10] A debate exists as to whether this principle of equality derives from the Equal Protection Clause (*see, e.g.*, Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 276 (1997)), or the Privileges or Immunities Clause (*see, e.g.*, Christopher R. Green, *The*

The remainder of the debates sheds little light on the understanding of either the Amendment itself or its statutory forerunner. The existing record, however, reveals a common understanding among the Amendment's proponents and opponents that, upon the Fourteenth Amendment's ratification, race neutrality would become the maxim.

B. The debates over the 1875 Act confirm that the Fourteenth Amendment imposes colorblindness.

The limited debate over the 1866 Act and the Fourteenth Amendment is counterbalanced by the robust arguments underlying the 1875 Act, a years-long press by its proponents to rid the States of as much segregation as politically possible.[11] The 1875 Act is

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Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992)). Those considering the 1875 Act engaged in similar arguments, *see* McConnell, *Originalism*, at 997-98, which were substantially complicated by this Court's 1873 decision in the *Slaughter-House Cases*. For present purposes, what matters is that the legislators tasked with enforcing the Fourteenth Amendment believed *the Amendment* imposed a requirement of race neutrality, irrespective of the precise Clause that did so.

[11] The rapid demise of the 1875 Act in *United States v. Stanley*, 109 U.S. 3 (1883), is perhaps why many scholars overlook the Act's importance as a tool for understanding the Fourteenth Amendment's original meaning. *Stanley* found the Act unconstitutional because it prohibited conduct untethered to any State action, and Congress therefore lacked authority under Section 5 to enact it. *See id*. at 17-18. This holding does not cast doubt on the 1875 Act's use in understanding what Section 1 of the Fourteenth Amendment originally meant. And here, because

particularly enlightening, for at least three reasons. First, the Fourteenth Amendment, through Section 5, all but commanded Congress to enact legislation to enforce the substantive protections enshrined in Section 1.[12] The 1875 Act was Congress's first attempt to do so. Second, and more importantly, "the only conceivable source of congressional authority" for the 1875 Act was Section 5. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education,* 19 HARV. J.L. AND PUB. POL'Y 457, 460 (1995). "Support for the bill was, therefore, tantamount to an interpretation of the Amendment." *Id*. And third, debate over the 1875 Act began a mere three years after the Fourteenth Amendment was ratified. Indeed, many members of the Congress that ratified the Fourteenth Amendment participated in the debates that led to the 1875 Act.

As first proposed, the 1875 Act contemplated full race neutrality. It provided that "all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of" numerous accommodations. Cong. Globe, 42d Cong., 2d Sess. 244 (1872) (read on Dec. 20, 1871). It also provided that this right of "equal and impartial enjoyment" "shall not be

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Harvard is subject to Title VI, it must comply with the principles of the Equal Protection Clause. *See Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

[12] "Indeed, supporters frequently averred not only that the bill was within the power of Congress, but that Congress had the constitutional responsibility to pass such a bill." McConnell, *Originalism*, at 991-92.

denied or abridged on any pretense of race, color, or previous condition of servitude." *Id.*

Although debate over the Act focused on the pressing question of that era—whether it would forbid segregation in State-operated schools—this crucible distilled, and then cemented, the notion that the Fourteenth Amendment demands race neutrality. During early debates, Senator Charles Sumner, the champion of the bill in the Senate, insisted that "equality is where all are alike." Cong. Globe, 42d Cong., 2d Sess. 242 (1872). He continued: "[A]ny rule excluding a man on account of his color is an indignity, an insult, and a wrong . . . ." *Id.* Indeed, to the proponents of the 1875 Act (many of whom served in Congress while the Fourteenth Amendment itself was being debated), "the Fourteenth Amendment stood for the proposition that all citizens are entitled to the same civil rights, regardless of their race, color, nationality, social standing, or previous condition of servitude." McConnell, *Originalism*, at 992.[13]

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[13] *See also* 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch) ("The duty of the lawmaker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned."); Cong. Globe, 42d Cong., 2d Sess. 3193 (1872) (Statement of Sen. John Sherman) (stating that the key to peace in the South was to "[w]ipe out all legal discriminations between white and black"); 2 Cong. Rec. 4083 (1874) (Statement of Sen. Daniel Pratt) ("[F]ree government demands the abolition of all distinctions founded on color and race."); Cong. Globe, 42d Cong., 2d Sess. 385 (Jan. 15, 1872) ("[The law] makes no discrimination on account of color."); 3 Cong. Rec. 956 (Feb. 3, 1875) ("[M]y understanding of human rights, of democracy if you please, is all rights to all men, . . . without regard to sections, complexions, or anything else.").

The 1875 Act, like the Fourteenth Amendment itself, had its congressional opponents. But these opponents "could not agree on any particular constitutional theory under which segregation could be defended as lawful, and many of them were acting out of evident hostility or indifference to the goals of the Fourteenth Amendment." *Id.* at 986. Some argued "separate but equal," while others simply appealed to the vile prejudices of the time, expressing hostility to the very idea of equality altogether. But many took race neutrality as a given. The question for them was not whether the Fourteenth Amendment demanded race neutrality. The question instead was to which rights would the Fourteenth Amendment apply—in other words, whether Congress had the authority under Section 5 to demand race neutrality in State schools.

In the end, the 1875 Act passed, although along the way it lost the provisions that would forbid segregation in schools. The enacted version provided:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, 18 Stat. 335, § 2 (1875).

The years-long process that led to the 1875 Act witnessed fierce debate over the substantive ingredients and the procedural scope of the Fourteenth Amendment. Unanimity was never possible. But the 1875 Act passed, and it cannot be read as anything but an endorsement of race neutrality where it applied.[14] And because the 1875 Act uniquely informs the Fourteenth Amendment's original understanding, *see supra* at 6-7, the original understanding of the Fourteenth Amendment should be understood to mandate race neutrality.

C. The practice among the States underscores that the Fourteenth Amendment required race neutrality.

Finally, the actions among the States suggest that the Reconstruction Amendments in general (and the Fourteenth Amendment in particular) were

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[14] Although the school-desegregation provisions did not survive the legislative process, this does not undermine the colorblindness principle. Nor does it suggest that *Brown* was wrong as a matter of the Fourteenth Amendment's original meaning. The Senate voted on different iterations of the 1875 Act at least ten times; the House, for its part, lodged eight recorded votes. McConnell, *Originalism*, at 1093. A majority (but always less than the required two-thirds supermajority) voted for "legislation premised on the unconstitutionality of school segregation"; "efforts to approve separate-but-equal requirements for education were invariably defeated"; and "there was a high correlation between votes on the Fourteenth Amendment and votes in favor of school desegregation." *Id.* at 1093-94. Given the catastrophic Republican losses in the 1874 Election, the failure to forbid school desegregation in the final version of the 1875 Act was most likely based on the political realities of the day and does not suggest *Brown* conflicts with the original view of the Fourteenth Amendment. *See id.* at 1088-92.

understood to impose race neutrality. This was seen, first, in the Southern States that had seceded and sought readmission to the Union. Federal law prohibited readmission of any State until Congress had examined its constitution and determined that it was "in conformity with the Constitution of the United States in all respects." *See* Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867). As the Southern States began drafting their respective constitutions, most agreed that "class legislation, so far as mere color is concerned, was gone forever." Remarks of Rep. Sweatt (quoted in McConnell, *Originalism*, at 963). The focus of the debate among the respective State delegations remained fixed on school segregation, McConnell, *Originalism*, at 963, and for the most part, the Southern States agreed (at that time)[15] that segregation was forbidden because the newly amended U.S. Constitution required race neutrality. Many State constitutions expressly reflected this understanding—e.g., "[i]t is the paramount duty of the State [of Florida] to make ample provision for the education of all the children residing within its borders, without

[15] "Shortly after gaining readmission with colorblind state constitutions, most Southern state legislatures enacted laws permitting or requiring segregated schools, and Congress had no authority (or no inclination) to review the domestic legislation of sovereign states." McConnell, *Originalism*, at 965. These State practices (and the federal government's silence), abhorrent as they were, do not detract from the fact that the Southern States, at least when proposing State constitutions "in conformity with the Constitution of the United States," *see* Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867), understood that readmission required race neutrality.

distinction or preference." FLA. CONST. of 1868, art. IX, § 1, *reprinted in* McConnell, *Originalism*, at 964-65.[16]

The evidence from the Northern States was more equivocal at first. School segregation had been commonplace in the North before the Civil War, but it was subject to litigation beginning in the 1840s. McConnell, *Originalism*, at 967. For their part, Minnesota, Maine, New Hampshire, and Vermont never had segregated schools. *Id*. at 968. And although New Jersey, Rhode Island, Michigan, Connecticut, and Illinois legislatively desegregated their schools not long after the Fourteenth Amendment's ratification, many other States were slow to act, and some (Nevada, Kansas, Indiana, and California) passed laws formalizing segregation shortly after the Fourteenth Amendment was ratified. *Id*. at 968-69. By the twilight of the 1880s, however, "[a]lmost all Northern states abolished school segregation," and at least one

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[16] *See also* LA. CONST. of 1868, tit. VII, art. 135, *reprinted in* McConnell, *Originalism*, at 964 ("All children of this State . . . shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition."); S.C. CONST. of 1868, art. X, § 10, *reprinted in* McConnell, *Originalism*, at 964 ("All the public schools, colleges and universities of this State . . . shall be free and open to all the children and youths of the State, without regard to race or color."); *id*. ("Three states (Texas, Mississippi and Virginia) were readmitted upon the stipulation 'that the constitution of [the state] shall never be so amended as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.'" (quoting Act of Mar. 30, 1870, ch. 39, 16 Stat. 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 68) (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 63 (Virginia))).

(Pennsylvania) "expressly linked" its decision to desegregate "to the demands of the Fourteenth Amendment." *Id*. at 970.[17]

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One final interpretive point bears mentioning. The notion of the colorblind Constitution that permeates the Reconstruction-era debates arose in the context of discussion about segregation, a practice rightfully considered repugnant in modern times. Some may reject the relevance of these debates to this case because segregation is morally indefensible, while *Grutter* lent its imprimatur to "benign" race-based admissions practices.

The Court should decline the invitation to drive a wedge based these two controversies. First, the proponents of desegregation were unequivocal—"equality is where *all* are alike," Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Statement of Senator Charles Sumner) (emphasis added), and "[t]he duty of the lawmaker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned," 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch). More fundamentally, trying to determine which racial classifications are "benign" has proven to be a fool's errand; as members of this Court have noted, "[t]he segregationists in *Brown* argued that their racial

[17] Early state judicial opinions over questions of school segregation were split; five upheld segregation, while four struck it (typically on state-law grounds without deciding whether segregation would also violate the Fourteenth Amendment). *See* McConnell, *Originalism*, at 971.

classifications were benign, not invidious." *Parents Involved*, 551 U.S. at 778 n.27 (Thomas, J., concurring) (citations omitted).[18]

And, to state it bluntly, in the zero-sum game of elite-college admissions, preferencing one race necessarily means hindering another.[19] The Court need look no further than this case to see how the flip side of providing "benign" race-based benefits for one historically disadvantaged group equates to unjust discrimination for a different historically disadvantaged group. *See* Pet. for Cert. at 12-17. For this reason, the Reconstruction Congress labored to rid the Nation of segregation through constitutional colorblindness. The time has come to resuscitate the original understanding of the Fourteenth Amendment, and, consequently, to excise considerations of race, whether they be patently odious or (superficially) benevolent.

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[18] *See also Croson*, 488 U.S. at 520 (Scalia, J., concurring) ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.").

[19] *See Croson*, 488 U.S. at 527 (Scalia, J., concurring) ("[I]t is important not to lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race." (citing *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting))).

II. CONTRARY THEORIES DO NOT WITHSTAND SCRUTINY.

Arguments that the Fourteenth Amendment was *not* understood to mandate race neutrality have plagued the legal academy.[20] Most rely on a sole data set—that, in the immediate aftermath of the Civil War, Congress enacted, along with its ratification of the Fourteenth Amendment, laws that appear to grant race-based benefits to African Americans. These laws divide neatly into two categories: the Freedmen's Bureau Acts, and several other provisions that (upon first glance) appear to single out newly freed black citizens for special government benefits.

These theories, however, suffer from a common defect. The Fourteenth Amendment, as written and as originally understood, did not apply to the federal government.[21] And because Section 5 enhanced federal

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[20] *See, e.g.*, CASS SUNSTEIN, RADICALS IN ROBES (2005); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

[21] "The best explanation for why the Amendment excluded the federal government is that the enactors believed the federal government could be trusted far more than the states. While the Congress likely believed that the federal government should not engage in arbitrary racial discrimination, it allowed this norm to be enforced solely through a principle of political morality." Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 72 NOTRE DAME L. REV. 71, 73 (2013) [hereinafter, "Rappaport, *The Colorblind Constitution*"]; *see also id.* at 86 ("[T]he federal government was purposefully excluded from the Amendment and there are good reasons for believing that the Congress was taking advantage of the flexibility that the Amendment allowed it to pursue public policy in the various circumstances confronting it at the time.").

power, Congress and the States were not similarly situated. As Justice Scalia put it, "it is one thing to permit racially based conduct by the Federal Government[,] whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment," but it is "quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed." *Croson*, 488 U.S. at 521-22 (Scalia, J., concurring).

For this reason, the debates surrounding congressional enactments that limited State authority (e.g., the 1866 Act and the 1875 Act) inform the original understanding of the Fourteenth Amendment, while other federal measures do not.[22]

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[22] Similarly, this renders largely irrelevant the stubborn existence of segregated schools in the District of Columbia during Reconstruction. According to Professor McConnell:

> The segregation of schools in the nation's capital was a powerful symbol. But as a legal matter it is less significant than may appear. At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District (although Congress appropriated money for the segregated schools that already existed). The sin was one of omission. More importantly, since the Fourteenth Amendment did not apply to congressional legislation, senators were free to vote in accordance with their assessments of practical impact (and even according to their personal preferences about the schools their children attended) rather than according to the perceived dictates of the Constitution. Opponents of desegregation followed a strategy of preventing

Even assuming these federal enactments inform the Fourteenth Amendment's original meaning (and they do not), most did not in fact confer race-based benefits that would cast doubt on the Constitution's commitment to colorblindness.

A. The first category to which the colorblind-Constitution skeptics point includes the twin Freedmen's Bureau Acts. Enacted in 1866 and 1867, the first iteration provided "clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children." Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 507. The second iteration expanded the assistance provided by the first.

Properly understood, however, the Freedmen's Bureau Acts were not race based. Although the term "freedmen" referred to former slaves, and virtually all former slaves were black, the triggering characteristic for receipt of government assistance was *not* skin color alone. By its terms, the Freedmen's Bureau Acts did not help African Americans who were not enslaved before the Civil War. To borrow Justice Scalia's

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> an up-or-down vote, and extraordinary numbers of representatives and senators failed to vote even on procedural motions. One member said outright that he could not cast a vote that might be interpreted as condoning segregation, but that he preferred that the issue not be raised. To read this as proof that the Congress of the day viewed segregation as constitutionally legitimate is to overread the evidence.

McConnell, *Originalism*, at 980.

parlance, the Freedmen's Bureau Acts were a constitutionally permissible example of the government "undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race," even though the Acts had "a racially disproportionate impact." *Croson*, 488 U.S. at 526 (Scalia, J., concurring).

At their core, the Freedmen's Bureau Acts gave "identified victim[s] of state discrimination that which [they] were wrongfully denied." *Id.* This is no different than "giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment." *Id.* "In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled." *Id.* This "is worlds apart from [a] system . . . in which those to be disadvantaged are identified solely by race." *Id.* And for this reason, the Freedmen's Bureau Acts do not cast doubt on the theory of the colorblind Constitution, nor do they provide original-understanding support for *Grutter*.

B. The second bucket of Reconstruction-era federal enactments to which colorblind-Constitution skeptics point consist of five laws:

1. A law that donated federally owned land in the District of Columbia "for the sole use of schools for colored children." Act of July 28, 1866, ch. 308, 14 Stat. 343.

2. A law that appeared to appropriate funds for the relief of destitute African American

women and children. Act of July 28, 1866, ch. 296, 14 Stat. 317.

3. A law that provided money for destitute "colored" persons within the District of Columbia. Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20.

4. A law that required military chaplains appointed for black troops to provide them with basic educational instruction. Act of July 28, 1866, ch. 299, 14 Stat. 337.

5. Several rules and procedures for the payment of "colored" servicemen in the Union Army. Act of July 28, 1866, ch. 299, 14 Stat. 367-68.

None of these enactments, when considered in context, suggest that Congress believed racial classifications were constitutionally acceptable under the Fourteenth Amendment. The law donating federal lands to "schools for colored children" was necessary because, before 1862, "public schools in the District were limited to white children." Rappaport, *The Colorblind Constitution*, at 102. Because white students already had schools, Congress's donation of land to "schools for colored children" was filling a void, not conferring a race-based benefit.

Reliance on a law purportedly appropriating funds to destitute African American women and children fares no better. This is because that law gave funds to a private organization that happened to be named the "National Association for the Relief of Destitute Colored Women and Children." *Id.* at 103. Because thousands of private organizations receive federal appropriations every year, it would make little sense to

use this appropriation as evidence that the Reconstruction-era Congress believed that the Fourteenth Amendment allowed race-specific benefit conferral.

Although the law providing relief for destitute "colored" District of Columbia residents appears race based, context suggests that it was not. "[T]hese benefits were not provided to destitute blacks because of their race or because there was a tendency for blacks to be in worse circumstances." *Id*. at 105. "Rather, Congress provided the benefits because there was a special problem exhibited by the shantytowns in the District where only blacks lived." *Id.* The use of a racial identifier was a surrogate term used for identifying to whom "the benefits should be provided." *Id.* In other words, these benefits were not provided to African Americans *because* they were African Americans. Instead, these benefits were provided for the destitute in the District of Columbia, the vast majority of whom happened to be African American. Rappaport, *The Colorblind Constitution*, at 103.

Reliance on the law that mandated chaplain-run educational instruction for black military troops suffers from the same deficiency blighting reliance on the law that donated federal land to "schools for colored children." Act of July 28, 1866, ch. 308, 14 Stat. 343. Specifically, this law was promulgated to ensure that black troops would receive the same instruction already being provided to white troops. Rappaport, *The Colorblind Constitution*, at 109. Because of rampant discrimination in the armed forces, Congress was likely "concerned that the black soldiers would not receive education from the" existing schools on military bases.

Id. "By requiring that the chaplains for the black soldiers provide education, Congress would have ensured that the black soldiers would have been taught by the chaplains for their regiments." *Id*. In any event, "there might have seemed to be little point to avoiding racial distinctions given the existing racial segregation and exclusion in the armed services." *Id.* at 110. Sloppy draftsmanship and the use of proxy terms, however, does not mean that Congress intended this provision to create unique benefits for black servicemembers.

The final Congressional enactment does appear race based, and, unlike the others, the historical record does not reveal a non-race-based explanation. *Id.* at 110-11. That law created price controls on the "amount that could be paid to agents who helped black servicemen secure bounties, pensions, and other payments that they were due," but did not provide the same benefits for white servicemembers. *Id*. at 110. Perhaps this law had a nonracial explanation, and it remains true that Congress did not consider itself bound by the Fourteenth Amendment. But even interpreting it in the light most favorable to the colorblind-Constitution skeptics, this sole law provides a wafer-thin reed on which to rest an argument that the Fourteenth Amendment allows—150 years after the abolition of slavery—the sort of race-based admissions regime approved by *Grutter*.

CONCLUSION

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). The Fourteenth Amendment's founders knew this. Justice Harlan knew this when he penned his *Plessy* dissent. This Court did as well when it unanimously decided *Brown*. *Grutter* deviated from this principle, and this deviation has been a scourge for Harvard's Asian-American applicants. Because *Grutter*'s holding is irreconcilable with the race-neutral original meaning of the Fourteenth Amendment, the Court should grant certiorari.

Respectfully submitted.

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