No. 23-1009

IN THE

Supreme Court of the United States

LEISEL M. CARPENTER, PETITIONER

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE, RESPONDENT

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

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AND MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING THE PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley and Wai Wah Chin, continue this research, including at the policy nexus of education and race underlying this litigation.

This case interests *amici* because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on racial nondiscrimination, a policy commitment that we share.

SUMMARY OF ARGUMENT

This case's merits go to a fundamental limitation on the power of the federal government, which Congress

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[1] No counsel for a party authored any part of this brief. No one other than *amici*, their members, or their counsel financed the preparation or submission of this brief. *Amici* provided parties' counsel timely notice under Rule 37.2 of their intent to file this brief.

regularly flouts: the Constitutional prohibition on treating Americans differently because of their race. Time and again, federal actors violate this proscription, but then—if Americans notice and challenge the offending programs—seek to deny this Court the chance to address the merits.

That's what happened here. Congress created a benefit program expressly excluding Americans like the plaintiff from participating because of their race. *Carpenter v. Vilsack*, 2023 U.S. App. LEXIS 27455, *3 (10th Cir.). After the plaintiff (and at least eleven others like her) challenged the propriety of that program, and after the Department of Agriculture not only took applications for it, but started paying program benefits, Congress repealed its authorization. *Id.*, *3-*5. The District Court then dismissed this action, claiming that Congress had mooted all the claims at issue, a conclusion the Tenth Circuit Court of Appeals shared. *Id.*, *9 and *12-*26.

Under this Court's precedents, that's not the case. It's wrong because the plaintiff had asserted a *Bivens* claim for damages already incurred, which Congress's retreat can mitigate, but cannot erase. It is also wrong, because—even if that were not the case—this fact pattern fits squarely within at least one traditional, established exception to mootness.

If the Court finds either argument colorable, pragmatic concerns counsel taking this case. The Court should recognize the seriousness of these issues and grant *certiorari* to prevent the federal government from continuing to systematically, strategically pursue unconstitutional policies, punctuated by tactical retreats to avoid judicial scrutiny.

ARGUMENT

I. CONGRESS CANNOT MOOT A VALID *BIVENS* ACTION THROUGH A MID-LITIGATION REPEAL

A. *Bivens* Claims Remain Valid for Select Narrow, Long-Established Claims

In 1971, this Court recognized the availability in at least one circumstance of Constitutional damages claims against federal officials whose actions infringe on the rights of Americans. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388. The Court later extended *Bivens* to allow more claims twice and only twice. See, *Egbert v. Boule*, 145 S.Ct. 1793, 1802 (2022) (citing *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)). For our purposes, only the first extension matters: *Passman* saw the Court recognize a *Bivens* claim for an equal protection violation worked by a federal official.

More recently, the Court has all but established that, while it will not disturb its holdings providing for claims against the same "category of defendants" for violating the same Constitutional provisions, it will *never* further extend the doctrine to recognize additional causes of action Congress has not created against either *other* categories of defendants or to enforce *other* Constitutional provisions. *Egbert.*, 145 S.Ct. at 1809. This case leaves *Bivens* claims available *only* where they match an existing, approved template, without federal law providing alternative remedies. *Id.*, at 1804.

Justice Gorsuch's concurrence may state the reasoning behind this state of the law most clearly:

> To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation…. It has no place in federal courts charged with deciding cases and controversies under existing law…. We should exercise the 'truer modesty of ceding an ill-gotten gain,' and forthrightly return the power to create new causes of action to the people's representatives in Congress.

Id., at 1809-1810 (cleaned up).

B. Precedents Place the Plaintiff's Damages Claim Squarely within Existing *Bivens* Parameters from *Passman*

1. Plaintiff's Claims Establish an Equal Protection Violation

All the plaintiff's asserted claims challenge the Constitutionality of the abolished, discriminatory benefit program. *Carpenter*, 2023 U.S. App. LEXIS at *7. They specifically challenge it as violative of the Constitutional constraint on federal power paralleling the Fourteenth Amendment's Equal Protection Clause's impact on the states. *Id.*, at *6.

The Court's holdings clearly establish that the two Constitutional prohibitions are coterminous. At least seven (7) of the current Justices have recognized this parallelism. The Chief Justice did so, at least, in *Sessions v. Morales-Santana*, 198 L.Ed.2d 150, 159 n. 1 (2017), and—with Justice Alito—in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly,

including in *Sessions*. In *U.S. v. Madero*, 142 S.Ct. 1439, 1544 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment's citizenship clause, but continuing to find it subject to the same limits. Justice Gorsuch's concurrence in *Madero*, slightly less explicitly, recognizes the same contours. *Madero*, 142 S.Ct., at 1556 (noting that the majority, on the theory that the relevant Constitutional provision of the Fifth Amendment was "fundamental," had applied Fourteenth Amendment jurisprudence, and had held it to have been satisfied, and writing separately only to object to any analysis of what portions of the Constitution are sufficiently "fundamental" to apply). In 2021, Justice Kavanaugh joined a concurrence to a denial of certiorari, which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment. *Nat'l Coal. for Men v. Selective Srv. Sys.*, 141 S.Ct. 1815, 1815 (2021). The remaining Justices appear to have not yet taken a position since their investitures.[2]

The Court's holdings also establish that *all* racial discrimination is odious, no matter the context. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162, 216 L. Ed. 2d 857, 881, 600 U.S. 181 (2023). It "demeans the dignity and worth of a person to

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[2] We have identified no opinions since their ascension to the Court in which either Justice Barrett or Justice Jackson address the comparative extent of the Constitutional constraint on federal power mirroring the Fourteenth Amendment's equal protection clause.

be judged by ancestry instead of by his or her own merit and essential qualities." *Id.*, at 2141 (cleaned up). "That principle"—the core of equal protection—"cannot be overridden except in the most extraordinary case," where racial classification and disparate treatment satisfies strict scrutiny *Id.*, at 2163 and 2162.

2. Plaintiff's Claims Include a Constitutional Bivens Claim for Damages from that Equal Protection Violation, with No Alternate Remedy

In addition to seeking declaratory and injunctive relief, the plaintiff sought *damages* from the challenged denial of equal protection. The Court of Appeals admits as much. *Carpenter*, 2023 U.S. App. LEXIS at, at *7. Its declaration of mootness underscores that, satisfying *Egbert*, the plaintiff retains no alternate remedy—she will either have a Constitutional avenue to seek redress through *Bivens*, or she will have no remedy at all.

That claim is proper, then, to the extent it fits an existing *Bivens* rubric.

3. Plaintiff's Bivens Claim Matches the Passman Rubric

In *Passman*, the Court recognized the availability of a *Bivens* claim for an equal protection violation by a federal official. While that equal protection violation arose from sex discrimination, rather than racial discrimination, that cannot matter—the Constitution imposes *more* stringent protection against racial discrimination (in the form of the more robust strict scrutiny), not less. Nor should it matter that the prohibited discrimination in *Passman* involved

discrimination against a federal employee: nothing in the text, structure, or history of the Constitution suggests that it affords greater protections against discrimination to federal employees than it does to American citizens.[3]

At least one Court of Appeals has affirmatively concluded that Constitutional claims challenging a denial of access to governmental assistance programs due to an applicant's race qualify as proper *Passman*-style *Bivens* claims. In *Greene v. Impson*, 530 Fed. Appx 777, 779-780 (10th Cir. 2013), a plaintiff functionally sought access to such a governmental assistance program and argued that he had been denied access because of his race.[4] The panel recognized both that "[b]ecause [the defendants] are federal employees, his complaint sounds in *Bivens*" and that "the Supreme Court has allowed a *Bivens* action to redress

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[3] Indeed, all three counsel the opposite. If the federal constraint is grounded in the Fifth Amendment, nothing in the text or structure of its due process clause suggests additional protections for federal employees. If the federal constraint is grounded in the Fourteenth Amendment's citizenship clause, it affirmatively requires equal treatment *of all American citizens*, not of the class of federal employees, who should include legally resident aliens. And Constitutional history, if anything, suggests fewer Constitutional constraints on federal employment decisions than on federal interactions with the citizenry: until the passage of civil service laws in the Constitution's second century, *all* federal employees served at will and could be fired for any reason or none.

[4] Because the plaintiff Mr. Greene represented himself *pro se*, his papers were inartful. The Court of Appeals was forced to construe them to assert the relevant issues before addressing them. *Id*., at 778 and nn. 3-6. It eventually construed them to assert a *Bivens* action based on the plaintiff "seeking Indian status to participate in certain government assistance programs."

the equal protection component of the Fifth Amendment Due Process Clause." *Id.*, at n. 3 (citing *Iqbal*, 556 U.S. at 675 and *Passman*, 442 U.S. at 229-230).

Greene, then, recognized the availability of a *Bivens* claim for a denial of access to a federal benefits program through an equal protection violation, and only rejected the plaintiff's claim for failing to assert one. *Id.*, at 780 ("classifications based on Indians and non-Indians do not offend the Due Process Clause because such classifications '[are] not based upon impermissible racial classifications' but instead are 'rooted in the unique status of Indians as … once-sovereign political communities.'") (citing *U.S. v. Antelope*, 430 U.S. 641, 645-646 (1977)).

Here, where the underlying discrimination affirmatively *was* racial, the *Greene* "out" does not apply. Instead, following the proper ruling of *Greene*'s unanimous panel, here, the plaintiff properly asserted a Constitutional damages claim for federal racial discrimination.

C. The Court Below Missed the Mark in Concluding Repeal Curtailed Availability of Those Constitutionally-Required Damages

The Court of Appeals admitted that "a claim based on a repealed statute is not moot 'so long as damages or other monetary relief may be claimed on account of the [repealed] provisions." *Carpenter*, 2023 U.S. App. LEXIS at *11. And this must be right where, as here, the damages are Constitutional—if the Constitution requires the payment of damages to the plaintiff, no act of Congress *could* intervene to cut off her right to recover those damages.

Nonetheless, entirely aside from its mootness analysis, the Court of Appeals imagined Congress's repeal of the discriminatory program to have left the plaintiff with *no* damages at issue. *Id.*, at *20 ("Carpenter has not identified any actual monetary harm from past payments made under the challenged statute or a present dispute over payments."). But that both misunderstands the injury worked by federal officials' racially discriminating and misstates the facts at issue in this litigation.

This Court recognizes that racial stereotyping and gatekeeping "cause[ ] continued hurt and injury" "contrary … to the 'core purpose' of the Equal Protection Clause[.]" *Harvard*, 143 S. Ct. at 2170 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) and *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Congress imposed that "hurt and injury" by ever *creating* the discriminatory program. Repeal mitigated its harms, but it is not a time-machine and neither can unring nor has unrung that bell.

More, Congress's repeal does not cure the *economic* injuries worked on the plaintiff by the discriminatory program during its lifetime. Other parties received test-payments through the program. *Carpenter*, 2023 U.S. App. LEXIS at *4. Expressly required disparate treatment of the plaintiff because of her race precluded her from receiving the same.

It should not matter that all four of those receiving payments lived in New Mexico while the plaintiff resided in Colorado—that should be a distinction without a difference. The defendants *intended* to exclude the plaintiff from participating in a federal program because of her race. They *succeeded* in excluding her from participating

because of her race. They made payments to others *not* excluded because of their race. The presence of a conflating factor in determining *which* others received such payments while the defendants excluded the plaintiff from receiving the same due to her race may meaningfully reduce the *measure* of the plaintiff's Constitutional damages attributable to this intentional racial discrimination. It should not preclude her recovery of *any* such damages.

II. AT LEAST ONE ESTABLISHED EXCEPTION TO MOOTNESS APPLIES, DESPITE LOWER COURTS' WIDESPREAD CONFUSION

But even if none of that were correct, this Court's holdings leave it error to conclude that Congress's repeal of the discriminatory program mid-litigation mooted the plaintiff's claims. Under those precedents, at least one traditional exception to mootness applies: voluntary cessation.

A. This Court Imposes "Heavy Burden" on Defendant: Prove It Could Not be Reasonably Expected to Reimplement Policy

This Court's precedents set the proper parameters for a voluntary cessation analysis.

> …a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice…. If it did, the courts would be compelled to leave "the defendant … free to return to his old ways…." "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be

> expected to recur…." "The heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal citations omitted).

This Court has applied this standard to federal actors just as it does to private ones. *West Virginia v. EPA*, 142 S.Ct. 2587, 2607 (2022) (reciting same standard and concluding that where "the Government 'nowhere suggests that … it will not' reimpose" the challenged policy and " 'vigorously defends' the legality of such an approach[,]" dismissal for mootness is inappropriate).

B. Lower Courts Substitute a More Forgiving Approach for Governmental Defendants

Nonetheless, a plurality of the Courts of Appeals have made a practice of presuming the good-faith of governmental actors and so reversed the presumptions applicable to governments' mid-litigation policy changes. *E.g.*, *U.S. Navy Seals 1-26 v. Biden*, 72 F.4th 666, 673-674 (5th Cir. 2023) ("The voluntary cessation analysis is somewhat different with respect to a government defendant. '[G]overnmental entities bear a 'lighter burden' … in proving that the challenged conduct will not recur once the suit is dismissed as moot.' … Accordingly, '[w]ithout evidence to the contrary, we assume that formally announced changes to official government policy are not mere litigation posturing.'") (internal citations omitted).

Effectively, the court below did the same. Rather than making the defendants meet their "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again," it placed that burden on the plaintiff—finding "no evidence to indicate that the legislature intends to reenact" the specific, discriminatory program, it held voluntary cessation inapplicable. *Carpenter*, 2023 U.S. App. LEXIS., at *23-*25.

C. At Least One Court of Appeals' Opinion Applied This Court's Test

Still, this practice has not been uniform—at least one Court of Appeals has faithfully applied this Court's approach at least once. *Gary B. v. Whitmer*, 957 F.3d 616, 631-632 (6th Cir. 2020).[5] There, the panel confronted claims against statewide officials after intervening legislation had re-delegated primary governing authority over the policies at issue to local officials. *Id.*, at 631. The panel

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[5] The *Whitmer* panel's ruling's current status is at best ambiguous. The Court of Appeals agreed to take the case *en banc*. *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020). Its standing local rules dictate that "grant [of] rehearing *en banc* vacates the previous opinion and judgment[.]" *Id.* Seemingly, the *en banc* court engaged to confront the panel's substantive ruling purporting to find a constitutional right to literacy. For mootness purposes, that would have constituted a reversal on other grounds. However, when the parties settled, the *en banc* Court of Appeals dismissed the case. *Gary B. v. Witner*, 2020 U.S. App. LEXIS 18312 (6th Cir. 2020). This leaves it unclear whether the *en banc* court intended to reverse on the merits or on the panel's mootness analysis. With no *en banc* correction, the original panel's decision has the status of an unpublished opinion, not binding precedent, but unsuperseded by any contrary analysis. In that spirit, we offer it as potentially persuasive authority, rather than to suggest that it creates a live circuit split.

assessed whether the legislature's re-delegation constituted voluntary cessation of the challenged practices for the sake of mootness, using essentially the same language this Court has employed: "voluntary conduct moots a case only in the rare instance where 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur." *Id.* Finding "no assurance that Defendants will not again inject themselves" into the policy area, the panel found "no basis to believe this change is a permanent one" and so applied the voluntary cessation exception. *Id.*, at 632.

D. This Court Should Clarify Where the Burden Lies for Governments Asserting That Mid-Litigation Corrections Moot Cases

Respectfully, the *amici* believe that on this specific question, the *Whitmer* panel had it right and the Fifth and Tenth Circuits (among others) have strayed from the path this Court's precedents set. The plaintiff should not have been required to adduce evidence that Congress intended to reinstitute the same discriminatory benefits program. Under *Friends of the Earth* and *West Virginia v. EPA*, the government had the burden of demonstrating that it *could not reasonably be expected* to engage in the same kind of discrimination. It has not done so, and presumably cannot do so for the same reason it failed to do so in *West Virginia v. EPA*: the Administration *fully intends to* (and "vigorously defends" its purported right to) *reimpose parallel discrimination in new benefits programs.*

The Court may agree. It may disagree. Fundamentally, the Court should accept *certiorari* in this case for the primary reason that, even if it prefers the route taken by the

Fifth and Tenth Circuits, the dissonance between the analysis they are using and that the Court has directed calls out for a harmonizing decision. The Court should not allow that dissonance to continue to cloud the proper standards for assessing when governments have engaged in forbidden voluntary cessation sufficiently to except their cases from the application of the mootness doctrine.

III. AMERICA NEEDS COURT TO CONFRONT HEAD-ON THE WIDESPREAD EFFORT TO FLOUT CONSTITUTIONAL CONSTRAINTS ON ALLOCATION OF BENEFITS BASED ON RACE

An additional pragmatic factor suggests the Court, to the extent it finds either question addressed above to be at least open, should resolve that ambiguity by taking *certiorari*.

The Court might be tempted to rely, as the Fifth and Tenth Circuits have, on a presumption of government actors' good-faith to conclude that the discriminatory benefits program at issue in this litigation was a one-off, whose repeal achieved a full course correction, leaving nothing of ongoing national importance still at issue in this case.

To the extent the Court entertains such deferential thoughts, it should reject them. Congress, the states, and their subdivisions are avidly pursuing precisely the kind of programmatic, definitional, intentional racial discrimination at issue here in a wide array of programs.

If the Court believes this case presents a vehicle where it *could* legitimately do so, the Court should accept *certiorari*, because America *needs* it to draw clear lines prohibiting that conduct.

A. Other Congressional Programs Actively Pursue Similar Discrimination

Sadly, the repealed, discriminatory benefit program at issue in this litigation is *not* a one-off mistake. Congress has legislated a whole spate of parallel programs, actively choosing beneficiaries based on their demography (often by compelling disparate treatment of potential beneficiaries across race, color, and national origin in determining eligibility). Unlike the program at issue in this case, almost *none* of these programs have been repealed.

1. When Courts Enjoin Parallel Programs, the Administration Evades Appellate Review

Some such programs—like that at issue in this case—have found their way into parallel litigation. Without being at all comprehensive, plaintiffs have challenged a host of Congressionally dictated policies requiring parallel disparate treatment. Importantly, though, the Administration's approach to these cases has left the Court no opportunity to address their merits. That has been the course in all such cases, including in:

- *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021).[6] A plaintiff challenged a parallel federal program prioritizing applications for aide to restaurants based on the race and sex of their ownership. The district court enjoined the program, the

[6] See also, *Greer's Ranch Café v.* Guzman, 540 F.Supp.3d 638 (N.D. Tex. 2021) (enjoining the same program's discrimination). *Greer's Ranch* saw no appeal of the injunction.

Court of Appeals upheld that injunction, and the Administration declined to seek *certiorari*.

- *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 2023 U.S. Dist. LEXIS 124268 (E.D. Tenn. 2023). A plaintiff challenged the U.S. Small Business Administration and the U.S. Department of Agriculture's use of a racially discriminatory presumption in determining 8(a) program eligibility. The district court granted summary judgment and permanently enjoined use of the presumption. The Administration declined to appeal.

- *Nuziard v. Minority Business Development Agency*, 2024 U.S. Dist. LEXIS 38050 (N.D. Tex. 2024). A plaintiff challenged an expressly racial statutory presumption of disadvantage (which served as the metric for program eligibility). The district court granted summary judgment that the relevant provision of the Minority Business Development Agency statute was unconstitutional and permanently enjoined the use of racial and ethnic classifications to determine eligibility. The Administration again declined to appeal.

2. Numerous Parallel Federal Programs Not Yet in Litigation Feature the Same Unlawful Practices

Above and beyond the set of parallel federal programs that have made it into litigation, been enjoined, and failed to reach this Court due to the Administration's strategic

litigation decisions, Congress has created scads of other federal programs crafted around precisely the same kinds of discrimination which have *not* yet found their way into court. These programs include (again, this listing is *not* comprehensive):

- The Minority Serving Institutions programs. This whole collection of statutory programs conditions federal funding of colleges and universities on their annual certification of achieving required racial or ethnic balances for their student bodies. See, Dan Morenoff, *Enforcing the Law on Colorblind Admissions: Stop Unconstitutional Discrimination and Fund Better Alternatives*, Manhattan Institute Issue Brief, Feb. 29, 2024, https://tinyurl.com/5e4puvdv; Alexander M. Heideman, "Hispanic-Serving Institutions and Emerging Constitutional Issues," 24 *Federalist Society Review* 148 (Jul. 24, 2023). These programs are different from federal support for America's Historically Black Colleges and Universities (which the MSI programs specifically bar from competing for grants) and America's Tribal Colleges and Universities (which have an entirely different relationship to the federal government, grounded in the unique status of America's sovereign tribal nations). The MSI programs: (a) discriminate against schools based on their imputed races; (b) discriminate against students at those schools, by denying funding to their institutions based on their aggregated races; and (c) use federal funding to incentivize: (i) public institutions to

violate the Fourteenth Amendment's Equal Protection Clause; and (ii) public and private institutions to violate Title VI.

- NIH's Faculty Institutional Recruitment for Sustainable Transformation grant program, which earmarks funds to support racially defined positions at major research institutions. See, Faculty Institutional Recruitment for Sustainable Transformation (FIRST): Funded Research, https://tinyurl.com/4f6ezz63 (last visited, Apr. 4, 2024). These grants expressly fund racial discrimination in hiring in violation of Title VII. When issued to public institutions, they fund equal protection violations of the Fourteenth Amendment.

3. Congress's Mid-Litigation Repeal Didn't Curtail Funding of Parallel Programs

This sampling is no more than a drop in a proverbial bucket. Congress continues to expressly fund discriminatory programming through countless agencies and programs. Whatever Congress did to the particular program at issue in this litigation, it has left *almost all* of those programs up and running, and fully-funded despite their equally discriminatory eligibility criteria.

A good-faith actor realizing its error in creating the discriminatory benefit program at issue in this litigation would have rethought *all* these parallel programs, not just that one. But Congress *didn't* repeal all of them or even a material subset. Instead, it repealed *just this one* program, while it was under challenge in at least twelve (12) cases and making Congress look bad. A reasonable observer

would conclude that the one-off was the repeal, not the creation of the program at issue and conclude that repeal undeserving of any presumption of good-faith.

B. States and Localities Actively Pursue Parallel Discrimination, Too

Nor is it only federal actors flouting the Constitution's limitations on unlawful discrimination. Paralleling Congress, states and localities regularly pursue overtly discriminatory eligibility schemes to pursue forbidden disparate treatment of races and ethnic groups, without regard for their clear unconstitutionality.

Perhaps most closely paralleling the discriminatory benefits program at issue in this litigation, during the pandemic, multiple states chose to allocate public health resources based on race and ethnicity. *E.g.*, Phil Galewitz, Kaiser Health News and *L.A. Times*, "Vermont Joins Montana in Giving COVID-19 Vaccine Priority to Minority Residents" (Apr. 5, 2021), https://tinyurl.com/mtjnvyew (last visited Apr. 5, 2024). The related litigation was ruled mooted by events when vaccine production ramped up to meet demand. *E.g., Jacobson v. Bassett*, 2022 U.S. Dist. LEXIS 65989 (N.D.N.Y. 2022).

But parallel discrimination has infested state and local programs far beyond pandemic response. As a (once more merely partial) sampling:

- San Francisco maintains multiple publicly funded basic minimum income programs choosing beneficiaries based on race and ethnicity. *Californians for Equal Rights Foundation*

v. City and County of San Francisco, Cal. Sup. Ct. Case. No. CGC-23-606796.

- San Diego provides first-time homebuyers grants and loans, if they are of preferred races or ethnicities. *Californians for Equal Rights Foundation v. City of San Diego*, S.D. Cal. Case No. '24CV0484-MMAMSB.

- More broadly, the California Assembly has approved a potential state constitutional amendment reauthorizing "research-based" or "research-informed" racial discrimination in state programming (including in education, contracting, and employment), whenever the Governor approves. See *Wall Street Journal*, "Reviving Racial Preferences in California: Democrats in Sacramento Try Again to Override the Voters and the State and U.S. Constitutions" (Aug. 30, 2023). https://tinyurl.com/yc6mezkp. The amendment would not *itself* make eligibility for programs turn on race and ethnicity, but would open the door to the state and its subdivisions making eligibility for programs turn on race and ethnicity, without any showing of anything like the compelling purpose and narrow-tailoring this Court's precedents require.

Additionally, a host of states and localities are openly exploring *further* race-based benefits through so called "reparations task forces." Both San Francisco and California appointed such panels and saw them complete reports proposing billions of dollars of race-exclusive undertakings to confront the generalized social discrimination this

Court has refused to find "compelling" for more than 40 years.

Other states and cities are racing to follow suit, including—non-comprehensively—New York (Michelle Watson, CNN, *New York Governor Signs Law Establishing Reparations and Racial Justice Commission* (Dec. 19, 2023) https://tinyurl.com/mryt9ch4) (last visited Apr. 5, 2024); Illinois (State of Illinois African Descent-Citizens Reparations Commission, https://adcrc.illinois.gov (last visited Apr. 5, 2024)); Philadelphia, Pennsylvania (Jamie Gauthier, Kendra Brooks, "Philadelphia Reparations Task Force" (Oct. 31, 2023) https://phlcouncil.com/reparations/ (last visited Apr. 5, 2024)); Boston, Massachusetts (Task Force on Reparations, https://tinyurl.com/4u22r8ty (last visited Apr. 5, 2024)); Detroit, Michigan (Malachi Barrett, "How Cities are Taking on Reparations After Decades of Federal Gridlock" (Apr. 4, 2024) https://tinyurl.com/ypbhnwuw); and Fulton County, Georgia (Chris Pandolfo, Fox News, "Atlanta Reparations Task Force Calls Fulton County 'Complicit' in Stealing Land from Black Residents" (Feb. 22, 2024) https://tinyurl.com/p2ewcc2x (last visited Apr. 5, 2024)).

All across the nation at all levels of government, officials are following Congress's lead down the road to institutionalized, ongoing, programmatic racial discrimination.

C. The Court Should Confront Widespread Practices Barred by the Constitution

Few if any of these efforts even make gestures toward satisfying strict scrutiny as the Court interprets the Constitution to require of any race-based policy of any level of American government.

We face a widespread effort to flout Constitutional constraints to allocate benefits based on race. Congress is part of that effort. This case concerns part of that effort. These issues will not go away until the Court provides clearer guidance for what is forbidden.

America needs the Court's guidance to avert further steps down these illicit paths, sooner rather than later.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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