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 PROFESSORS OF HISTORY AND LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are historians and professors of legal history who specialize in race, politics, culture, and law in the nineteenth-century United States. They have extensively researched and written about the Civil War, the end of slavery, and Reconstruction. *Amici* submit this brief to provide the Court with an accurate account of the historical context surrounding the passage and early implementation of the Fourteenth Amendment. That account disproves Petitioner's claim that *Grutter v. Bollinger*, 539 U.S. 306 (2003), is at odds with the Fourteenth Amendment's "original meaning." Pet. Br. 50. To the contrary, the Reconstruction Framers recognized that there exists an important distinction between, on the one hand, racial designations that denigrate and harm, and, on the other hand, race-conscious laws that ameliorate discrimination and advance equality of opportunity. The Framers wrote, and the ratifying public understood, the Fourteenth Amendment to bar the former and permit the latter. The higher education admissions policies at issue in these cases, as well as the holding in *Grutter* itself, are consistent with that original meaning.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner asserts that the Fourteenth Amendment prohibits all race-conscious admissions policies, and purports to justify that position with an erroneous interpretation of the Amendment's original

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission. All parties have provided blanket consent to this filing.

meaning. But in addressing race-conscious admissions policies, this Court has long and correctly held otherwise. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

Nothing in the original meaning of the Fourteenth Amendment—not the Equal Protection Clause, not the Citizenship Clause, not the Due Process Clause, not the Privileges or Immunities Clause—clearly prohibits race-conscious admissions policies. Rather, as demonstrated by the Fourteenth Amendment's text and historical context, the Reconstruction Framers understood the Amendment to bar States from enacting and enforcing laws that subordinated people based on race and to permit as constitutional actions designed to ameliorate the conditions of members of a subordinated race. The Framers' anti-discrimination principle did not forbid race-conscious measures, but instead—including in civil rights statutes that applied to the States—the Framers explicitly gave rights to non-white people, recognizing that whites in practice had a dominant position in society. Several of those race-conscious measures were focused specifically on educational opportunity for Black people, demonstrating that the Reconstruction Framers and the ratifying public recognized that using race to help ensure equal availability of educational opportunities is constitutionally permissible. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 269 (1997) ("[T]he framers and ratifiers of the Fourteenth Amendment did not understand or intend . . . to call into constitutional question any and all forms of race-conscious action. Indeed, they repeatedly rejected proposals that would have done that[.]").

In asking this Court to overrule *Grutter* and hold that any consideration of race in higher education admissions is impermissible, Petitioner's *amicus* former Attorney General Edwin Meese III advances an incorrect account of the history and purpose of the Fourteenth Amendment. *See* Amicus Brief of Former Attorney General Edwin Meese III ("Meese Br."). For one, he contends that the Reconstruction Congress was concerned with remediating the harms of enslavement as distinct from any consideration of race. *See* Meese Br. 23-24. But the Reconstruction Congress often did not distinguish between formerly enslaved people and other Black people when allocating the benefits of ameliorative policies, thus belying the notion that those policies addressed only status (enslavement) and not race.

Petitioner's *amicus* uses this erroneous contention and other historical errors in claimed support of the notion that the Fourteenth Amendment demands strict race neutrality in all circumstances. But his ahistorical descriptions of the Fourteenth Amendment cannot credibly provide a basis for the Court's decision in this case. That decision must be informed by an accurate history of the period, not inaccurate reinventions. A faithful account of the Fourteenth Amendment's history demonstrates that the Reconstruction Congress supported race-conscious programs designed to create opportunities for self-advancement, and that they *rejected* demands for strict race neutrality. As a historical matter, it is implausible that the Reconstruction Framers could have deemed it proper to enact a series of race-conscious measures to combat discrimination and advance equality of opportunity across multiple realms, including education, and yet simultaneously

have intended to prohibit any consideration of race for these same purposes in higher education admissions.

Even if the history were unclear—and it is not—overcoming *stare decisis* requires "something more than ambiguous historical evidence." *Gamble v. United States*, 139 S. Ct. 1960, 1974, 1969 (2019); *see also id.* at 1980 (Thomas, J., concurring) (declining to overrule a precedent because "the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine"). Here, however, the historical evidence thoroughly supports maintaining *Grutter* and affirmance of the decisions below.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Focus on Ensuring Equality, Not Mandating Race Neutrality.

Following the ratification of the Thirteenth Amendment in 1865, many States in the South enacted discriminatory Black Codes intended to "confin[e] [Black people] to the bottom rung of the social ladder." Daniel C. Thompson, *The Role of the Federal Courts in the Changing Status of Negroes Since World War II*, 30 J. Negro Educ. 94, 95 (1961). Those "exclusionary" laws, which governed multiple aspects of everyday life, built on pre-Civil War laws that had discriminated against free Black people. *See* Margaret Washington, *African American History and the Frontier Thesis*, 13 J. Early Republic 230, 237 (1993); *see also United States v. Vaello Madero*, 142 S. Ct. 1539, 1548 (2022) (Thomas, J., concurring). After the Civil War, these Codes were extended to discriminate against Black people based on their race, regardless whether they had been free or enslaved at

the time of emancipation. *See, e.g.*, Kate Masur, *Until Justice Be Done* 309-10 (2021); N.C. Black Codes § 2 (1866), *available at* https://www.ncpedia.org/anchor/black-codes-1866 (subjecting "[a]ll persons of color . . . to the same bur[d]ens and disabilities, as by the laws of the State were conferred on, or were attached to, free persons of color, prior to the ordinance of emancipation"). It was in this context that the Fourteenth Amendment was drafted and, in 1868, enacted. *See, e.g.*, Joseph H. Taylor, *The Fourteenth Amendment, the Negro, and the Spirit of the Times*, 45 J. Negro Hist. 1, 27 (1960).

The Fourteenth Amendment is a broad guarantee of equality. In relevant part, it provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[2] The Amendment does not merely prohibit discrimination on account of previous status as an enslaved person; rather, it "extends its protection to races and classes, and prohibits any state legislation, which has the effect of denying to any race

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[2] Many originalists have argued that the Citizenship Clause, the Privileges or Immunities Clause, or both impose anti-discrimination norms. *See* Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment* (2021); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493 (2013); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. C. R. L.J. 1 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). The evidence *amici* adduce shows that neither the Reconstruction Framers nor the ratifying public understood *any part* of the Fourteenth Amendment to prohibit race-conscious ameliorative policies.

or class, or to any individual, the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 24 (1883); *see also, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring) ("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." (citation omitted)).

As detailed below, although the Reconstruction Congress often invoked the principle of anti-discrimination, this did not mean race neutrality. Rather, for leading Republicans, the aim was to follow the abolition of slavery with efforts to outlaw certain anti-Black policies and practices that resulted from centuries of race-based slavery and associated racial prejudice, so as to provide Black people with a framework of fairness and opportunity in the post-emancipation United States. Thus, when Republicans spoke of banishing racial discrimination, they were referring to the aim of eliminating the impact of racism and levelling the existing playing field; they were not endeavoring to eliminate any consideration of race regardless of context or purpose. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton) (explaining that race-conscious measures adopted during Reconstruction were intended to "break down discrimination between whites and blacks" and "ameliorat[e] . . . the condition of the colored people"). In fact, the Reconstruction Congress repeatedly *rejected* calls for race neutrality made by opponents of the many race-conscious policies enacted during this era, who argued that the adopted

policies would lead to racial discrimination against whites, and instead passed race-conscious measures designed to ameliorate harms faced by non-white citizens.

In short, the record is clear: supporters of the Fourteenth Amendment did not see a conflict between the Amendment and race-conscious policies. To the contrary, they were open to ameliorative and equality-enhancing race-conscious policies and believed such policies could help vindicate the Amendment's promise. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring) (rejecting an "an all-too-unyielding insistence that race cannot be a factor" and concluding that race may be taken into account to "ensur[e] all people have equal opportunity regardless of their race").[3]

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[3] Although the historical record clearly refutes the contentions of Petitioner and its *amicus*, even if that record were less clear, that would still not justify reversing the decisions below or overruling *Grutter*. *See Gamble*, 139 S. Ct. at 1969; *see also, e.g.*, William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 809, 816 (2019) ("[D]octrines of precedent . . . can help settle legal questions when there is no 'demonstrable' answer offered by history."); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 Fla. L. Rev. 1551, 1565 (2012) ("In essence, the Constitution establishes a presumption against federal power in favor of state power, which can only be overcome by sufficient interpretative evidence to the contrary.").

II. The Reconstruction Congress Embraced a Variety of Race-Conscious Efforts to Advance Equality of Opportunity.

During the same time that it was drafting and passing the Fourteenth Amendment, the Reconstruction Congress enacted many race-conscious laws to advance equality. *See, e.g.*, Stephen Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 558-65 (1998); Jack M. Balkin, *Living Originalism* 223, 417-18 n.20 (2011); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754-83 (1985). These contemporaneous legislative efforts, described in detail below, further evince that the Reconstruction Framers saw no conflict between the Fourteenth Amendment's call for "equal protection of the laws" and race-conscious policies designed to mitigate the harms of racism and advance equality of opportunity. *See, e.g.*, Gregory P. Downs, *The Second American Revolution: The Civil War-Era Struggle Over Cuba and the Rebirth of the American Republic* 37-38, 45-46 (2019).

The Civil Rights Acts of 1866 and 1870 and the 1866 Freedmen's Bureau Act[4] aid in understanding the promise and bounds of the Fourteenth Amendment. Like the Amendment, the 1866 Civil Rights Act and Freedmen's Bureau Act were adopted

[4] Although popularly referred to as the Freedmen's Bureau, its official name was the Bureau of Refugees, Freedmen, and Abandoned Lands, and the official title of its enabling legislation was the Act to Establish a Bureau for the Relief of Freedmen and Refugees. Act of March 3, 1865, ch. 90, 13 Stat. 507, 508 (1865).

by the Thirty-Ninth Congress. Those who supported these Acts and the Amendment understood them "as consistent and complementary," and those who opposed them saw them "as part of a single coherent policy." Schnapper, *supra*, at 785 (collecting legislator statements). In addition, the historical "evidence places beyond cavil . . . that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." Jacobus tenBroek, *Equal Under Law* 201 (1965); *see also* Cong. Globe, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) ("[E]very gentleman knows [the Civil Rights Act of 1866] will cease to be a part of the law whenever . . . [the other] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife . . . and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it.").

The Civil Rights Acts of 1866 and 1870 and the Freedmen's Bureau Act illuminate the Reconstruction Framers' understanding of the Fourteenth Amendment's equal protection guarantee in two different and complementary respects. The Civil Rights Acts shed light on how Congress understood its power to regulate the States through race-conscious measures consistent with the Amendment. And the Freedmen's Bureau Act reveals that where Congress exercised its own power, it saw no principled or legal problem with employing ameliorative racial classifications.

These Acts make clear that the Reconstruction Congress was comfortable with *race*-conscious policies, not just policies conscious of one's status as a formerly enslaved person. The benefits of these ameliorative Acts and similar policies were not exclusively available to formerly enslaved people; rather, as a matter of express policy or practical implementation, they "were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites." Schnapper, *supra*, at 754; *see also id.* at 796 ("The thirty-ninth Congress approved race-conscious programs designed to enable blacks to improve their situation and, although the programs were remedial in purpose, no attempt was made to screen individual black participants to assure that they were actual victims or to measure the degree of past disadvantage."); Balkin, *supra*, at 223 (similar). That focus on race rather than status makes sense given the significant number of free Black people in the United States prior to the start of the Civil War—more than 488,000 in 1860, of which about 262,000 lived in slaveholding states. *See* Joseph G. Kennedy, *Population of the United States in 1860; Compiled from the Original Returns of The Eighth Census* xii (1864). Moreover, for decades before the war, free Black Americans had actively sought access to American institutions and recognition of their citizenship. *See* Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (2018).

Given the centrality of the Civil Rights Act and Freedmen's Bureau Act to understanding the original

meaning of the Fourteenth Amendment, *amici* discuss below the history, design, and implementation of these laws and other race-conscious efforts enacted by the Reconstruction Congress. These enactments conclusively show that the Fourteenth Amendment's framers did not intend strict race neutrality.

A. The Civil Rights Acts of 1866 and 1870.

Passed following ratification of the Thirteenth Amendment in 1865, in response to Black Codes enacted by Southern States to repress and isolate Black citizens, the 1866 Civil Rights Act was intended to "give effect" to the Thirteenth Amendment's "abstract truths and principles." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull); *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 Hastings L.J. 1135, 1141-42 (1990). Both the 1866 and 1870 Civil Rights Acts were expressly designed to limit the power of the States—the Acts required States not to enforce racially discriminatory laws, and instructed States that all non-white people were to have the same rights as white people.

Petitioner's *amicus* argues that congressional debates over the 1866 Act demonstrate that the Framers understood the Fourteenth Amendment to require race neutrality, but in so doing, he addresses only the 1866 Act's first draft, which provided that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." Meese Br. 6 (quoting Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866)). Based on that "on account of race" language, former

Attorney General Meese argues that the Civil Rights Act was concerned with "race neutrality." *Id.* at 6-7.

In fact, the first draft's "on account of race" language did not make it into the final bill. The actual text of the enacted Civil Rights Act of 1866 explicitly acknowledged that white citizens had certain rights and were treated as a privileged class, and required that non-white citizens be permitted to enjoy those rights. *See* Franklin, *supra*, at 1145 ("Congress enacted the [Civil Rights Act of 1866] . . . to extend to all citizens the rights enjoyed by the most favored of all its citizens, the white people of the United States."). Specifically, Section 1 of the Act—which is enforceable against both government officials and private parties—provided that all persons "of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, to be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Ch. 31, 14 Stat. 27, 27 (1866) (emphasis added), codified as amended at 42 U.S.C. §§ 1981 and 1982.

Section 2, in turn, included an expressly race-conscious provision designed to enable enforcement of the civil rights the Act guaranteed. It established criminal penalties for subjecting non-whites to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of white

persons." *Id.* By making it a crime to punish non-whites more than whites for the same conduct, but not the reverse, Section 2's application thus turned on the race of the person subjected to "different punishment." *See Siegel*, *supra*, at 563. When Senator Trumbull introduced Section 2, he explained, "When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull).

President Andrew Johnson vetoed the Act in part because he viewed it as providing Black citizens with special treatment relative to white citizens. As he explained, the Act, and particularly Section 2's race-conscious provision concerning administration of justice, was designed "to afford discriminating protection to colored persons," 6 *A Compilation of the Messages and Papers of the Presidents, 1789-1902* 408 (James Richardson ed., 1907), and its "distinction of race and color . . . operate[s] in favor of the colored and against the white race," *id.* at 413.

The Reconstruction Congress rejected these arguments and overrode President Johnson's veto. In so doing, Senator Lyman Trumbull, the principal drafter of the Act, countered President Johnson's narrative by persuading his colleagues that "protecting the rights of freedmen" required race-conscious protection, and that the Civil Rights Act was necessary to "secure to all persons within the United States practical freedom." Cong. Globe, 39th Cong.,

1st Sess. 474-75 (1866) (statement of Sen. Trumbull); *see also id.* at 1758 (statement of Sen. Trumbull) (contending that the Act's provisions "are for the relief of the persons who need the relief, not for the relief of those who have the right already").

In 1870, two years after the ratification of the Fourteenth Amendment, the Reconstruction Congress affirmed its comfort with race-conscious laws governing the States and enacted the 1870 Civil Rights Act to enforce the Fourteenth Amendment. *See Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 & n.11 (1973); Xi Wang, *The Making of Federal Enforcement Laws, 1870*-72, 70 Chi.-Kent L. Rev. 1013, 1031-32 (1995); Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* 238 (2015). Section 16 of the 1870 Act re-enacted Section 1 of the 1866 Act, providing that "all persons within the jurisdiction of the United States shall have the same right[s] . . . as [are] enjoyed by white citizens." Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144 (1870). Congress has maintained that race-conscious language to the present day. *See* 42 U.S.C. §§ 1981, 1982.

Thus, as the text and history make plain, the goal of the 1866 and 1870 Civil Rights Acts was not to demand race neutrality in all circumstances. Nor was it merely to ameliorate discrimination based on the status of being formerly enslaved. Rather, Congress designed the Acts to ensure that Black and other non-white citizens had and were able to enjoy the same rights as white citizens.

B. The Freedmen's Bureau Act.

Also "central to the Reconstruction effort" was the Freedmen's Bureau Act. Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 Tex. L. Rev. 1361, 1362 (2016). Whereas "[t]he Civil Rights Act of 1866 enumerated the fundamental rights of free persons and citizens," Congress created the Bureau to "provide[] former slaves and refugees with the goods and services they needed to make the transition from slavery to full American citizenship and to avoid falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic." *Id.*

Enacted in 1865 and expanded in 1866, the Bureau's aim was to bridge "the gulf which separates servitude from freedom." Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (statement of Rep. Eliot). Its intention thus was to empower the federal government to act on behalf of the welfare of its people. Consistent with that focus on social welfare, the Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and labor contracts, [and] rented them land." Siegel, *supra*, at 559.

Although the coverage of the Act extended to both formerly enslaved people and refugees of any race whose lives had been upended by the Civil War, the Act used a race-conscious approach to provide those groups different benefits. As expanded in July of 1866, the Act authorized the Bureau "to aid [freedmen] in making the freedom conferred by the proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment,

available to them and beneficial to the republic" but provided support to "loyal refugees" only "so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens." Act of July 16, 1866, ch. 200, § 2, 14 Stat. 173, 174 (1866). In other words, "although the Bureau was authorized to aid blacks in almost any manner related to their newly-won freedom, white refugees could be provided only that assistance necessary to make them self-supporting." Schnapper, *supra*, at 772. The Act also limited the Bureau's educational programs to Black citizens. *Id.*

Supporters of the Bureau defended its race-conscious approach by stressing the special needs of Black citizens and distinguishing between race-conscious ameliorative efforts and unfair discrimination. As Congressman Moulton explained, "The very object of the bill is to break down the 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) (statement of Rep. Moulton). Representative Phelps similarly explained that the Freedmen's Bureau Act focused on providing assistance to Black citizens because they lacked the same political power as white citizens to advance their rights. *See id.* at App. 75 (statement of Rep. Phelps). And Representative Donnelly contended that failing to attend to the unique needs of Black citizens beyond emancipation "would be a cruel mockery. These men are without education, and morally and intellectually degraded by centuries of bondage." Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (statement of Rep. Donnelly).

Consistent with President Johnson's reasoning for vetoing the Civil Rights Act of 1866, *see supra* at 13, opponents of the Freedmen's Bureau Act denounced it for distinguishing "between the two races" and providing special treatment to Black citizens, Cong. Globe, 39th Cong., 1st Sess. 397 (1866) (statement of Sen. Willey). Congressman Taylor, for instance, called the Act "class legislation—legislation for a particular class of the blacks to the exclusion of all whites." *Id.* at 544 (statement of Rep. Taylor). Senator Saulsbury asked, "[H]as the Congress of the United States the power to take under its charge a portion of the people, discriminating against all others, and put their hand in the public Treasury, take the public money, appropriate it to the support of this particular class of individuals, and tax all the rest of the people of the country for the support of this class?" Cong. Globe, 39th Cong., 1st Sess. 3840-41 (1866) (statement of Sen. Saulsbury); *see also id.* at 401 (statement of Sen. MacDougall) ("This bill undertakes to make the negro in some respects their superior . . . and gives them favors the poor white boy in the North cannot get."). President Johnson vetoed the 1866 Freedmen's Bureau Act, arguing that providing special treatment to any "favored class of citizens" was "danger[ous]." 6 *A Compilation of the Messages and Papers of the Presidents, 1789-1902* at 425 (1907).

As with the Civil Rights Act, the Reconstruction Framers were undeterred by and rejected this opposition. In July 1866, one month after sending the Fourteenth Amendment to the States for ratification, the Reconstruction Congress voted overwhelmingly to override President Johnson's veto of the Freedmen's

Bureau Act of 1866. *See* Cong. Globe, 39th Cong., 1st Sess. 3842, 3850 (1866). Those legislators who supported the Act were virtually identical to those who supported the Fourteenth Amendment. *Id.* at 3042, 3149, 3842, 3850.

C. Other Congressional Race-Conscious Efforts.

In addition to the measures detailed above, the Reconstruction Congresses passed a host of other race-conscious laws not limited to formerly enslaved people to advance equality of opportunity, including for Black Americans in particular. These actions further demonstrate the Reconstruction Framers' principled acceptance of race-conscious measures.

For example, in 1865, Congress established the Freedmen's Savings and Trust, a bank to provide financial services to "persons heretofore held in slavery, or their descendants, being inhabitants of the United States." Act of Mar. 3, 1865, ch. 92, § 11, 13 Stat. 510, 512 (1865); *see also* Balkin, *supra*, at 417 n.20 (observing that because of "[t]he addition of the words 'their descendants' . . . the bill was not restricted to assisting only former slaves"). Among other provisions, the Trust's charter established an Education and Improvement Committee to oversee a "special trust fund" to be used for "the education and improvement of persons heretofore held in slavery, or their descendants being inhabitants of the United States." Act of Mar. 3, 1865, ch. 92, By-Laws of the Freedman's Savings and Trust Company § XI.

In 1866 and 1867, Congress, concerned that unscrupulous claims agents were defrauding Black soldiers out of financial benefits earned during their

service with the U.S. Army, passed race-conscious measures to ensure Black soldiers received their owed payments. Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (1866) (providing for payments to "colored" soldiers and their representatives and setting 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, 27 (1867) (similar). Supporters of this legislation noted the unique needs of Black servicemen relative to their white counterparts. Representative Scofield, for example, explained, "we have passed laws for the protection of white soldiers, but not going quite as far as this, because, unlike the blacks, they have not been excluded from your schools by legal prohibition, nor have they all their lives been placed in a dependent position." Cong. Globe, 40th Cong., 1st Sess. 444 (1867) (statement of Rep. Scofield).

Additionally, in 1866, Congress provided for a chaplain to be appointed to "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 (1866). Chaplains appointed to white troops "had no similar responsibilities, and education for white troops remained an unfunded 'optional service' during and after Reconstruction." Siegel, *supra*, at 560-61.

Further, in 1866, Congress enacted the Southern Homestead Act. *See* Southern Homestead Act, ch. 127, 14 Stat. 66 (1866). Without contradiction, Senator Pomeroy of Kansas stated: "[I]t need not be disguised that [the Act] is aimed particularly for the

benefit of the colored men . . . . [T]he object of this bill is to let [Negroes] have the land in preference to people from Europe or anybody else." Cong. Globe, 39th Cong., 1st Sess. 2735-36 (1866) (statement of Sen. Pomeroy). If Petitioner was right, Senator Pomeroy's statement would be evidence of unconstitutional discriminatory intent.

In 1867, Congress appropriated funds "for the relief of freedmen or destitute colored people in the District of Columbia," Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20 (1867), where more than 11,000 free Black people lived prior to the Civil War, *see* Kennedy, *supra*, at 587. And between 1863 and 1865, Congress incorporated institutions to assist poor Black citizens, including the National Association for the Relief of Destitute Colored Women and Children, the Colored Catholic Benevolent Society, and the Colored Union Benevolent Association. Act. of Feb. 14, 1863, ch. 33, 12 Stat. 650-51 (1863); Act of June 28, 1864, ch. 169, 13 Stat. 201 (1864); Act of Mar. 3, 1865, ch. 118, 13 Stat. 535 (1865).[5]

Just like the Civil Rights Act and Freedmen's Bureau Act of 1866, these legislative efforts confirm that the Reconstruction Framers did not have an unbending vision of colorblindness. Rather, they

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[5] Some States enacted race-conscious laws following ratification of the Fourteenth Amendment. South Carolina, for example, extended distinct benefits to Black Americans in judicial proceedings. It prohibited government-licensed businesses from discriminating based on "race, color, or previous condition," and provided that if the person alleging discrimination was "colored or black, . . . the burden [would] be on the Defendant." 1870 S.C. Acts No. 279, §§ 1, 7, at 386-88.

believed that race-conscious measures to ensure equality of opportunity were necessary to ameliorate the harms inflicted through generations of racial subjugation.

III. The Reconstruction Framers Were Particularly Focused on Advancing Racial Equality in Education, Including Through Race-Conscious Actions.

Among the many race-conscious measures enacted by the Reconstruction Congress to advance equality of opportunity for Black citizens, they placed a notable focus on education. The Framers of the Fourteenth Amendment recognized that education is "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 587 (1866) (statement of Rep. Donnelly) ("We are interfering in behalf of the negro; let us interfere to educate him."); *id.* at 321-22 (1866) (statement of Sen. Trumbull) ("The cheapest way by which you can save this race from starvation and destruction is to educate them. . . . [W]hen slavery no longer exists, the policy of the Government is to legislate in the interest of freedom. Now, our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro"). They also understood equal access to education as essential to combatting race-based discrimination, noting, for example, that education would "protect [Black people] reasonably in their civil rights." *Id.* at 630 (statement of Rep. Hubbard).

One of the central avenues during Reconstruction for advancing educational opportunity was the

Freedmen's Bureau. *See supra* Argument § II.B. Indeed, education was "the foundation upon which all efforts to assist the freedmen rested." Eric Foner, *Reconstruction, America's Unfinished Revolution, 1863-1877* at 144 (1988). The Bureau's education efforts were focused on Black students generally—"no distinctions were made according to the degree of past disadvantage." Schnapper, *supra*, at 781.

The Bureau deployed a substantial share of its resources for education—"[i]n most years more than two-thirds of all funds expended by the Bureau were used for the education of freedmen," and from 1867 to 1870, over $400,000 was allocated to funding colleges for Black students. *Id.* at 780-81 & n.149. The resulting achievements were significant. The Bureau "educated approximately 100,000 students, nearly all of them black." *Id.* at 781; *see also* Foner, *supra*, at 144 (noting that, by 1869, "nearly 3,000 schools, serving over 150,000 pupils reported to the Bureau").

The Bureau also "provided funds, land, and other assistance to help establish more than a dozen colleges and universities for the education of black students," including Howard University, one of the oldest Historically Black Colleges and Universities in the United States, to which it gave the down payment for its campus and an additional $500,000 to construct its buildings. Schnapper, *supra*, at 781-82; 2 O. Howard, *Autobiography* 397-401 (1907). As a condition of this funding, the Bureau required that Howard, which was open to students of all races, make "special provision" for Black students. Bureau Refugees, Freedmen and Abandoned Lands, *Sixth Semi-Annual Report on Schools for Freedmen, July 1, 1868* at 60 (1868).

Additionally, the Bureau provided significant funding to Berea University in Kentucky, which sought to enroll equal numbers of Black and white students. *See* Richard Sears, *A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904* at 44, 56, 59, 63, 69, 89 (1996). Berea's intent was that the school would "incorporate as basic racial principles the total equality of the Negro," and that "blacks would be present in such numbers as to stamp their own life style on college society." Paul Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. Negro Hist. 13, 13, 17 (1974). Berea's mission and integrated student body were well known during Reconstruction and supported by reformers including Frederick Douglass and Wendell Phillips. Sears, *supra*, at 51, 56, 138.

In enacting the Freedmen's Bureau Act and ensuring its strong focus on educational equity in particular, the Reconstruction Congress again faced arguments that such race-conscious efforts were impermissible and/or unwise. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 402 (1866) (statement of Rep. Davis) ("[I]t is a scheme devised to practice injustice and oppression upon the white people of the late slaveholding States for the benefit of the free negroes."); *id.* at 401 (statement of Sen. MacDougall) ("This legislation specially for the negro race . . . in favor of them as against our own people, the white men who labor, the effort to make a privileged class of what are called the freedmen."); *id.* at App. 71 (statement of Rep. Rousseau) ("Here are four schoolhouses taken possession of, and unless they mix up white children with black, the white children can

have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates.").

The Reconstruction Congress rejected those arguments for strict race neutrality. In fact, the commitment to advancing equality of opportunity in education by providing school facilities for Black children was so strong among the Reconstruction Congress that not just Republicans but even some Democrats embraced this race-conscious effort. *See, e.g.*, Cong. Globe, 41st Cong., 3d Sess. 1850-51 (1871) (statement of Rep. Randall) ("That part of the resolution which relates to the education of the negroes I do not suppose anybody will object to."). And when Congress subsequently voted to limit the functions of the Bureau, it nonetheless extended the educational support functions of the Bureau. *See* Act of July 25, 1868, ch. 245, 15 Stat. 193.

That Congress enacted manifold race-conscious measures in service of educational equity at the same time it enacted the Fourteenth Amendment illustrates that the Reconstruction Framers were not colorblind. Rather, they understood the Fourteenth Amendment to permit race-conscious actions to ameliorate the badges of slavery and combat anti-Black discrimination, particularly in the field of educational opportunity.

IV. Petitioner and Its *Amicus* Mischaracterize and Fail to Account for the Historical Context of the Fourteenth Amendment.

Petitioner and its *amicus* either ignore or seek to dismiss the critical historical context described above as irrelevant to the original meaning of the

Fourteenth Amendment. In doing so, they turn a blind eye to an accurate historical accounting.

First, *amicus* former Attorney General Meese contends that contemporaneous actions by Congress applicable to the federal government are irrelevant to a historical understanding of the Fourteenth Amendment because the Amendment applies only to the States. *See, e.g.*, Meese Br. 20-21 & nn. 23, 4 (citing, *inter alia*, Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 86 (2013)). This critique is misplaced, however, as there is "substantial evidence" that the Reconstruction Framers "believed that Congress was, and indeed always had been, bound by the principles that the [A]mendment extended to the states." Schnapper, *supra*, at 787-88 & nn.182-83; Cong. Globe, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham) ("[T]he amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers."); *id.* at 2459 (statement of Sen. Stevens) ("[E]very one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect."); Barnett & Bernick, *supra*, at 202 (adducing evidence that Republicans believed citizens "could [not] be deprived of rights of national citizenship by *any* governmental entity, whether state or federal, consistent with the Fourteenth Amendment."); *Vaello Madero*, 142 S. Ct. at 1551 (Thomas, J., concurring) (finding "substantial support for the proposition that, by conferring citizenship, the Citizenship Clause

guarantees citizens equal treatment by the Federal Government with respect to civil rights").

Moreover, regardless whether the principles of the Fourteenth Amendment apply only to the States, the Reconstruction Congress's contemporaneous enactments show its comfort with using race-conscious measures for ameliorative purposes. It is implausible that the same Congress that adopted the Freedmen's Bureau Act, the 1866 Civil Rights, and the Fourteenth Amendment would have "intended the [Fourteenth] [A]mendment to forbid the adoption of such remedies [like the Freedmen's Bureau Act programs] by itself or the states." Schnapper, *supra*, at 785. Indeed, "[n]o member of Congress hinted at any inconsistency between the [F]ourteenth [A]mendment and the Freedmen's Bureau Act"—rather, both supporters and opponents of Reconstruction efforts discussed the Amendment and the Act in the same breath and treated them as substantively aligned. *Id.* Notably, the primary article on which former Attorney General Meese's brief relies rejects the notion that these federal enactments are irrelevant. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (considering actions of Congress contemporaneous with the Fourteenth Amendment's enactment to advance a historical understanding of the Amendment's original meaning as related to segregation).

Further, as former Attorney General Meese acknowledges, the Civil Rights Acts *were* intended to restrain the States. *See* Meese Br. 21 ("[T]he debates surrounding congressional enactments that limited

State authority (*e.g.*, the 1866 Act and the 1875 Act) inform the original understanding of the Fourteenth Amendment."). Thus, the text and context of those Acts are relevant even under the view of Petitioner's *amicus*. As noted above, *see supra* Argument § II.A, the Reconstruction Congress clearly endorsed ameliorative and equality-enhancing race-conscious efforts in the Civil Rights Acts of 1866 and 1870.

To the extent Petitioner's *amicus* contends that contemporaneous legislative action—both those efforts that did restrict the States (like the Civil Rights Act) and those that did not directly do so (like the Freedmen's Bureau Act)—were focused on remediating the harms of slavery separate and apart from any considerations of racial discrimination, that is also incorrect. Congress's Reconstruction-era enactments were designed to do more than remediate the badges of slavery; they were focused on eradicating racial discrimination, meaning, racial *degradation*. They thus focused not just on slavery-related status, but on race. *Cf.* Siegel, *supra*, at 560 (explaining that the Framers of the Fourteenth Amendment understood "[p]revious condition of servitude" as "a surrogate for race").

For example, Senator Lyman Trumbull, in debating the Second Freedmen's Bureau Act, explained that the goal was to eradicate all remnants of slavery as well as anything designed to "degrad[e] the colored race." Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull). He argued that the Act was responsive to "all badges of servitude made in the interest of slavery and as a part of slavery," and noted that "even some of the non-

slaveholding States passed laws abridging the rights of the colored man which were restraints upon liberty." *Id.* Representative Ignatius Donnelly similarly recognized the need to support equal citizenship not limited to those recently freed from bondage: "[W]e must make all the citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men." *Id.* at 589 (statement of Rep. Donnelly); *see also* Masur, *supra*, at 16-19, 207-8, 230-31, 298-300, 304. The Framers' attentiveness to race-based discrimination, not merely discrimination against those who were freed at emancipation, impacted a meaningful portion of the Black population, as more than a quarter-million free Black people lived in slaveholding states prior to the Civil War. Kennedy, *supra*, at xii.

Debates over segregation in schools and the 1875 Civil Rights Act—a law that former Attorney General Meese claims was "an endorsement of race neutrality," Meese Br. 14—further illustrate that Reconstruction legislators were concerned with ameliorative anti-discrimination efforts, not race neutrality. They often framed their opposition to segregation in terms of ameliorating both a cause and consequence of anti-Black prejudice. Representative Williams, for one, observed that segregation teaches "our little boys that they are too good to sit with these men's children in the public school-room, thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter." 3 Cong. Rec. 1002 (1875) (statement of Rep. Williams); *see also, e.g.*, Cong. Globe, 41st Cong., 3d Sess. 1055 (1871) (statement of Sen. Sumner) ("You should not begin life with a rule

that sanctions a prejudice. Therefore do I insist . . . that we should banish a rule which will make [children] grow up with a separation which will be to them a burden—a burden to the white, for every prejudice is a burden to him who has it, and a burden to the black, who will suffer always under the degradation.”).

Further, the Framers of the Fourteenth Amendment were concerned with protecting not just Black Americans (whether formerly enslaved or not), but also other specific groups, including white Union sympathizers living in the South, and Chinese immigrants. *See id.* at 1093 (statement of Rep. Bingham) (“The adoption of this amendment is essential to the protection of Union men.”); *id.* at 1263 (statement of Rep. Broomall) (“[W]hite 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.”); Cong. Globe, 41st Cong., 2d Sess. 3658 (1870) (statement of Sen. Stewart) (“[W]e will protect Chinese aliens or any other aliens whom we allow to come here.”).

Moreover, this Court has previously recognized that the Reconstruction Amendments were meant to be ameliorative with respect to *both* race and prior condition of slavery. In the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court described the “pervading purpose” of the Amendments as “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” *Id.* at 71. The Reconstruction Amendments, the Court

continued, were concerned with both "color *and* . . . slavery," and were "addressed to the grievances of [the Black] race." *Id.* at 72 (emphasis added).

Justice Harlan similarly explained in his *Plessy* dissent that the Fourteenth Amendment was meant to be ameliorative on the basis of both race and prior condition of slavery. He recognized that the Reconstruction Amendments were intended "to secure to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy," and to protect Black citizens such "that no discrimination shall be made against them by law because of their color." *Plessy v. Ferguson*, 163 U.S. 537, 555-56 (1896) (Harlan, J., dissenting), *overruled by Brown*, 347 U.S. 483.

Petitioner and its *amicus* contort Justice Harlan's statement in his *Plessy* dissent that the goal of the Fourteenth Amendment was for society to become "color-blind." *Id.* at 559 (Harlan, J., dissenting); *see* Pet. Br. 1, 5, 47, 51; Meese Br. 2. This statement was not a proclamation that the Reconstruction Framers prohibited States from ever considering race. In the preceding sentence, Justice Harlan stated: "There is no caste here." 163 U.S. at 559 (Harlan, J., dissenting). In context, Justice Harlan's reference to "colorblindness" embodied an anti-caste principle, befitting the context of Jim Crow legislation that was designed to stamp Black people with "a badge of servitude wholly inconsistent with the civil freedom." *Id.* at 562 (Harlan, J., dissenting). Consistent with the foregoing analysis, he read the Fourteenth

Amendment as designed to eliminate the evils of "caste" and a "superior, dominant, ruling class of citizens"—a desire that is entirely consistent with race-conscious ameliorative policies. *Id.* at 559 (Harlan, J., dissenting). Accordingly, he explained that the Fourteenth Amendment contained "a necessary implication of a positive immunity or right, *most valuable to the colored race*—the right to exemption from unfriendly legislation against them." *Id.* at 556 (emphasis added). Petitioner and its *amicus* seek to strip the value provided by the Fourteenth Amendment by arguing—contrary to the historical context—that it must turn a blind eye to race in all circumstances. That is not how Justice Harlan understood it, and that is not what a faithful account of history teaches.

CONCLUSION

Petitioner cannot show that the Fourteenth Amendment imposes a strict mandate of racial neutrality that prohibits *all* race-conscious admissions policies, and certainly so not as to dislodge longstanding precedent to the contrary. Contemporaneous historical evidence shows the opposite—that the Reconstruction Congress understood the Amendment to allow for race-conscious efforts to ameliorate discrimination, enable more fulsome social integration, and advance equality of opportunity. Respondents' race-conscious higher education admissions policies are consistent with the constitutional text, understood in the context of the Reconstruction Framers' words, legislative actions, and inclusive civic vision that knew no "superior,

dominant, ruling class." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

For the foregoing reasons, the Court should affirm the decisions below.

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APPENDIX

APPENDIX

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