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.,
Petitioner,
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 BLACK WOMEN LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Black women law scholars who, based on their professional and personal experiences, share a deeply rooted commitment to defending the legality of race-conscious admissions policies in educational institutions across the country. They submit this brief to present their unique and vital perspective on the history, constitutionality, and importance of race-conscious programs like those adopted by Harvard University and the University of North Carolina ("UNC").[2]

INTRODUCTION & SUMMARY OF ARGUMENT

"The enduring hope" of our Nation "is that race should not matter," but "the reality is that too often it does." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring). "Race matters … because of persistent racial inequality in society." *Schuette v. BAMN*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting). And it matters "because of the long history of racial minorities' being denied access to the political process," employment, and education. *Id.*

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[1] All parties have consented to the filing of this brief. 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 its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

[2] A full list of *amici* is attached as an appendix to this brief.

But according to Petitioner Students for Fair Admissions and its *amici*, race is just a dangerous "obsession." Pet. Br. 65. As they see it, race does not matter because, "[i]n the eyes" of our Constitution, "we are just one race … American." Pet. Br. 47, 86–87. And, in that supposedly "colorblind" society, the race-conscious admissions programs authorized by decades of this Court's precedent—including *Grutter v. Bollinger*, 539 U.S. 306 (2003)—are an unnecessary, undesirable, and unconstitutional vestige of the distant past.

That view is profoundly mistaken. It rests on a blinkered understanding of our Nation's history, and it collides with the Fourteenth Amendment's promise of racial inclusion and equality. *Amici* respond to each of those basic errors in this brief.

In Part I, *amici* explain why history—in particular, the contributions made by Black people in shaping the country's education system after the Civil War—cuts firmly against Petitioner's call to overrule precedent.

After Emancipation, newly freed Black people were instrumental in expanding access to educational opportunities, especially in the South. In the words of W.E.B. DuBois: "[T]he first great mass movement for public education … in the South, came from Negroes."[3] Newly freed Black people built schools and universities; many became educators; and others

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[3] W.E.B. DuBois, *Black Reconstruction: An Essay Towards a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* 638 (1935).

fought tirelessly (and successfully) for a right to public education. Black women played leading roles in these efforts.

But despite their incalculable contributions, Black people were quickly excluded from the very educational institutions they had helped build in the Jim Crow South and other segregated states. Often, this exclusion was violent: many Black schoolhouses were burned to the ground by the Ku Klux Klan, and Black teachers nationwide were subjected to harassment, intimidation, and even murder. Other times, exclusion took the form of political violence, including the horrors of Jim Crow and *de jure* segregation.

This history teaches important lessons. Most important, it demonstrates the absurdity of claims that the Fourteenth Amendment is blind to the difference between programs that inflict racism and those that remedy its invidious consequences. It also confirms that from the earliest days of the Equal Protection Clause, Black people made enormous contributions to the country's public education infrastructure—and were then systematically denied equal access to the very same institutions they had founded in the aftermath of slavery and subjugation. Petitioner's version of the historical record omits all this, just as it more basically fails to reckon with our society's ongoing obligation to remedy and root out white supremacy.

In Part II, *amici* draw on history to explain that race-conscious admissions programs vindicate the core promise of the Equal Protection Clause because they seek to "remedy[] the effects of past intentional discrimination." *Parents Involved*, 551 U.S. at 720.

In arguing otherwise, Petitioner and its *amici* repeatedly invoke the myth of the "colorblind" Constitution. But that repugnant canard is false. Far from colorblind, the Constitution has long been conscious of race—almost always to the detriment of Black people and other people of color. Invoking racial neutrality now as a basis to strip those communities of pathways to equal educational opportunity would not vindicate the Fourteenth Amendment's promise of equality; it would make our society less free and more unequal.

Eliminating race-conscious admissions programs would have devastating consequences. Preventing schools from adopting such programs will exacerbate existing racial disparities in our colleges, universities, graduate schools, and professions. It will create unfair disadvantages for applicants of color who seek entry into those educational institutions. And if justified based on the so-called "mismatch" theory, it would reinscribe racist theories about the inadequacy of Black students and other students of color into the fabric of our law.

Race-conscious programs are a proven, constitutional method to ensure that Black students and other students of color are fairly represented in our educational system and social institutions. Such programs are not inimical to equality; they are necessary to achieve it. The judgments below should be affirmed.

ARGUMENT

I. THE HISTORY OF PUBLIC EDUCATION AFTER THE CIVIL WAR SUPPORTS RACE-CONSCIOUS ADMISSIONS PROGRAMS

Before turning to the legal question presented in these cases, *amici* begin by explaining the important historical role that Black people—and especially Black women—played in establishing and expanding the country's education system in the wake of the Civil War. *Amici* address this history for three reasons.

First, developments (and public understanding) surrounding the passage of the Fourteenth Amendment must inform this Court's assessment of the constitutionality of race-conscious admissions programs. *See Evenwel v. Abbott*, 578 U.S. 54, 64 (2016) ("We begin with constitutional history."); *McDonald v. City of Chicago*, 561 U.S. 742, 770–78 (2010) (relying on history to determine the intent of "the Framers and ratifiers of the Fourteenth Amendment"). Those who wrote and ratified the Fourteenth Amendment sought to ensure that formerly enslaved Black people enjoyed the full suite of rights, privileges, and opportunities enjoyed by white citizens. *See Parents Involved*, 551 U.S. at 829 (Breyer, J., dissenting). There can be little doubt that these Framers would have viewed race-conscious admissions programs as consistent with the promise of full and equal citizenship for newly freed Black people—who were systematically denied educational opportunities afforded to the white majority.

Second, the history presented below bears on the constitutional analysis because this Court has an obligation to "apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." *Schuette*, 572 U.S. at 381 (Sotomayor, J., dissenting). As Members of this Court have rightly urged, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Parents Involved*, 551 U.S. at 833 (Breyer, J., dissenting). And here, historical context strongly reinforces the conclusion that there is a compelling government interest in remedying the violent exclusion of Black people from the educational institutions they helped to create and build.

Finally, *amici* wish to share this "unique history" because it forms a crucial part of their identity and "locates [them] within the law and the larger society."[4] As Black women law scholars, *amici* stand on the shoulders of the educators, reformers, and activists who came before them. To borrow the immortal words of James Baldwin: "We carry our history with us. We *are* our history."[5] *Amici* respectfully urge the Court to account fully for that history in assessing the legality of race-conscious admissions programs.

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[4] Carla D. Pratt, *Sisters in Law: Black Women Lawyers' Struggle for Advancement*, 2012 Mich. St. L. Rev. 1777, 1779; *cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 139–40.

[5] James Baldwin, *I Am Not Your Negro* 107 (Raoul Peck ed., 2017).

A. Antebellum Laws Prohibited the Education of Enslaved People

Before Emancipation, nearly all States in the Confederacy prohibited the instruction of enslaved people.[6] To quell any possible uprising, these States made teaching enslaved people to read or write punishable by corporal violence, fines, and imprisonment.[7] For example, Georgia passed a law in 1829 that made teaching any "slave, negro or free person of colour, to read or write either written or printed characters" punishable by, among other things, "fine and whipping."[8] Likewise, the 1830 North Carolina state assembly passed a law dictating that any free person who taught enslaved people to read or write—or provided them with "any books or pamphlets"—was to be "fined, imprisoned, or whipped, at the discretion of the court," since "the teaching of slaves to read and write, has a tendency to excite dissatisfaction in their minds."[9] These anti-literacy laws took their toll. Scholars estimate that just about "5 percent" of enslaved people knew how to read on the eve of the Civil War.[10]

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[6] Heather Andrea Williams, *Self-Taught: African American Education in Slavery and Freedom* 203–13 (2005).

[7] *Id.*

[8] *Id.* at 204.

[9] *Id.* at 206.

[10] James Anderson, *The Education of Blacks in the South, 1860-1935* 16 (1988).

B. Newly Freed Black People Played a Key Role in Efforts to Expand Education

After Emancipation, Black people turned to education as one of the key means to attain equal citizenship.[11] As Professor Hilary Green has explained, "urban African Americans … successfully enshrined the African American schoolhouse as the fundamental vehicle for distancing themselves from their slave past."[12] Free from the shackles of slavery, newly emancipated Black people pooled their resources—however meager—to hire teachers and build or open schoolhouses in locations such as "abandoned warehouses, billiards rooms, or … , former slave markets."[13] These grassroots efforts were successful. Between 1870 and 1900, the illiteracy rate among Black people over the age of 14 dropped from 80% to 45%.[14]

Beyond these achievements, Black people also fought to secure educational reforms that benefited all Americans. After the Civil War, Southern States held constitutional conventions to rewrite their constitutions.[15] Black delegates were especially active

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[11] Hilary Green, *Educational Reconstruction: African American Schools in the Urban South, 1865-1890* 3 (2016).

[12] *Id.*

[13] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 97 (2014 ed.).

[14] National Assessment of Adult Literacy, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/naal/lit_history.asp.

[15] *See* Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1090 (2019) (citing Cynthia E.

participants at these transformational political conventions, and worked hard to enshrine a robust right to public education into law.[16] For instance, at the Georgia Constitutional Convention, James Porter—a Black Republican—introduced a bill implementing the new State constitution's public education provisions, which in turn established the system of governance for the public school system.[17] Similarly, at the South Carolina Constitutional Convention, where 59% of the delegates were Black, and three of the five members of the Committee on Education (including the committee chair, Francis Cardozo) were Black, the delegates successfully lobbied for a clause guaranteeing universal access to public schools throughout the State.[18]

The herculean efforts of Black reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education.[19] In this respect, as in so many oth-

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Browne, *State Constitutional Conventions from Independence to the Completion of the Present Union, 1776-1959: A Bibliography* (1973)).

[16] Foner, *supra* n.13 at 316.

[17] Edmund L. Drago, *Black Politicians and Reconstruction in Georgia: A Splendid Failure* 97–98 (1992).

[18] David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am. J. Educ. 236, 245–46 (1986).

[19] Black, *supra* n.15 at 1093.

ers, post-Civil War Black reformers contributed significantly to expanded access to educational opportunities for millions of Americans. They "increased educational access for future generations of African American children, and established educators as middle-class leaders essential for turn-of-the-century activism."[20]

Meanwhile, at the federal level, Congress took steps to eradicate the badges and incidents of slavery. Between 1864 and 1869, Congress successfully proposed a trio of amendments (known as the Reconstruction Amendments), which, upon their ratification, abolished slavery, guaranteed the right to equal protection under the law, and enshrined certain voting rights.[21] During this same period, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands (the "Freedmen's Bureau"), to provide federal services to formerly enslaved people.[22] In 1866, Congress granted express authorization to the Commissioner of the Freedmen's Bureau "to 'erect[] suitable buildings for asylums and schools' for the benefit of newly freed slaves."[23] This school provi-

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[20] Green, *Educational Reconstruction, supra* n.11 at 9.

[21] U.S. Const. amends. XIII, XIV, & XV.

[22] Aderson Bellegarde François, *Acts of Meaning: Telling and Retelling the Narrative of Race-Conscious Affirmative Action*, 57 How. L.J. 467, 468–9 (2014); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 760–62 (1985).

[23] François, *supra* n.22 at 469 (quoting Cong. Globe, 39th Cong. 1st Sess. 210 (1866)).

sion—which was by its terms race-conscious—led "to the establishment of no fewer than nine colleges and universities dedicated to the education of African Americans."[24]

The Fourteenth Amendment was born amid ongoing race-conscious measures to make citizens of enslaved people, and amid a national campaign by Black leaders to create and ensure access to public education institutions. Given that historical context, it is hard to take seriously any assertion that the people who drafted and ratified the Equal Protection Clause in the 1860s—and founded the Nation's very first affirmative action program—would have spurned race-conscious admissions programs of the sort adopted by Harvard and UNC. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 398 (1978) (opinion of Marshall, J.) (finding it "inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures").

C. Black Women Played a Leading Role in Expanding Access to Educational Opportunities After the Civil War

Black women were particularly active leaders in the Reconstruction Era movement to ensure that Black people had equal access to education, including through race-conscious measures. As students, teachers, activists, and reformers, they made enormous contributions to educational institutions that still exist today—and that form an essential part of

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[24] *Id.*

the history from which the stories and arguments in this brief emerge.

In the post-Civil War South, education was not for men alone; to the contrary, Black people "valued and encouraged education equally for males and females." [25] Consequently, school attendance data in states like Georgia depict roughly equal attendance for Black men and women in the immediate aftermath of emancipation.[26] And Black women of the era "were more likely to attend college than [Black] men."[27]

But Black women were not just students; they were also celebrated educators. In fact, employment statistics reveal that most Black educators during Reconstruction were women; by 1910, Black women teachers outnumbered Black male teachers by "over 3 to 1" in Southern States.[28] Charlotte Forten, one of

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[25] Williams, *supra* n.6 at 111; *see also* Elizabeth L. Ihle, *Black Women's Academic Education in the South. History of Black Women's Education in the South, 1865-Present*, James Madison University, Instructional Modules for Educators, Modules III & IV at 5 (1986), https://files.eric.ed.gov/fulltext/ED281959.pdf.

[26] Williams, *supra* n.6 at 111 ("The twenty-six [Georgia] schools that reported the sex of their students registered 1,360 females and 1,364 males.").

[27] Ihle, *supra* n.25, Modules III & IV at 9.

[28] Ihle, *Black Girls and Women in Elementary Education. History of Black Women's Education in the South*, James Madison University, Instructional Modules for Educators, Module I at 5, https://files.eric.ed.gov/fulltext/ED281957.pdf; *see* Williams, *supra* n.6 at 49–50, 118, 165; Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* 130

the first Northerners to relocate to the South to teach freed people, moved from Philadelphia to South Carolina and taught in the Sea Islands.[29]

Black women also founded leading educational institutions: Cornelia Bowen founded Mount Meigs Institute in Alabama in 1888; Mary Peake founded a school near Fortress Monroe in Virginia in 1861; Lucy Lainey founded the Haines Normal Institute in Georgia in 1886; Jennie Dean founded the Manassas Industrial School in 1893; Emma J. Wilson founded the Mayesville Institute in South Carolina in 1896; and Elizabeth Wright founded the Denmark Industrial School in the late 1890s.[30] In 1866, Mary Lumpkin inherited the jail compound she had been enslaved in and heroically helped to develop it into a school for newly freed Black people.[31]

Many of these schools still exist today as Historically Black Colleges and Universities ("HBCUs"). The

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(1975); Angel David Nieves, *An Architecture of Education, African American Women Design the New South* 69 (2018).

[29] Ihle, *supra* n.28, Module I at 4; *see* Carol Faulkner, *Women's Radical Reconstruction, The Freedmen's Aid Movement* 73 (2007).

[30] Nieves, *supra* n.28 at 9, 69, 75–76, 80–83; *see History*, Voorhees University, https://www.voorhees.edu/our-college/history.

[31] Kristen Green, *The Enslaved Woman Who Liberated a Slave Jail and Transformed It Into an HBCU*, Smithsonian Magazine, Apr. 4, 2022, https://www.smithsonianmag.com/history/the-enslaved-woman-who-liberated-a-slave-jail-and-transformed-it-into-an-hbcu-180979757/.

Denmark Industrial School led to the creation of Voorhees College.[32] The Virginia school started by Peake is considered the first facility of Hampton University.[33] And the school developed by Lumpkin in 1866 later became Virginia Union University.[34]

Despite receiving fewer federal resources than historically white institutions,[35] HBCUs have consistently produced our Nation's future leaders—including Ella Baker, Ida B. Wells, and Vice President Kamala Harris.[36] By nurturing young Black scholars, HBCUs have graduated 50% of Black lawyers and 80% of Black judges.[37] They have thus carried on a remarkable legacy—born in the 1860s and 1870s—of efforts by Black women to ensure that Black people can access the Nation's educational institutions (and thereby become full participants in the Nation's political and economic life).

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[32] Nieves, *supra* n.28 at 9, 76.

[33] *History*, Hampton University, https://home.hamptonu.edu/about/history/.

[34] Green, *The Enslaved Woman Who Liberated a Slave Jail and Transformed It Into an HBCU*, *supra* n.31.

[35] *See* Krystal L. Williams & BreAnna L. Davis, American Council on Education, *Public and Private Investments and Divestments in Historically Black Colleges and Universities* 5 (Jan. 2019), https://www.acenet.edu/Documents/Public-and-Private-Investments-and-Divestments-in-HBCUs.pdf.

[36] Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. Pa. J. L. & Soc. Change 351, 357–59 (Sept. 2021).

[37] *Id*. at 359.

D. Black People Were Excluded from the Educational System They Helped Build

Tragically, the early educational victories achieved by Black people in the wake of Emancipation came at a terrible price. Black people seized their new educational opportunities at risk to their own personal safety. Their efforts were routinely met with fierce resistance from those seeking to further entrench white supremacy. And this resistance came in many forms in every community and every level of government.[38]

At its most brutal, resistance manifested in the harassment, intimidation, and murder of teachers. To take just a handful of examples:

> In July 1869, sixty-three Tennessee counties reported that thirty-seven schoolhouses had been burned since the first of the year, teachers had been mobbed and whipped, and "ropes were put around their necks accompanied with threats of hanging." Five months later the bureau superintendent of North Carolina wrote that in many sections teachers were frightened and threats of violence had nearly disbanded numerous schools.[39]

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[38] Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 Rutgers L. Rev. 55, 61 (2006).

[39] William Preston Vaughn, *Schools for All: The Blacks and Public Education in the South, 1865–1877* 35–36, 47 (1974).

These attacks were not isolated to the South, and they predated Reconstruction. In 1833, Prudence Crandall, a Quaker educator in Connecticut, admitted Black girls as students, leading to years-long vandalism and arson attempts that forced the closure of her school.[40] A Black student from Crandall's school then attempted to study at another integrated school in New Hampshire, which was attacked by a white mob who "dragged the building to the swamp using almost a hundred oxen."[41]

During a Congressional inquiry into the "Condition of Affairs in the Southern States," Peter Cooper, a Black educator in Winston County, Mississippi, testified that he left the profession of teaching because an armed group of 37 "Ku-Klux came one night and got after me," and because the white residents of his county "[s]aid there shouldn't be no colored schools … that I shouldn't teach at all."[42] Before the same committee, Lydia Anderson (a formerly enslaved

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[40] G. Smith Wormley, *Prudence Crandall*, 8 J. of Negro Hist. 72, 76–80 (1923), https://www.journals.uchicago.edu/doi/epdf/10.2307/2713460.

[41] Samantha de Vera, *'We the ladies … have been deprived of a voice': Uncovering Black Women's Lives through the Colored Conventions Archive*, 19: Interdisc. Stud. in the Long Nineteenth Century, No. 27, 2018, at 3.

[42] Joint Select Comm. On the Condition of Affairs in the Late Insurrectionary States, U.S. Congress, *Rep. of the Joint Select Committee Appointed to Inquire Into the Condition of Affairs in the Late Insurrectionary States*, at 492–96 (1872), https://quod.lib.umich.edu/m/moa/aca4911.0011.001/538?view=image&size=100.

woman in Mississippi) testified that Nathan Campbell (a Black preacher) had been whipped by the Ku Klux Klan "because he was teaching school; they said he shouldn't teach school and be a preacher."[43]

Usually, threats by the Ku Klux Klan were sufficient to drive a teacher away. But some teachers remained.[44] Because of the resolve to establish Black education in North Carolina, at least 56 new schools were established from 1865 to 1867, and the number of Black students increased by approximately 4,500 (totaling over 13,000 students).[45] But the ongoing violence took its toll; by 1869, 511 teachers departed, 49 schools closed, and 1,683 fewer students were enrolled in the State.[46] A similar story unfolded in Tuskegee, Alabama, where by 1870, "[n]early every colored church and school-house" had been burned down by white mobs.[47] There are countless other educators whose fates were never documented, but who did not survive this reign of terror.[48]

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[43] *Id*. at 513.

[44] Vaughn, *supra* n.39 at 35–36.

[45] Roberta Sue Alexander, *Hostility and Hope: Black Education in North Carolina during Presidential Reconstruction, 1865-1867*, 53 N.C. Hist. Rev. 113, 125 (1976).

[46] Ethan Roy & James E. Ford, *Deep Rooted: A Brief History of Race and Education in North Carolina*, EdNC (Aug. 11, 2019), https://www.ednc.org/deep-rooted-a-brief-history-of-race-and-education-in-north-carolina/.

[47] Foner, *supra* n.13 at 428.

[48] *See* Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the*

Of course, some forms of resistance to Black education were less brutal but no less insidious. As this Court is well aware, *de jure* segregation re-entrenched white supremacy, deprived Black people of equal access to education and other rights for nearly a century, and reversed many of the political and social gains made by Black people during Reconstruction.[49] *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

E. Harvard University and the University of North Carolina Are Built on This Racially Exclusionary Legacy

Both Harvard and UNC, each in its own well-documented way, share in the shameful history of racism and discrimination described above.

At Harvard, enslaved people worked on campus grounds for 150 years.[50] Between 1636 and 1738, Harvard presidents, faculty, and staff enslaved as many as 70 individuals.[51] In 1850, Dean Oliver Wendell Holmes Sr. (father of the Supreme Court Justice) expelled the only three Black medical students enrolled at Harvard's medical school, describing the attempted integration as "distasteful" and "injurious"

United States Government Against the Negro People (1951), https://depts.washington.edu/moves/images/cp/1.%20We%20Charge%20Genocide%201-28.pdf.

[49] *See* Tyack & Lowe, *supra* n.18 at 239, 245–46.

[50] *See* Tomiko Brown-Nagin et al., Harvard University, *Harvard & the Legacy of Slavery* 7 (2022).

[51] *Id.* at 15.

to the school.[52] From 1890 to 1940, Harvard University admitted an average of three Black students per year.[53] Black women were not allowed to enter Radcliffe College until 1894, fifteen years after its founding. And they were denied on-campus housing until 1925.[54]

UNC, for its part, was built by enslaved people; before Emancipation, UNC students would "bring with them to college their personal slaves."[55] The first Black students did not enroll in the university until the 1950s and even then did so only pursuant to a court order.[56] UNC Student Resp'ts Br. 7–8. And in 1951, the university attempted to retract the admission of Gwendolyn Harrison after learning she was Black, but eventually allowed her to attend summer classes after she filed a federal lawsuit.[57]

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[52] *Id.* at 34.

[53] *Id.* at 9.

[54] *Id.* at 51–52.

[55] Susan Ballinger et al., *Slavery and the Making of the University*, The University of North Carolina Libraries, https://exhibits.lib.unc.edu/exhibits/show/slavery/college_servants.

[56] Donyell Roseboro, *Icons of Power and Landscapes of Protest: The Student Movement for the Sonja Haynes Stone Black Cultural Center at the University of North Carolina at Chapel Hill*, U. of N. C. at Greensboro, 4 (March 16, 2005) (unpublished Ph.D. dissertation) (available on ProQuest.com).

[57] *Id.*

As this history shows, Black people (and Black women in particular) made enormous contributions to the development of the Nation's education system—even as they were subsequently denied the fruits of that labor. This sordid history of racist exclusion laid the groundwork for an educational system that denied, and that in too many respects continues to deny, Black people and other historically excluded groups fair and equal access to higher education. It also stands firmly against the flawed view of the Equal Protection Clause pressed by Petitioner.

Petitioner fails to grapple with this history. In its view, the Court's decision in *Brown v. Board of Education* has already "vindicated the promise of the Fourteenth Amendment." Pet. Br. 1. But *Brown* was not a panacea for the rampant racism and inequality that infected our Nation's education system. Shortly after the decision was issued, many white-majority communities deemed Black educators unfit to teach white students; as a result, between 1954 and 1965, approximately 38,000 Black educators in 17 States were demoted or dismissed.[58] The result was a public school system that perniciously denied Black people the right to teach and left students without educators who looked like them. And those tendencies toward *de facto* segregation did not abate over the following decades. Numerous schools across the country remained segregated in the 1960s and 1970s, and, as

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[58] Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for* Brown, 33 Educational Researcher, No. 7, Oct. 2004, at 6.

one scholar notes, "[s]egregation actually grew in the 1990s."[59]

Simply put, it is wrong and dangerous to treat the *Brown* decision as an inflection point that renders irrelevant the Nation's history of subordinating Black people in our educational institutions. And it is equally wrong (and equally dangerous) to treat the issuance of *Brown* as the moment at which this Court magically set things right. Much remains to be done to remedy the history of racism and inequality that Black people, in particular, have confronted (and continue to confront) in seeking access to higher education. Race-conscious admissions programs rank among the most important remedial measures, and to invalidate them would strike a terrible blow against equality.

II. THE NEED TO REMEDY INEQUALITY AND DISCRIMINATION SUPPORTS RACE-CONSCIOUS ADMISSIONS PROGRAMS

Race-conscious admissions programs do not run afoul of the Constitution. To the contrary, and particularly in view of the history discussed above, such programs are a necessary means to further the compelling government interest of remedying the past exclusion that Black people in the United States have faced (and continue to face) in seeking access to higher education.

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[59] *Id.*

Petitioner's attempt to abolish these programs by invoking the myth of the "colorblind" Constitution disregards our country's ugly history of racism and white supremacy. Eliminating race-conscious admissions programs would be a stunning betrayal of the constitutional promise of equal protection. It would also leave our schools, students, and country worse off. This Court should not take us down that painful path.

A. Race-Conscious Admissions Policies Are Justified as a Remedy for Past Intentional Discrimination in Education

In testing the constitutionality of "racial classifications in the school context," this Court has "recognized two interests that qualify as compelling." *Parents Involved*, 551 U.S. at 720 (citing *Freeman v. Pitts*, 503 U.S. 497, 494 (1992)). The first is "the compelling interest of remedying the effects of past intentional discrimination," *id.*; the second is "the interest in diversity in higher education," *id.* at 722; *Fisher v. Univ. of Tex.*, 570 U.S. 297, 308 (2013).

As Respondents correctly explain, the diversity rationale adopted by this Court in its prior decisions is a sufficient basis on which to re-affirm the constitutionality of race-conscious admissions programs. *See* Harvard Resp't Br. 28–34; UNC State Resp'ts Br. 37–40; UNC Student Resp'ts Br. 36–42.[60] But a far

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[60] Shakira D. Pleasant, *Fisher's Forewarning: Using Data to Normalize College Admissions*, 21 U. Pa. J. Const. L. 813, 833 (2019) ("[T]he *Fisher II* decision also solidified Justice Powell's

more compelling justification for race-conscious admissions programs is remedying the lasting and lived effects of centuries of racial discrimination against Black people and other historically underrepresented groups. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) ("[T]o remedy the effects of prior discrimination, it may be necessary to take race into account.").

This Court has long recognized that remedying the present effects of past intentional discrimination can be a compelling government interest. For instance, in *Albemarle Paper Co. v. Moody*, the Court held that "[w]here racial discrimination is concerned, [courts have] not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 422 U.S. 405, 418 (1975) (cleaned up). Just a few years later, in his separate opinion in *Bakke*, Justice Marshall applied that principle in the education context; as he explained, "[i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America." 438 U.S. at 401 (opinion of Marshall, J.); *see id.*, 438 U.S. at 324 (Brennan, J., concurring) (recognizing that race-conscious admissions programs are constitutionally

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foresight that having a racially diverse student body is a constitutionally permissible goal that can satisfy strict scrutiny.").

permissible to "redress the continuing effects of past discrimination").

Applied here, those principles confirm that race-conscious admissions policies like those adopted by Harvard and UNC are constitutional. Given the long history recounted above—in which Black people were excluded from the educational institutions that they helped build in the aftermath of the Civil War—there can be no doubt that the Fourteenth Amendment allows the use of race-conscious programs to "level[] a playing field that was legally imbalanced for hundreds of years."[61] Those who ratified the Equal Protection Clause "would have understood the legal and practical difference between the use of race-conscious criteria in defiance of [its] purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together." *Parents Involved*, 551 U.S. at 829 (Breyer, J., dissenting).

To be sure, over the past few decades, the Court has taken an increasingly stingy view of the remediation rationale. In particular, the Court has held that remedying "societal" or industry-wide discrimination is not a permissible justification for race-conscious government policies; instead, such policies must be justified by reference to tailored findings that are often institution-specific. *See City of Richmond v. J.A.*

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[61] Kimberly Reyes, *Affirmative Action Shouldn't Be About Diversity*, The Atlantic, Dec. 27, 2018, https://www.theatlantic.com/ideas/archive/2018/12/affirmative-action-about-reparations-not-diversity/578005/.

Croson Co., 488 U.S. 469, 496–97 (1989).[62] The Court has applied that test even to racial classifications that seek to include or benefit historically disadvantaged groups. *See Parents Involved*, 551 U.S. at 741–42. Whereas the Court had previously (and rightly) applied the Fourteenth Amendment to invalidate racist and exclusionary anti-miscegenation laws, it has used that same standard to "invalidate race-based government efforts aimed at eliminating the vestiges of slavery and Jim Crow."[63]

The Fourteenth Amendment was meant for better things. It "sought to bring into American society as full members those whom the Nation had previously held in slavery." *Parents Involved*, 551 U.S. at 829 (Breyer, J., dissenting); *Slaughter–House Cases*, 16 Wall. 36, 71 (1872). It was never meant to hamstring university officials from taking commendable steps to remedy the lasting effects of white supremacy and structural racism. To the extent precedent forecloses reliance on the compelling interest of remedying the systemic inequality that has historically plagued our country's educational institutions, the Court should realign its precedent to conform to the promise of the Equal Protection Clause.

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[62] *See* Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 Tenn. L. Rev. 63, 84 (1992).

[63] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 77 (2019).

B. The Constitution Is Not Colorblind

In objecting to the diversity and remedial bases for race-conscious admissions programs, Petitioner and its *amici* invoke the myth of the colorblind constitution—"a popular justification for attacking remedial efforts that seek to eliminate the continuing effects of discrimination."[64] To support that fallacy, they weaponize Justice John Marshall Harlan's admonition (from his dissent in *Plessy v. Ferguson*) that "'[o]ur constitution' … 'is color-blind, and neither knows nor tolerates classes among citizens.'" Pet. Br. 1 (quoting 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); Br. of Texas as *Amicus Curiae* 1.

Tellingly, Petitioner omits that Justice Harlan also declared that the "white race" was "the dominant race … in prestige, in achievements, in education, in wealth, and in power" and that "it will continue to be for all time." *Plessy*, 163 U.S. at 559 (Harlan, J, dissenting). Despite his professed commitment to colorblindness, Justice Harlan went on to note that "the Chinese race" was "so different from our own that we do not permit those belonging to it to become citizens of the United States." *Id.* at 561. These statements constitute the context in which Justice Harlan articulated his vision of colorblindness—one in which white supremacy remained the rule of American life. To invoke his dissent while ignoring that context is to miss an essential failing of Justice Harlan's theory: the

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[64] Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 Akron L. Rev. 209, 210–11 (2000).

Constitution demands vision, not blindness, in realizing the long-heralded promise of equal protection.

In reality, the Constitution is not, and has never been, colorblind.[65] It was not colorblind when it sanctioned slavery.[66] It was not colorblind when it apportioned congressional representation based on the "[n]umber of free [p]ersons," (i.e., white people) and "three fifths of all other [p]ersons."[67] And it was not colorblind when this Court held that Black people were "beings of an inferior order," *Dred Scott v. Sandford,* 60 U.S. 393, 407 (1857), and that the Constitution aimed "to secure to the citizens of the slave holding states the complete right and title of ownership in [Black people], as property," *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 539, 540 (1842).

These provisions remain part of the Constitution. As the Civil War drew to a bloody close, the Nation did not erase references to its original sins, but instead enacted new amendments that strive toward redemption. The very face of the Constitution displays in unaltered form a history that remains with

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[65] *See* Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 Wash. U. J. Urb. & Contemp. L. 157, 160–61 (1998); *cf.* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 Nw. J. L. & Soc. Pol'y 473, 475 (2011).

[66] U.S. Const. art. I, § 9, cl. 1 (prohibiting any legislation that would outlaw the slave trade until 1808).

[67] U.S. Const. art. I, § 2, cl. 3.

us, and that the Fourteenth Amendment aims to remedy.[68]

But soon after the Fourteenth Amendment was ratified, this Court hindered that purpose, holding that the Fourteenth Amendment was never meant "to abolish distinctions based upon color, or to enforce … a commingling of the two races upon terms unsatisfactory to either." *Plessy*, 163 U.S. at 544. As Professor Erika Wilson has explained, this tragic history demonstrates that "[r]ace generally and white supremacy specifically are embedded into the framework of most American social institutions."[69]

The upshot of that history is not to demand that the government remain an idle bystander in the struggle for racial equality—but rather to prohibit only invidious discrimination. Those who ratified the Fourteenth Amendment knew the difference between actions designed to remedy or reinforce racial inequality. They enacted the Reconstruction Amendments on the basis of that difference. They did not force future generations to proceed in blindness of the very purpose that animated their entire political project.

In practice, Petitioner's insistence on racial "neutrality" betrays the Constitution. Pet. Br. 2. "By ap-

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[68] *See* Omar Khayyám, *The Rubaiyat*, Stanza 71 ("The moving finger writes, and having writ, moves on. Nor all your piety nor wit shall lure it back to cancel half a line, nor all your tears wipe out a word of it.").

[69] Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DePaul J. for Soc. Just. 1, 2 (2018).

pealing to formal racial equality," Petitioner invites a "ruling[] that appear[s] … neutral and fair" but actually "ignore[s] the material harms inflicted by systems that are structured by white supremacy," and "shield[s] those systems from efforts to dismantle them."[70] Such a decision would do little more than result in inaction in the face of centuries-long discrimination.

The Equal Protection Clause permits—indeed, it *requires*—more than fainthearted resignation to the status quo. As Justice Sotomayor has explained, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race," and to "confront[] the racial inequality that exists in our society." *Schuette*, 572 U.S. at 381 (Sotomayor, J., dissenting).[71] Rather than accept the myth of colorblindness, "we ought to develop a jurisprudence that not only unties the hands of any state actor who wants to remedy [injustice], but actively encourages them to use their hands to build a different, more just society."[72]

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[70] Roberts, *supra* n.63 at 79.

[71] *See, e.g.*, Michelle Adams, *The Last Wave of Affirmative Action*, 1998 Wis. L. Rev. 1395, 1399 (1998) (Race-conscious affirmative action programs "strive for colorblindness by recognizing that we must first look at race to get beyond it.").

[72] Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. Rev. 55, 108 (2016); *see* Roberts, *supra* n.63 at 77–79.

C. Eliminating Race-Conscious Admissions Policies Will Exacerbate Racial Inequality in the United States

Petitioner's arguments are not only historically and theoretically unsound, but also risk disastrous consequences. As Black women legal scholars, *amici* have witnessed and experienced the benefits of race-conscious admissions programs. Banning such programs will harm students, schools, and society in three interrelated ways: (1) it will deepen existing racial disparities in higher education and other social institutions; (2) it will disadvantage Black candidates and other students of color in the admissions process; and (3) it will fuel racist stereotypes about people of color, including and especially Black women. *Amici* address each of those considerations in turn.

First, eliminating race-conscious admissions programs would exacerbate racial disparities in higher education by denying Black candidates and other applicants of color a vital entry point into elite colleges, graduate programs, and professional schools. Educational institutions that employ race-conscious admissions policies "are able to ensure that the democratic leaders they produce reflect the demographic makeup of our democracy as a whole; so that individuals from historically subordinated and marginalized groups have a meaningful opportunity to effectively participate in our democracy."[73] Prohibiting those laudable

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[73] Carla D. Pratt, Commentary, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 Hous. L. Rev. 55, 59 (2006).

steps would severely undermine efforts to ensure that Black students and other students of color have equal access to our country's educational institutions.[74]

Decreasing the number of Black students and other students of color in institutions of higher learning will have cascading effects on future generations. When historically excluded groups, especially Black women, are represented in elite professions, they can "serve as role models in ways that may enhance the pipeline of available diversity candidates."[75] That type of representation matters. When "law students of color have fewer faculty mentors who look like them or who share their identity to serve as mentors, … the likelihood that they will see themselves becoming law professors in the future" decreases.[76] Moreover, "[w]hen there is little or no meaningful representation, students of color may experience increased feelings of isolation and fear that their educational

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[74] Mark Long & Nicole Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 Educ. Evaluation & Pol'y Analysis 188, 196–99 (2020); *see* UNC Student Resp'ts Br. 45–46.

[75] Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. Rev. 856, 879 (2011); *see also* Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind*, A.B.A. 18 (2020), https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf.

[76] Tiffany D. Atkins, *#ForTheCulture: Generation Z and the Future of Legal Education*, 26 Mich. J. Race & L. 115, 143 (2020); *cf.* Pratt, *supra* n.73 at 78.

struggles or shortcomings confirm negative stereotypes about their identity and racial groups."[77]

Outlawing race-conscious programs would be particularly damaging to the legal profession, which already suffers from severe racial disparities. Judicial clerkships are a case in point. As this Court knows well, clerkships uniquely position young lawyers to achieve "positions of influence, affluence, and prestige" within the profession. *See Bakke*, 438 U.S. at 401 (opinion of Marshall, J.). But, according to the National Association for Law Placement, the percentage of Black and Hispanic law clerks in the class of 2016 across federal, state, and local clerkships, was just 5.3% and 5.0%, respectively.[78] The statistics for federal clerks for the same cohort are even more discouraging: 3.5% were Black, and 4.6% were Hispanic.[79] Barring race-conscious admissions programs would reduce these already staggeringly low numbers by decreasing the overall number of Black and Hispanic law school candidates eligible for clerkships.

Second, Black applicants and other candidates of color will suffer inherent disadvantages if educational institutions are prohibited from considering race in

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[77] Atkins, *supra* n.76 at 144; *see* Sha-Shana Crichton, *Teaching in the Time of Disruption: A Case for Empathy and Honoring Diversity*, 25 Legal Writing: J. Legal Writing Inst. 4, 11 (2021).

[78] Eboni S. Nelson, *A Demographic Profile of Judicial Clerks – 2006 to 2016*, Nat'l Ass'n for L. Placement (Oct. 2017), https://www.nalp.org/1017research.

[79] *Id.*

the admissions process. Banning schools from considering an applicant's race will send a troubling signal to admissions officials across the country: namely, that their holistic assessment of a candidate's background and qualifications deserves no respect and should be replaced by supposedly more "objective" criteria (like standardized tests or numerical Grade Point Average), even if that approach results in a distorted and doubtful set of metrics.

As a threshold matter, this Court should not micromanage the institutional judgments and priorities of educational institutions in a manner that disadvantages students of color. As Professor Eboni Nelson has explained, "affording an appropriate degree of deference to a university's academic judgments—regarding both its educational interest and the race-based means by which to achieve it—is both consistent with and called for under the Supreme Court's jurisprudence."[80] *See Fisher I*, 570 U.S. at 310. Beyond that, a blanket prohibition on race-conscious admissions programs will force admissions officials to over-rely on assertedly "objective" criteria that have "had the unintended consequence of allowing one social class to enjoy hegemony" as "[q]uantitative measures often reflect family re-

[80] Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in* Fisher v. Texas, 47 U. Rich. L. Rev. 1133, 1150 (2013).

sources and influence rather than a student's resourcefulness or intelligence."[81]

In *amici*'s experience, true racial neutrality in the admissions processes is impossible. When students of color apply to schools, they often highlight their racial background and explain how it has shaped their lives. If admissions officers are forbidden from considering those aspects of an application, that will put Black students and other students of color at a disadvantage vis-à-vis white students (whose membership in the majority often makes it unnecessary for them to talk explicitly about race). *See* UNC Student Resp'ts Br. 12–13 ("UNC's … race-conscious process enables the University to see how an applicant's race or ethnicity may have led to unique life experiences and outlooks."). Ultimately, excluding "race from consideration of an individual's background while considering other forms of social identity," "treats racial identity as inferior" and has the effect of demeaning the "dignity of individuals who identify by race."[82]

Finally, overruling *Grutter* risks emboldening proponents of unscientific and racist stereotypes about Black applicants and other candidates of color. In particular, many critics of race-conscious admissions programs (including some Members of this Court) have invoked the so-called "mismatch theo-

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[81] Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 148–49 (2003).

[82] Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. Rev. Discourse 65, 67 (2016).

ry"—a baseless theory which posits that race-conscious admissions programs place students of color in institutions where they will be unable or unlikely to succeed. *See, e.g.*, Br. for Richard Sander as *Amicus Curiae* 24–27; *Fisher I*, 570 U.S. at 331–32 (Thomas, J., concurring).[83]

The mismatch theory is offensive and wrong. It is offensive because it rests on dangerous stereotypes about students of color (while often saying nothing about white students who benefit from legacy preferences or other forms of racialized privilege).[84] And it is wrong because it is "untethered to robust real world outcome data," including data showing that "African American and Latino graduation rates are" actually "highest … at the most selective universities."[85] Studies aside, *amici* know from firsthand ex-

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[83] *See* Tr. of Oral Argument at 67:10-15, *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016) (No. 14-981) (Justice Scalia alluding to the mismatch theory in questioning whether Black students are better off attending "a less-advanced school"); Stacy Hawkins, *Mismatched or Counted Out? What's Missing from Mismatch Theory and Why It Matters*, 17 U. Pa. J. Const. L. 855, 857 (2015) (describing mismatch theory).

[84] Angela Onwuachi-Willig et. al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299, 1345–46 (2008); Guinier, *supra* n.81 at 186–90.

[85] William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch"*, 92 Tex. L. Rev. 895, 903, 906–07 (2014); Deborah N. Archer, Essay, *Collective or Individual Benefits?: Measuring the Educational Benefits of Race-Conscious Admissions Programs*, 57 How. L.J. 557, 566 (2014) ("Black students at top-tier institutions, … graduate at high rates and … have careers as distinguished and accomplished as their white classmates.").

perience that Black students and other students of color are included among their best performing students and enrich the educational experience of all students. Beneficiaries of race-conscious admissions policies are not "mismatched." They belong too.

* * *

Our Nation has done much to rid itself of the lingering stench of slavery and racial segregation. But eliminating race-conscious admissions policies in the name of the Constitution would be a devastating, indefensible step backward. Our Constitution, our country, our communities, and our classrooms demand better.

CONCLUSION

The Court should affirm the judgments below.

Respectfully submitted,

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

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