**Nos. 20-1199 & 21-707**

IN THE

# Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
*Petitioner,*

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
*Respondent.*

STUDENTS FOR FAIR ADMISSIONS, INC.,
*Petitioners,*

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
*Respondents.*

**On Writs of Certiorari to the United States Courts of Appeals for the First and Fourth Circuits**

## BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amicus Curiae*

* Counsel of Record

August 1, 2022

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

Cases

**TABLE OF AUTHORITIES – cont'd**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**



Books, Articles, and Other Authorities

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the scope of the Fourteenth Amendment's protections and in this case, and CAC has filed *amicus curiae* briefs in this Court in numerous cases raising significant issues regarding the text and history of the Fourteenth Amendment.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Students for Fair Admissions ("SFFA") contends that any use of race in a public or private university's holistic admissions policy violates the Fourteenth Amendment's guarantee of the equal protection of the laws and Title VI of the Civil Rights Act of 1964, which applies the Fourteenth Amendment's constraints on racial discrimination to private institutions that accept federal financial assistance.

According to Petitioner, the Fourteenth Amendment prohibits any consideration of race in admissions. Pet'r Br. 50. But Petitioner's argument is based

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief.

on a fundamentally false and radically incomplete account of the text and history of the Fourteenth Amendment. Significantly, SFFA's one-sided account fails entirely to grapple with the fact that the Framers of the Fourteenth Amendment were the originators of affirmative action.

Far from establishing an absolute constitutional ban on the use of race by the government, the Framers of the Fourteenth Amendment rejected proposals to prohibit any and all use of racial classifications by the government. Indeed, contemporaneous with the Fourteenth Amendment's enactment, the Reconstruction Congress enacted a long list of race-conscious legislation intended to ensure equality of opportunity to all persons regardless of race. These acts were not limited to persons who had previously been held in bondage or to the goal of redressing badges of slavery or other government-sponsored racial oppression. Rather, like Harvard College's and the University of North Carolina's use of race under review here, the race-conscious measures enacted by the Framers of the Fourteenth Amendment were forward-looking in design, seeking to ensure equality of opportunity and fulfill the promise of equality contained in the Fourteenth Amendment.

At the heart of these race-conscious government measures were federal efforts to ensure equality of educational opportunity for Black Americans. Recognizing the importance of providing pathways to leadership and professional life, the federal government established schools and colleges throughout the South, making it possible for Black persons to realize the full potential of the freedom secured by the Fourteenth Amendment. The Framers also provided chaplains to assist in the education of Black soldiers. The Reconstruction Framers thus recognized that in certain

contexts it was permissible to use race—indeed, to classify on account of race—to help ensure that educational opportunities were available to all regardless of race. SFFA's contrary view—that universities may take into account every sort of diversity *except* for racial diversity—would turn the Fourteenth Amendment on its head.

In keeping with the Fourteenth Amendment's text and history, this Court has consistently held that public colleges and universities may use race as a factor in selecting diverse, academically accomplished student bodies, so long as those universities ensure individualized consideration of the diverse background and qualification of all persons regardless of race. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (*Fisher II*). Applying strict scrutiny, *Bakke, Grutter*, and *Fisher II* all held that the use of race as one factor among many in selecting a rich, vibrant, and diverse student body can withstand the rigorous judicial review that this Court has applied to judge the constitutionality of governmental racial classifications. As this Court explained, universities "may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity,'" *Fisher II*, 579 U.S. at 381 (quoting *Fisher I,* 570 U.S. at 310), and ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity," *Grutter*, 539 U.S. at 332.

Petitioner urges this Court to overrule *Grutter (*and *Bakke* and *Fisher* as well), insisting that even the most modest use of race to help achieve a truly diverse student body is no different than the Jim Crow segregation annulled in this Court's landmark decision in

*Brown v. Board of Education*, 347 U.S. 483 (1954). According to SFFA, "Because *Brown* is our law, *Grutter* cannot be." Pet'r Br. 47.

The Framers of the Fourteenth Amendment, however, rejected Petitioner's view that race-conscious governmental efforts to assist Black people in the transition to equal citizenship are constitutionally equivalent to efforts to subordinate Black people and strip them of their fundamental freedoms. Indeed, they concluded that forward-looking, race-conscious measures would "break down discrimination between whites and blacks," Cong. Globe, 39th Cong., 1st Sess. 632 (1866), and ensure that "the gulf which separates servitude from freedom is bridged over," *id.* at 2779. As the text and history of the Fourteenth Amendment demonstrate, the Amendment's Framers recognized that race-conscious governmental measures were sometimes necessary to ensure equal opportunities for all persons regardless of race and to redress systemic racial inequalities.

SFFA insists that this Court's precedents have failed to heed basic constitutional first principles concerning the meaning of the Fourteenth Amendment's guarantee of equal protection of the laws to all persons. But it is Petitioner who has lost sight of our Constitution's text, history, and original meaning. SFFA's plea that this Court rewrite the text and history of the Fourteenth Amendment and cast aside decades of its own precedent upholding the sensitive use of race in university admissions should be rejected.

## ARGUMENT

### I. The Text and History of the Fourteenth Amendment Permit Governments to Enact Race-Conscious Measures to Ensure Equality of Opportunity to All Persons Regardless of Race.

The Fourteenth Amendment provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Rejecting efforts to establish a constitutional proscription solely on racial discrimination, the Framers of the Fourteenth Amendment wrote a broad universal guarantee of equality that swept men and women of all races and groups into its coverage. "Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color, or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring). Rather than simply prohibiting discrimination on account of race or previous condition of servitude, "[t]he fourteenth amendment extends its protection to races and classes, and prohibits any state legislation, which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

In writing the guarantee of the equal protection of the laws into the Constitution, the Framers of the Fourteenth Amendment established an all-encompassing guarantee of equality under the law in order to protect, among others, Black persons newly freed from enslavement, white Union sympathizers residing in the South, and Chinese immigrants in the West from state-sponsored discrimination. *Report of the*

*Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress* xiii (1866) ("[i]t was impossible to abandon [the newly freed slaves] without securing them their rights as free men and citizens"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) ("[t]he adoption of this amendment is essential to the protection of Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been at arms against them"); *id.* at 1263 ("white men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country"); *id.* at 1090 (arguing that "all persons, whether citizens or strangers within this land" should "have equal protection in every State in this Union in the rights of life and liberty and property"); Cong. Globe, 41st Cong., 2d Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are.").

As the text of the Equal Protection Clause makes clear, every person in this country can invoke its universal guarantee of equality. In this respect, the Framers of the Fourteenth Amendment established that "in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). What Justice Harlan's famous statement meant is that, under the Fourteenth Amendment, states were constitutionally forbidden to enact measures to "humiliat[e] citizens of a particular race" and thereby "place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the

United States." *Id.* at 563 (Harlan, J., dissenting). As its Framers explained, the Equal Protection Clause "abolishes all class legislation," "does away with the injustice of subjecting one caste of persons to a code not applicable to another," and "establishes equality before the law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). In their view, the "words caste, race, [or] color" were "ever unknown to the Constitution." *Id.* at 630.

At the same time, in writing the Fourteenth Amendment, the Framers recognized that, after a century of racial slavery, the Constitution could not be simplistically color-blind. Faced with the task of fulfilling President Abraham Lincoln's promise of a "new birth of freedom," and integrating Black Americans into the civic life of the nation as equals, the Framers of the Fourteenth Amendment concluded that race-conscious efforts were appropriate to further "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring).

The Fourteenth Amendment's Framers time and again rejected proposed constitutional language that would have precluded race-conscious measures designed to assist Black Americans in their transition to equal citizenship. *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposing that "[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color"); Benjamin B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, at 46 (1914) (proposing that "all laws, state or national, shall operate impartially and equally on all persons without regard to race or color"); *id.* at 83 (proposing that "[n]o discrimination shall be made . . .

as to the civil rights of persons because of race, color, or previous condition of servitude"); Resp. Br. 23 (20-1199); Students Resp. Br. 20 (21-707); Univ. Resp. Br. 29-30 (21-707).

In this respect, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966). Thus, under the Fourteenth Amendment, "race may be considered in certain circumstances and in a proper fashion" to help realize the constitutional promise of equal protection. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015).

Indeed, not only did the Reconstruction Framers reject proposed constitutional language that would have prohibited race-conscious efforts to guarantee equality of opportunity, but, contemporaneous with the drafting and passage of the Fourteenth Amendment, they enacted a long list of race-conscious legislation to help ensure that the Amendment's promise of equality would be a reality for Black Americans. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754-84 (1985) (cataloguing race-conscious measures enacted by the Framers of the Fourteenth Amendment); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997) (same); Jack M. Balkin, *Living Originalism* 223, 417 n.20 (2011) (same); Resp. Br. 23-24 (20-1199); Students Resp. Br. 19-21 (21-707); Univ. Resp. Br. 30-32 (21-707). The Framers of the

Fourteenth Amendment recognized that forward-looking, race-conscious measures would help realize the promise of equality contained in the Fourteenth Amendment, "break down discrimination between whites and blacks," and "ameliorat[e] . . . the condition of the colored people." Cong. Globe, 39th Cong., 1st Sess. 632 (1866).

In the debates over these legislative acts, the Reconstruction Framers repeatedly rejected their opponents' arguments that race-conscious legislation was inconsistent with the principle of equality under the law because it classified people on the basis of race. In the Framers' view, efforts to ensure equality of opportunity and assist Black Americans in securing the full measure of freedom promised in the Civil War Amendments were consistent with, not contrary to, the new constitutional guarantee of equality.

The Reconstruction Framers' principal effort to assist Black persons in the transition from slavery to freedom was the creation of the Freedmen's Bureau. Enacted in 1865 and expanded in 1866, the Freedmen's Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and their labor contracts, [and] rented them land." Stephen A. Siegel, *The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 559 (1998). As members of the 39th Congress explained, "[h]aving made the slave a freeman, the nation needs some instrumentality which shall reach every portion of the South[,] stand between the freedman and oppression," Cong. Globe, 39th Cong., 1st Sess. 585 (1866), and "protect them in their new rights, to find employment for the able-bodied, and take care of the suffering," *id.* at 937; *see also id.* at 2779 ("[W]e have struck off their chains. Shall we

not help them to find homes? . . . We have not let them know the meaning of the sacred name of home.").

While the Act's provisions extended to those freed from enslavement as well as refugees of any race whose lives had been devastated by the Civil War, the Act gave the two groups vastly different benefits. The Act, as expanded in 1866, authorized the Bureau to "aid" Black persons freed from bondage in any manner "in making the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of States, and by constitutional amendment," while it provided support to "loyal refugees" only to the extent that "the same shall be necessary to enable them . . . to become self-supporting citizens." Freedmen's Bureau Act, § 2, 14 Stat. 173, 174 (1866); Schnapper, *supra*, at 772 ("[Although the Bureau was authorized to aid blacks in almost any manner related to their newly-won freedom, white refugees could only be provided that assistance necessary to make then self-supporting."). Further, the Act's educational provisions permitted the Bureau's commissioners to use, sell, or lease certain property in the former Confederacy abandoned during the Civil War for "the education of the freed people." Freedmen's Bureau Act, § 12, 14 Stat. at 176.

Opposition to the nation's first Reconstruction-era affirmative action programs was phrased in terms of the same principle of colorblindness SFFA urges here. Congressional opponents of the Fourteenth Amendment and Reconstruction denounced the Act as discriminatory, arguing that it "make[s] a distinction on account of color between the two races." Cong. Globe, 39th Cong., 1st Sess. 397 (1866). Using the same terminology the Amendment's Framers had used in describing the Equal Protection Clause, Democratic opponents denounced the Freedmen's Bureau Act as

"class legislation," *id.* at 2780; *see also id.* at 649; *id.* at app. 69-70, that treats "freedmen" not "equal before the law, but superior" directly "in opposition to the plain spirit . . . of the Constitution that congressional legislation should in its operation affect all alike," *id.* at 544. Likewise, President Andrew Johnson cited the "danger of class legislation" in vetoing two versions of the 1866 Act, 6 *Messages and Papers of the Presidents* 422, 425 (James D. Richardson ed., 1897) (veto message of July 16, 1866), arguing that there was no legitimate reason why the Freedmen's Bureau "should be founded for one class or color of our people more than another," *id.* at 401 (veto message of Feb. 19, 1866).

The Reconstruction Framers in Congress resoundingly rejected these arguments. They explained that "the very object of the bill is to break down discrimination between whites and blacks" and to make possible "the amelioration of the condition of the colored people," Cong. Globe, 39th Cong., 1st Sess. 632 (1866), and that race-conscious measures were appropriate "to make real to these freedmen the liberty you have vouchsafed to them," noting that "[w]e have done nothing to them, as a race, but injury," *id.* at 2779. On July 16, 1866, barely a month after sending the Fourteenth Amendment to the States for ratification, Congress, by votes of 104-33 in the House and 33-12 in the Senate, overrode President Johnson's second veto of the 1866 Act. *Id.* at 3842, 3850. In approving race-conscious measures to foster racial equality, the Framers recognized that ending racial subjugation—not overly simplistic colorblindness—was the true purpose of the Fourteenth Amendment.

Particularly important here, in approving the Freedmen's Bureau, the Framers of the Fourteenth Amendment recognized that education is "the very foundation of good citizenship," *Brown,* 347 U.S. at

493, and that race-conscious efforts to guarantee equal educational opportunity were necessary to integrate Black Americans into the civic life of the nation as equals. Providing equal educational opportunity for those freed from bondage was the signature achievement of the Freedmen's Bureau, "the foundation upon which all efforts to assist the freedmen rested." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877,* at 144 (1988). By 1869, at a time when public education in the South was still in a skeletal state, *see Brown*, 347 U.S. at 489-90, "nearly 3,000 schools, serving over 150,000 pupils reported to the Bureau," helping to "lay the foundation for Southern public education," Foner, *supra*, at 144. Among Black Americans, the conviction that "'knowledge is power'" drew "hundreds of thousands, adult and children alike to the freedmen's schools, from the moment they opened." Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 473, 474 (1979).

The Freedmen's Bureau also "provided funds, lands, and other assistance to help establish more than a dozen colleges and universities," Schnapper, *supra*, at 781, recognizing the importance of providing pathways to leadership and professional life for African Americans, *see id.* at 781-82 (discussing the Bureau's assistance in establishing Howard University, which was open to students of all races but made special provisions for the education of those freed from enslavement).

Championing these race-conscious efforts, the Framers explained that the Freedmen's Bureau Act was designed to "lift [freedmen] from slavery into the manhood of freedom, to clothe the nakedness of the slave, and to educate him into that manhood." Cong. Globe, 39th Cong., 1st Sess. 656 (1866). Race-conscious education measures were meant to support

Black Americans' efforts to achieve full and equal citizenship, while also enlightening young minds and breaking down prejudices. "Education has here fused all nations into one; it has obliterated prejudices; it has dissolved falsehoods; it has announced great truths; it has flung open all doors . . . ." *Id.* at 586. The Framers recognized that race-conscious efforts by the government in the field of education were critical to providing Black Americans the opportunity to rise in the world and enjoy the equal citizenship promised by the Fourteenth Amendment.

Congress also enacted numerous other race-conscious measures to ensure equality of opportunity to all persons regardless of race that were not limited to those freed from enslavement. The Reconstruction Framers designed these acts to be forward-looking in design, helping to fulfill the Fourteenth Amendment's promise of equality rather than remedying specific discriminatory practices.

For example, in 1866 and 1867, Congress enacted legislation designed to protect the rights of Black soldiers to receive bounties for enlisting in the Union Army. Concerned that Black soldiers who had served the Union in the Civil War were being cheated out of their bounties by the fraudulent acts of claims agents, Congress enacted race-conscious anti-fraud measures to ensure that Black soldiers, in fact, obtained the bounties to which they were entitled for their military service. *See* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (fixing the maximum fees chargeable by an agent to collect a bounty on behalf of "colored soldiers"); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26-27 (providing for payment to agents of "colored soldiers, sailors, or marines" by the Freedmen's Bureau); *see also* Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302 (appropriating money for "collection and

payment of bounty, prize-money and other legitimate claims of colored soldiers and sailors"); Act of Mar. 3, 1873, ch. 127, 17 Stat. 510, 528 (same); *see also* Siegel, *supra*, at 561 (observing that these measures resulted in "the creation of special protections for black, but not white, soldiers").

Congressional opponents of Reconstruction denounced these additional measures to protect the rights of Black soldiers as "class legislation" and argued that "there is no reason . . . why we should pass a law such as this applicable to colored people and not apply it to white people." Cong. Globe, 40th Cong., 1st Sess. 79 (1867). The Framers of the Fourteenth Amendment firmly rejected the argument that Congress could not adopt race-conscious measures to protect Black soldiers from fraud and ensure that "the balance of this little bounty shall get into the hands of the soldier himself, so that he shall have the money to spend either in the education of himself or of his children." *Id.* at 444. Emphasizing that "[w]e have passed laws that made it a crime for them to be taught," the Reconstruction Framers concluded that it was permissible to enact race-conscious measures "to protect colored soldiers against the fraudulent devices by which their small bounties are taken away from them." *Id.*

The Reconstruction Congress enacted other race-conscious measures, not limited to those who had previously been enslaved, to further equality of opportunity for all regardless of race. It provided for the appointment of one chaplain "for each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education," Act of July 28, 1866, ch. 299, § 30, 14 Stat. 332, 337; *see* Siegel, *supra*, at 560-61 (noting that "chaplains for white troops had no similar responsibilities, and education for white troops remained an unfunded

'optional service' during and after Reconstruction"). And it appropriated money "[f]or the 'National association for the relief of destitute colored women and children,'" Act of July 28, 1866, ch. 296, 14 Stat. 310, 317, a corporation created three years earlier by Congress "for the purpose of supporting . . . aged or indigent and destitute colored women and children," Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650, as well as "for the relief of freedmen or destitute colored people in the District of Columbia," Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20. Like other Reconstruction-era race-conscious legislation, these measures were not limited to assisting those previously held in bondage and were not designed to remedy specific forms of racial discrimination; indeed, many "expressly refer[red] to color in the allotment of federal benefits," Rubenfeld, *supra*, at 431, in order to "ameliorat[e] the condition of the colored people," Cong Globe, 39th Cong., 1st Sess. 632 (1866), and ensure "the gulf which separates servitude from freedom is bridged over," *id.* at 2779; *see also* Balkin, *supra*, at 223 (noting that the Reconstruction Framers provided federal benefits to Black Americans "regardless of whether they were newly freed slaves").

In writing the Fourteenth Amendment and in adopting race-conscious measures to fulfill its promise, the Framers rejected "an all-too-unyielding insistence that race cannot be a factor," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), concluding that government may properly take race into account to "ensur[e] all people have equal opportunity regardless of their race," *id.* at 788. While the Framers were intent on preventing state-sponsored racial discrimination and ensuring that the "words caste, race, [or] color" were "ever unknown to the Constitution," Cong. Globe, 39th Cong., 1st Sess. 630 (1866), they concluded that race-conscious governmental measures were

sometimes appropriate to ensure equal opportunities and remedy racial inequalities.

Thus, the text and history of the Fourteenth Amendment establish that government may, consistent with the guarantee of equal protection, seek to use race-conscious measures in certain circumstances to ensure equality of opportunity for all persons regardless of race. The notion that, in *all* circumstances, the Constitution must be color-blind, prohibiting all race-conscious assistance, is inconsistent with the text and history of the Fourteenth Amendment.

## II. This Court's Precedent Reflects the Reconstruction Framers' Judgment that Race-Conscious Measures Are Appropriate to Ensure Equal Educational Opportunity to All Persons Regardless of Race.

This Court has interpreted the Equal Protection Clause to give effect both to the universal language of the Clause, protecting all persons from discrimination, as well as the Reconstruction Framers' recognition that certain circumstances warrant the use of race-conscious measures to ensure equality of opportunity to all persons regardless of race.

Emphasizing that the Fourteenth Amendment protects "*persons*, not *groups*," this Court has held that "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to the equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (emphasis in original). This Court has also made clear that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" and that "[c]ontext matters when reviewing race-based governmental action under

the Equal Protection Clause." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 237); *see also Adarand*, 515 U.S. at 228 ("[S]trict scrutiny *does* take 'relevant differences' into account—indeed that is its fundamental purpose. . . . The point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race."); *Fisher I*, 570 U.S. at 314.

Accordingly, strict scrutiny must be applied against the backdrop of constitutional text and history which makes clear that it is constitutionally permissible to use race-conscious measures to ensure equality of opportunity for all persons regardless of race. As this Court observed in *Adarand*, "[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups is an unfortunate reality, and the government is not disqualified in acting in response to it." 515 U.S. at 237. Nearly a century and a half after the framing of the Fourteenth Amendment, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Inclusive Cmtys.*, 576 U.S. at 546.

Consistent with the text and history of the Fourteenth Amendment, this Court's cases applying strict scrutiny have recognized that "this Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). In nearly four decades of equal protection jurisprudence, this Court has never wavered from the principle that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," *Bakke,* 438 U.S. at 313, and that universities may take race into account "so that all members of our heterogeneous society may participate in the educational institutions

that provide the training and education necessary to succeed in America," *Grutter*, 539 U.S. at 333. The sensitive use of race in admissions, this Court has repeatedly held, "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 570 U.S. at 308. By helping to break down "unconscious prejudices and disguised animus" that result from "covert and illicit stereotyping," *Inclusive Cmtys.*, 576 U.S. at 540, properly tailored race-conscious admissions policies may help realize equal opportunities for all regardless of race.

More than forty years ago, in *Bakke*, this Court held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and national origin." 438 U.S. at 321. Recognizing a compelling state interest in ensuring student body diversity, Justice Powell's plurality opinion explained that an applicant's race or ethnic background may be treated as "simply one element—to be weighed fairly against other elements—in the selection process," thus "treat[ing] each applicant as an individual in the admissions process." *Id.* at 318.

A quarter of a century later, in *Grutter*, this Court upheld the University of Michigan's Law School policy of using race as one factor in admitting a diverse, academically accomplished student body. 539 U.S. at 306. Applying strict scrutiny, *Grutter* "endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in admissions," *id.* at 325, emphasizing that the policy "ensure[d] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.* at 337.

In line with the text and history of the Fourteenth Amendment described above, *Grutter* recognized that race-conscious measures can assist in achieving equal educational opportunity for all persons regardless of race and fulfilling the Fourteenth Amendment's promise of equality. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible is to be realized." *Id.* at 332. Noting the role of universities in serving as a "training ground for a large number of our Nation's leaders," *Grutter* held that it is constitutionally permissible to take race into account to ensure that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 333. Thus, consistent with the history of the Fourteenth Amendment, *Grutter* held that the government may enact forward-looking measures that call for the sensitive use of race to foster equality in education.

In *Fisher II*, this Court applied *Grutter*'s teachings and upheld the University of Texas at Austin's race-conscious admissions policy, reaffirming that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" 579 U.S. at 381. *Fisher II* reaffirmed that "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.'" *Id.* (citations omitted). This Court refused to second-guess the university's conclusion that the sensitive use of race helped it select a truly diverse student body and ensure pathways to leadership for all regardless of race, and it refused to limit the university to race-neutral measures that had failed to ensure true diversity in the past. *Id.* at 385 ("[T]he University

spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded."). The fact that the university used race modestly to bolster racial diversity in a small, but meaningful, number of cases was "a hallmark of narrow tailoring, not evidence of unconstitutionality." *Id.* at 384-85.

## III. This Court Should Reaffirm *Grutter*.

Petitioner's primary submission is that this Court should overrule *Grutter* (and *Bakke* and *Fisher* as well) because *Grutter* is irreconcilable with this Court's landmark decision striking down Jim Crow segregation in *Brown*. According to SFFA, "[b]ecause *Brown* is our law, *Grutter* cannot be. Just as *Brown* overruled *Plessy*'s deviation from our 'colorblind' Constitution, this Court should overrule *Grutter*'s." Pet'r Br. 47. According to Petitioner, the Equal Protection Clause requires strict colorblindness without exception and public universities can never consider race at all—even to address racial isolation in schools or to help ensure pathways for leadership for all persons regardless of race.

When this Court is asked to overrule one of its past precedents, a key question is whether the precedent in question departs from or accords with the Constitution's text and history. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring) (voting to overrule an "egregiously wrong" prior precedent that conflicted with the Constitution's "original meaning and this Court's precedents"). On this score, SFFA's argument fails badly. Petitioner's far-reaching theory is based on a false, radically incomplete account of the text and history of the Fourteenth Amendment. Petitioner never grapples at all with the text and history, presented above, which demonstrate that the Fourteenth Amendment permits race-conscious efforts

to ensure equality of opportunity for all persons regardless of race. And Petitioner's argument ignores the fundamental differences between the state-enforced racial segregation annulled in *Brown*, which subordinated Black people and made a mockery of the Fourteenth Amendment's promise of equal citizenship, and the admission policies at issue in this case, which consider race in modest ways to help ensure a truly diverse student body. *See* Stephen L. Carter, *When Victims Happen to Be Black*, 97 Yale L.J. 420, 433-34 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.").

SFFA's claim is based on a selective and skewed analysis of the Fourteenth Amendment's text and history. It points to Senator Daniel Pratt's statement, during the debates over the Civil Rights Act of 1875, that "free government demands the abolition of all distinctions founded on race and color," Pet'r Br. 50 (quoting 2 Cong. Rec. 4083 (1874)), while ignoring the long line of congressional enactments, passed contemporaneous with the Fourteenth Amendment, that took race into account to break down systemic inequalities. Petitioner's claim that the Constitution forbids all use of race by the government was rejected time and again by the Framers of the Fourteenth Amendment, both in writing that Amendment and in enacting a long list of race-conscious measures that assisted Black Americans in the transition to their new status as equal citizens. SFFA's insistence on a principle of absolute colorblindness is a historical invention that cannot be squared with the true history of the Fourteenth Amendment.

Petitioner's *amici* try to poke holes in the fact that the Framers of the Fourteenth Amendment were the originators of affirmative action. Former Attorney General Edwin Meese suggests that the congressional race-conscious measures designed to foster equality can be disregarded because "[t]he Fourteenth Amendment did not apply to the federal government." Brief of Former Attorney General Edwin Meese 20 (hereinafter "Meese Br."). But during the debates over the federal race-conscious measures of the Reconstruction Era, no one took the view that the federal government was not bound by the Constitution's demand for equality under the law. On the contrary, opponents of our nation's first affirmative action programs denounced them—along the same lines invoked by SFFA—for "mak[ing] a distinction on account of color between the two races," Cong. Globe, 39th Cong., 1st Sess. 397 (1866), and treating Black people not as "equal before the law, but superior," directly "in opposition to the plain spirit . . . of the Constitution that congressional legislation should in its operation affect all alike," *id.* at 544. In the arguments over the Freedmen's Bureau and other congressional legislation that took account of race to foster equality, the Framers and their opponents all assumed that the federal government was required to respect the equality of all persons as a matter of due process. *See* Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's* Social Statics, 88 Mich. L. Rev. 1366, 1376 (1990) ("The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted. It was part-and-parcel of the presumed fairness of governmental processes, of due process of law."); Cong. Globe, 39th Cong., 1st Sess. 1094 (1866) (arguing that "due process" is "impartial, equal, [and] exact justice").

Equally unavailing is Meese's argument that the race-conscious legislation of the Reconstruction-era was "not race based" because "the triggering characteristic for receipt of government assistance was *not* skin color alone." Meese Br. 20 (emphasis added). As the history recounted above demonstrates, that is an inaccurate characterization of the race-conscious legislation the Reconstruction-era Congress passed to foster equality. The Freedmen's Bureau legislation provided different benefits to Black Americans and white refugees on account of their race, aiming to ensure "the amelioration of the condition of the colored people," Cong. Globe, 39th Cong., 1st Sess. 632 (1866), to redress the fact that "[w]e have done nothing to them, as a race, but injury," *id.* at 2779. Numerous other pieces of Reconstruction-era legislation provided benefits to Black persons, whether or not they had been held in bondage, leading Democratic opponents to complain that, because of the constitutional imperative of color-blindness, "there is no reason . . . why we should pass a law such as this applicable to colored people and not apply it to white people." Cong. Globe, 40th Cong., 1st Sess. 79 (1867).

Opponents of the race-conscious policies enacted contemporaneous with the Fourteenth Amendment apparently subscribed to Petitioner's view that race can never be considered, even to foster equality. But the Framers of the Fourteenth Amendment disagreed. They and the Reconstruction Congress understood that it was not enough to "str[ike] off their chains" and guarantee their equal citizenship; race-conscious action was necessary to ensure that "the gulf which separates servitude from freedom is bridged over." Cong. Globe, 39th Cong. 1st Sess. 2779 (1866). They recognized—and acted on the recognition—that race-conscious governmental measures were necessary to

ensure equal opportunities for all persons regardless of race and to redress systemic racial inequalities.

SFFA proposes a radical revision of the law based on willful blindness to a critical aspect of the Fourteenth Amendment's text and history. *Grutter* respected that text and history. It should be reaffirmed.

## CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amicus Curiae*

August 1, 2022

* Counsel of Record