Nos. 20-1199, 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSION, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSION, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE U.S. COURTS OF APPEALS FOR THE FIRST AND FOURTH CIRCUITS

BRIEF OF THE WASHINGTON BAR ASSOCIATION AND THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Max Carter-Oberstone
Amari L. Hammonds
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Upnit K. Bhatti
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
ubhatti@orrick.com

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

The Washington Bar Association (WBA) was founded in 1925 as one of several Black bar groups formed across the nation. Its founder, Charles Hamilton Houston, made inestimable sacrifices to challenge the *Plessy* regime and resist the treatment of Black Americans as second-class citizens. The presence of a Black bar group in the District of Columbia protected laypersons who, through the WBA, could combat inequitable treatment in the public school system and employment discrimination in the federal and local governments.

The presence of a Black bar group also made it possible for the Black community and Black lawyers to seek recompense in the local courts for police brutality against Black citizens and to advocate for the appointment of Black judges on the Supreme Court of the District of Columbia, later known as the Municipal Court. This court today is the Superior Court for the District of Columbia.

The WBA and its members have effected change in society and in the law, making great strides toward achieving equality. That mission is today more important than ever, recognizing that much remains to be done in the days ahead to combat the country's

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

attitudes towards race and to remedy present and past racial discrimination.

The Women's Bar Association of the District of Columbia (WBA-DC) is one of the oldest women's bar associations in the country. Since 1917, the WBA-DC has advocated for the advancement of women and historically oppressed communities and upheld its mission to maintain the honor and integrity of the legal profession, promote the administration of justice, advance and protect the interests of women lawyers, promote their mutual improvement, and encourage a spirit of friendship. In support of its mission, the WBA-DC participates as amicus curiae before this Court and other courts throughout the nation to advocate for the rights of historically oppressed groups, including women.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To understand the importance of affirmative action, one must be careful to remember this country's history, which underscores the dire need for race-sensitive policies. The Fourteenth Amendment was put into place to correct the injustices perpetrated against Black Americans through centuries of enslavement and second-class citizenship. Black lawyers have worked tirelessly to ensure that the original purpose of the Reconstruction Amendments can be fulfilled. Unfortunately, much work remains in achieving that goal, as racial inequities still permeate higher education in America. Eliminating affirmative action by overruling *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539

U.S. 306 (2003), *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*), and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (*Fisher II*) would be a devastating setback in the long struggle to fulfill the Fourteenth Amendment's promise.

Race-neutral policies cannot rectify the damage from centuries of race-based discrimination, and the Fourteenth Amendment does not restrict governmental entities to such half-measures. Invoking Justice Harlan's statement that the Constitution "is color-blind and neither knows nor tolerates classes among citizens," Petitioner contends that race cannot be used as a factor in awarding educational opportunities. Pet. Br. 1 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). That argument ignores the fact that the Constitution has consistently been interpreted and implemented in ways that reinforce—or worsen—racial disparities. To strike down race-sensitive policies by paying lip service to color-blindness would disregard this constitutional history and the structural racism that permeates today's society.

ARGUMENT

I. The Fourteenth Amendment Permits Race-Sensitive Policies.

A. Race-sensitive policies advance the Fourteenth Amendment's core purpose of remedying the harms inflicted on Black Americans through slavery and discrimination.

Resolving whether the Fourteenth Amendment permits race-sensitive educational policies requires a consideration of the "evidence of Congress' aim[s]" when it approved the Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 773 (2010); *see also id.* at 770-78; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (endorsing "reliance on history to inform the meaning of constitutional text"). Although sometimes "'[h]istorical analysis can be difficult,'" *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 803 (Scalia, J., concurring)), here it is simple: Congress indisputably passed the Fourteenth Amendment to remedy the harms inflicted on Black Americans through centuries of slavery and white supremacy, and to mitigate the burdens Black Americans faced after the Civil War. Far from being constitutionally forbidden, race-sensitive policies are essential to achieving the Fourteenth Amendment's aim, based on the original understanding of those who enacted it. Indeed, "many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority.'" *Bakke*, 438 U.S. at 293 (Powell, J., announcing the judgment of the

Court). And the same Congress that approved the Fourteenth Amendment in 1866 also implemented race-sensitive remedies necessary to achieve these goals.

This country's "legacy of slavery and racial discrimination" is well known, *Bakke*, 438 U.S. at 294 (opinion of Powell, J.), and the Fourteenth Amendment's legislative history has been extensively documented elsewhere, including in Justice Thurgood Marshall's separate opinion in *Bakke*.[2] The Founders' commitment to freedom did not extend to Black Americans, who were "dragged to this country in chains" and "thrust into bondage for forced labor." *Id.* at 387-88 (Marshall, J.). Black people were "brutalized and dehumanized," and "deprived of all legal rights" in America. *Id.* at 388. Anti-literacy laws and other legal disabilities excluded even free Blacks from obtaining education or owning property in order to uphold America's racial hierarchy. *See* John Hope Franklin, Racial Equality in America 77-79 (1993). *See generally* Hilary J. Moss, Schooling Citizens: The Struggle for African American Education in Antebellum America (2009).

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[2] 438 U.S. at 387-98 (opinion of Marshall, J.); *see also* Brief of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811). Having been a Black civil rights lawyer fighting to secure the Fourteenth Amendment's protections for Black Americans, Justice Marshall brought unique insights to these questions, and his warnings about straying from the Amendment's principles anticipated the positions advanced in these cases. For these reasons, Justice Marshall's account of this history is particularly apt and bears repeating here.

Emancipation after the Civil War "did not bring [Black Americans] citizenship or equality in any meaningful way." *Bakke*, 438 U.S. at 390 (Marshall, J.). Southern states eager to continue their oppression quickly passed "Black Codes" to effectively "re-enslave" Black people. *Id.* These discriminatory laws reified America's racial hierarchy by limiting Black people's right to own property and imposing measures like poll taxes and property and literary qualifications that operated to disenfranchise Black Americans. *Id.*

In response, Congress passed several laws intended to correct the wholesale exclusion of Black people from equal society. *Bakke*, 438 U.S. at 390-91 (Marshall, J.) (discussing the Reconstruction Acts, Civil Rights Acts, and the Bureau of Refugees, Freedmen, and Abandoned Lands Acts, or "Freedmen's Bureau Acts"). Congress met the Black Codes' attack on Black education with its own focus on supporting programs specifically for "the education of the freed people." Act of July 16, 1866, ch. 200, 14 Stat. 173, 176 (Freedmen's Bureau Act of 1866). While some measures extended relief to White refugees from the South, many were specifically limited to Black people. *See, e.g.*, Act of Mar. 3, 1865, ch. 92, 13 Stat. 510 (incorporating the Freedman's Savings and Trust Company); Act of Feb. 14, 1863, ch. 33, 12 Stat. 650 (incorporating the National Association for the Relief of Destitute Colored Women and Children); Act of Mar. 3, 1863, ch. 103, 12 Stat. 796 (incorporating the Institution for the Education of Colored Youth in the District of Columbia); *see also* Harvard Br. 23-25; UNC Br. 30-33.

Congress was well aware that these measures uniquely benefitted Black people while excluding Whites, and it found such race-sensitive remedies appropriate even after considerable debate on that issue. Many lawmakers opposed the Freedmen's Bureau Acts and other bills on the view that they "undert[ook] to make the negro in some respects … superior … and g[ave] them favors that the poor white boy in the North [could not] get." *Bakke*, 438 U.S. at 397 (Marshall, J.) (quoting Cong. Globe, 39th Cong., 1st Sess. 401 (1866) (remarks of Sen. McDougall)); *see also id.* at 397-98. Others raised questions as to whether the Thirteenth Amendment provided sufficient constitutional justification for these race-sensitive programs. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 322 (remarks of Sen. Trumbull). But the bills' supporters believed that "governmental protection" directed specifically to Black people was necessary given the "absence" of civil rights and immunities for them on par with White Americans. *Bakke*, 438 U.S. at 397 (quoting Cong. Globe, 39th Cong., 1st Sess., at App. 75 (remarks of Rep. Phelps)).

The 39th Congress that passed the Civil Rights Act of 1866 and Freedmen's Bureau Act of 1866 also proposed the Fourteenth Amendment that year, after which state legislatures ratified the Amendment in 1868. "[M]any of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority.'" *Bakke*, 438 U.S. at 293 (Powell, J.). And "historians agree" the Amendment was also intended to provide constitutional grounding for extending certain aid specifically to Black Americans. Jacobus tenBroek, Equal Under

Law 201 (1965 ed.); *cf. McDonald*, 561 U.S. at 775 ("Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.").[3]

In light of this history, Petitioner's suggestion that the Fourteenth Amendment universally demands color-blindness is wholly without merit. Again, Justice Marshall put it well:

> Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color[,] to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

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[3] Of course, the Amendment "was framed in universal terms," *Bakke*, 438 U.S. at 293 (Powell, J.), and the Court has rightly extended its protections to other racial and ethnic minorities "seeking protection from official discrimination," *id.* at 292.

Bakke, 438 U.S. at 398 (Marshall, J.) (internal quotation marks and citation omitted).

It is clear that when Congress approved the Fourteenth Amendment, it meant to authorize race-sensitive remedies. Initially, this Court recognized as much. Even in narrowing the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court nevertheless understood that the Amendment's "one pervading purpose" was "the freedom of the [Black American], 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. Petitioner's insistence on unqualified "color-blindness," Pet. Br. 51, is completely at odds with that core and central purpose of the Amendment.

B. Petitioner's formalistic reading of *Brown v. Board of Education* dishonors the Fourteenth Amendment's original meaning, ignores the historical context that gave rise to that landmark decision, and would undermine the promise of *Brown*.

As this incontrovertible history shows, Petitioner's argument that "*Grutter* has no support in the Fourteenth Amendment's 'historical meaning,'" *e.g.*, Pet. Br. 50, is unmoored from the relevant facts surrounding the Amendment's passage. For its assertion, Petitioner looks to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954),

almost nine decades after the Amendment was ratified, reading that decision to mean that a State does not have "'any authority … to use race as a factor in affording educational opportunities.'" Pet. Br. 51 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion)).

This formalistic account of *Brown* as requiring color-blind policies is exemplified by Petitioner's slogan that "[b]ecause *Brown* is right, *Grutter* is wrong." Pet. Br. 51. That position overlooks critical context for the *Brown* decision. In addition to dishonoring the Fourteenth Amendment's original meaning, Petitioner's arguments perversely weaponize *Brown* as a cudgel against the same Black community that was instrumental in achieving that watershed ruling correcting the Court's earlier mistaken decisions in this area. *See* Pet. Br. 50-51, 68 (superficially equating the elimination of race-sensitive admissions with *Brown*'s repudiation of racial discrimination). A proper appreciation of the relevant history and context shows that *Brown* is of a piece with the history of race-sensitive remedies discussed above and with the Court's subsequent decisions in *Bakke*, *Grutter*, and *Fisher*.

1. Nothing in *Brown* supports Petitioner's rigid rule against any consideration of race in admissions. After all, the issue before the Court in *Brown* concerned whether racial minorities were entitled to inclusion in White public schools in the first place. In the decades before *Brown*, America had quickly retreated from the "short-lived" Reconstruction era and its fundamental aim of eliminating the chasm

between White and Black Americans. *Bakke*, 438 U.S. at 391 (Marshall, J.). The subsequent 1877-1965 Jim Crow era began just nine years after the States ratified the Fourteenth Amendment, and with it, "the Negro was rapidly stripped of his new civil rights." *Id.*; *see also* Earl Warren, *Lyndon B. Johnson and Civil Rights*, 51 Tex. L. Rev. 197, 199 (1973); Leslie V. Tischauser, Jim Crow Laws 1 (2012). "The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War." *Bakke*, 438 U.S. at 390 (Marshall, J.).

During Jim Crow, a slew of discriminatory laws aimed at sustaining America's racial hierarchy pervaded the national landscape—laws that in many instances remained in place through the 1960s. In large swaths of this country, Black people "could not live where they desired; they could not work where white people worked except in menial positions; they were prosecuted for breaking peonage contracts; they could not use the same rest rooms, drinking fountains, or telephone booths"; "[t]hey were denied the right to sit on juries," not allowed to vote, and much more. Warren, *supra*, at 200-202 (cataloguing Jim Crow injustices). In particular, the tried-and-true method of solidifying subjugation through denying Black Americans adequate education persisted through segregated school systems. *Id.* at 202; *Bakke*, 438 U.S. at 395 (Marshall, J.). Black people were also subject to racial terror through extrajudicial lynchings and deprived of due process in criminal trials, injustices that for decades were met with the federal government's indifference. *See* Genna Rae McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil

Rights 112 (1983) (leading up to the 1930s, "the last place in Washington where a black could look for protection was the Justice Department").

Far from acting to implement the constitutional promise of racial equality, this Court instead entrenched this racial caste system through a series of decisions narrowly interpreting the Fourteenth Amendment's Equal Protection Clause. "Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal." *Bakke*, 438 U.S. at 326-27 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (footnote omitted). Indeed, the Equal Protection Clause was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." *Id.* at 291 (Powell, J.) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 381 (1949)); *see also* Mary Frances Berry, Black Resistance/White Law: A History of Constitutional Racism in America 236 (1971) ("The need to respect constitutional government ha[d] been … twisted and perverted" for the "promotion of white nationalism").

In one infamous example of this jurisprudence, the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that the Fourteenth Amendment did not allow Congress to prohibit private discrimination in public accommodations. *Id.* at 24-25. Without any factual basis, the Court asserted that Black Americans in 1883 had "progress[ed]" so far that "beneficent legislation" directed specifically at their advancement was no longer appropriate. *Id.* at 25. In *Plessy*, 163 U.S. 537,

the Court blessed Jim Crow segregation laws that branded Black Americans with second-class citizenship. *Id.* at 550-51. With both federal and state actors refusing to recognize or protect Black Americans' right to equal treatment and inclusion, questions of how race-sensitive remedies might continue to be necessary to achieve the "security" and true freedom from "oppression[]" that the Fourteenth Amendment contemplated for them, *The Slaughter-House Cases*, 83 U.S. at 71, were left for another day.

It took decades of tireless dedication and keen strategy by Black lawyers to remove *Plessy*'s stain on this Court's jurisprudence and revive the promise of the Reconstruction Amendments. Charles Hamilton Houston (the WBA's founder), Thurgood Marshall, and others methodically brought test cases designed to incrementally undermine *Plessy*. The nature of this fight should not be sugarcoated—it was a "discouraging" one, "requir[ing] great courage, tenacity, and discipline to move justice forward even a little bit in the trial pits and hostile appellate courts." A. Leon Higginbotham, Jr., *Foreword* to McNeil, *supra*, at xix. Black lawyers often did this work entirely on their own in the face of "the relentless prejudice of a Jim Crow [legal] bar." Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 264 (1976). Few White lawyers "dared to defend advocates of racial equality." *Id.* The American Bar Association "shrugged aside the problem [of racial inequality] as a 'political' issue beyond its purview," *id.*—an abdication of professional responsibility that led Black attorneys to found the WBA's national parent bar association, the National Bar Association, McNeil, *supra*, at 6. In critical periods, "the African

American civil rights movement … depended largely" on the "black lawyers of the United States." *Id.*

To Houston—who in the 1930s also worked for the National Association for the Advancement of Colored People (NAACP) as the director of its newly funded legal campaign against discrimination—attacking educational discrimination and inequality was critical "because of [its] effect on an entire generation of black people." McNeil, *supra*, at 116. In his view, "[s]ince education [was] a preparation for the competition of life," educational inequality "handicap[ped] black youth" and perpetuated white supremacy through "a new form of slavery." *Id.* at 132, 133; *see also Brown*, 347 U.S. at 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). "If ignorance prevail[ed] … among any race, they bec[a]me the tools of a small exploiting class"; "[d]emocracy and ignorance [could not] endure side by side." McNeil, *supra,* at 134 (internal quotation marks omitted). "Houston was persuaded that failure to eradicate inequality in the education of black youth would condemn the entire race to an inferior position within American society in perpetuity." *Id.* "Discrimination in education [was] symbolic of all the more drastic discriminations which Negroes suffer[ed] in American life." *Id.* The "inferior" education afforded to Black Americans resulted not from any "alleged black inferiority," but rather from the "definite objective on the part of the ruling whites to curb the young [Blacks] and prepare them to accept an inferior position in American life without protest or struggle." *Id.* (internal quotation marks omitted).

With these principles in mind, the NAACP pressed *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936) (holding that the Equal Protection Clause required Maryland to admit the petitioner to the sole in-state law school) and other targeted litigation, setting the table for cases like *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that petitioner was entitled to admission at Missouri law school in the absence of other substantially equal provision for in-state legal training), *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (holding that petitioner's right to equal legal education required him to be admitted to the University of Texas Law School), and ultimately, the overruling of *Plessy* in *Brown*. *See, e.g.*, McNeil, *supra*, at 138-39. There, the Court held that segregated schools "deprive[d] the children of the minority group of equal educational opportunities," and "generate[d] a feeling of inferiority." *Brown*, 347 U.S. at 493-94.

As the trajectory laid out above makes clear, *Brown* did not purport to take rase-sensitive remedies off the table. Indeed, *Brown* began by explaining that the Amendment's history was "inconclusive" with respect to the specific question before it: whether segregated schools denied Black Americans equal protection of the law. 347 U.S. at 489. Had the Court been deciding the propriety of race-sensitive policies more broadly as Petitioner suggests, it would not have made this statement in light of the history set forth above. It is no wonder, then, that Petitioner's argument relies not on the language of *Brown* itself, but rather on a later plurality opinion's flawed characterization of that precedent. *See id.* at 6, 51 (quoting *Parents Involved*, 551 U.S. at 747 (plurality)). Correctly

understood, *Brown* was about prohibiting governmental exclusion of Black children from "the benefits they would receive in a racial[ly] integrated school system." 347 U.S. at 494. Petitioner's formalistic position would subvert *Brown*—and the vital efforts of the Black lawyers who brought about that landmark decision—by prohibiting governmental *inclusion* of Black students in those same diverse school systems.

2. Although *Brown* played a vital role by removing *Plessy*'s stain from this Court's jurisprudence, it could not fully undo the damage *Plessy* and decades of discrimination had already done to Black Americans. *See Bakke*, 438 U.S. at 401 (Marshall, J.) ("[H]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978."). At the time of *Bakke*, Black Americans' ability to make their way in the world continued to trail that of White Americans', with shorter life expectancies, higher maternal mortality rates, and high rates of poverty and unemployment—trends undeniably tied to "the history of unequal treatment afforded to the Negro." *Id.* at 396. Thus, after *Brown*, and decades after the Freedmen's Bureau Act of 1866 and other race-sensitive remedies contemplated by the Fourteenth Amendment's drafters had fallen by the wayside with the emergence of Jim Crow, this Court squarely considered—and approved—government's ability to enact remedies meant "to redress the continuing effects of past discrimination." *Id.* at 324 (Brennan, White, Marshall, and Blackmun, JJ.).

Along these lines, the Court held in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *McDaniel v. Barresi*, 402 U.S. 39 (1971) that school boards could constitutionally consider race in assigning students to schools. *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977), approved the use of race-sensitive reapportionment that enhanced the electoral power of Black and Puerto Rican Americans in New York. Further, in *Bakke*, five Justices agreed that the government is not barred from taking race into account in higher education admissions to serve "compelling governmental interest[s]." *Bakke*, 438 U.S. at 299 (Powell, J.); *see also id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ.). A majority of the Court reaffirmed the view of those five Justices in *Grutter*, 539 U.S. at 322-23, and the Court further clarified the principles relevant to assessing the constitutionality of a public university's race-sensitive admissions program in *Fisher*, *see Fisher II*, 579 U.S. at 376-77.

To be sure, the splintered *Bakke* opinions and the Court's subsequent decisions in *Grutter* and *Fisher* did not generate a clear demarcation of what the Fourteenth Amendment permits in terms of race-sensitive remedies. Despite "several hundred years of class-based discrimination against Negroes, the Court [was] unwilling to hold that a class-based remedy for that discrimination [was] permissible," and instead relied on the State's educational diversity rationale as a justification for considering race in higher education admissions. *Bakke*, 438 U.S. at 400 (Marshall, J.). Nevertheless, *Bakke*, *Grutter*, and *Fisher* correctly recognized the availability of race-sensitive policies in at least some circumstances. And

they are part of the same fabric as *Brown*, advancing the Fourteenth Amendment's original purpose to "bridg[e] the vast distance" between White Americans and Black Americans, *id.* at 293 (Powell, J.).

II. Affirmative Action In Educational Institutions Is Still Necessary To Combat The Lasting Effects Of Discrimination.

In seeking to overrule *Bakke*, *Grutter*, and *Fisher*, Petitioner makes much of what it misleadingly calls *Grutter*'s "25-year grace period" for race-sensitive admissions policies. Pet. Br. 12; *see also* Pet. Br. 9, 48, 68, 80. First, Petitioner contends that *Grutter* has generated no reliance interests because the Court there set a specific "deadline" for universities to terminate their race-sensitive admissions policies. Pet. Br. 68. Petitioner also argues that, even if the Court upholds *Grutter*, universities' failure to "wind down" these policies as that purported deadline approaches suggests they are in violation of *Grutter*'s principles. *Id.*; *see also* Pet. Br. 68-69, 80.

But *Grutter* imposed no such "deadline." The *Grutter* majority observed that in the 25 years "since Justice Powell first approved the use of race" in public higher education in *Bakke*, "the number of minority applicants with high grades and test scores ha[d] indeed increased." *Grutter*, 539 U.S. at 343. Assuming this trend continued, the Court "expect[ed]" that "the use of racial preferences [would] no longer be necessary to further the [governmental] interest approved" in that case. *Id.*

The failure of the *Grutter* Court's assumed trend to manifest demonstrates why there is nothing impermissible under the Fourteenth Amendment about universities continuing their affirmative action policies. Although *Grutter* correctly suggested that eventually, "all race-conscious admissions programs [should] have a termination point," 539 U.S. at 324, these cases present no occasion to determine when such programs would no longer be necessary or how they should end: Along many metrics—including the applicant metric that the *Grutter* majority highlighted—slavery's legacy still substantially impedes the success of Black Americans. The need for the use of race in public and private higher education admissions remains just as important now as it did when this Court issued its decision in *Grutter*.

1. To assume that the use of race in admissions is no longer necessary is to ignore the reality of today's America. Structural racism infects the whole of American society; racial inequality along economic, social, professional, and educational lines is still quite substantial. Empirical evidence shows that even *with* gains made by race-sensitive admissions policies, the effects of centuries of cruel discrimination and segregation have not been sufficiently mitigated. To this day, there exists an urgent need to diminish the inequities that disadvantage Black and other historically oppressed communities, particularly in the educational realm.[4]

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[4] As one commentator has noted, "'[s]tructural racism' is a newly popular term but a long-standing problem":

Authoritative statistics prove this point. For example, in 2021, while the United Sates Census Bureau reported that from 2011 to 2021, the percentage of Black adults ages 25 and older with a bachelor's degree or higher increased from 19.9% to 28.1%, U.S. Census Bureau, Census Bureau Releases New Educational Data (Feb. 24, 2022), https://tinyurl.com/5fbh8k5a, the disparity between Black adults and White adults with higher degrees is still striking. In 2021, only 4,853 Black adults ages 25 and older had obtained a bachelor's degree—a substantial difference from the nearly 42,000 White adults in the same age group. U.S. Census Bureau, Educational Attainment in the United States: 2021, at tbl.3 (Feb. 24, 2022), https://tinyurl.com/3cv524vm. That represents nearly ten times more White adults holding undergraduate degrees than Black adults. *See id.* The numbers are similar for other minority groups. *Id.*; *see also Affirmative Action: Myths Versus Reality*, Binghamton Univ., https://tinyurl.com/35fp2sxm (last visited July 28, 2022) (rebutting the "myth" that

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> It has been defined as "the policies, programs, and practices of public and private institutions that result in greater rates of poverty, dispossession, criminalization, illness, and ultimately mortality of African Americans. Most importantly, it is the *outcome* that matters, not the intentions of the individuals involved."

Florence Wagman Roisman, *Structural Racism in Housing in Indianapolis*, 18 Ind. Health L. Rev. 355, 355 (2021) (quoting Keeanga-Yamahtta Taylor, From #BLACKLIVESMATTER to Black Liberation 8 (2016)). *See generally* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 Stan. L. Rev. 985 (2007); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717 (2000).

"affirmative action is no longer needed to achieve pay equity"). Another study by the Pew Research Center found that "Black and Hispanic workers remain underrepresented in the science, technology, engineering and math (STEM) workforce … [which is] closely tied to representation in the STEM educational system, particularly across the nation's colleges and universities." Richard Fry et al., *STEM Jobs See Uneven Progress in Increasing Gender, Racial and Ethnic Diversity*, Pew Rsch. Ctr. (Apr. 1, 2001), https://tinyurl.com/3z47axy3. A UCLA-led study found the same in the medical field. *Affirmative action bans had 'devastating impact' on diversity in medical schools, UCLA-led study finds*, UCLA Health (May 2, 2022), https://tinyurl.com/yf3xzn22.

In 2020, the American Council on Education reported that although "[h]igher education in the United States is more diverse now than at any time in its history," "the opportunities and experiences of students, faculty, and staff in higher education continue to vary along racial and ethnic lines." Morgan Taylor et al., *Race and Ethnicity in Higher Education: 2020 Supplement*, Am. Council on Educ., at xv (2020). The study concluded that "higher education has a critical role to play in diminishing inequities and providing meaningful opportunities for students from all backgrounds." *Id.* There are a number of explanations for this, one being that Black students are more likely to attend high-poverty schools given continued segregation and economic and racial isolation of minorities. *See id.* at 3; *see also* Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, The Atlantic (Feb. 29, 2016), https://tinyurl.com/4dt6f5kv. The scarce financial resources

and limited access to a robust education that these schools are able to offer hinder the progress of these students, leading to "unequal outcomes across racial lines." Taylor, *supra*, at xv; *see* Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, Opportunity Insights (Mar. 2018), https://tinyurl.com/bdfah9h3 ("[B]lack Americans have substantially lower rates of upward mobility and higher rates of downward mobility than whites, leading to large income disparities that persist across generations."). Consequently, when graduating high school, Black students are less prepared than White students for college. *Id.*

This reality stems from the continued effects of discrimination. While Black people were fighting for equality in education (among other realms), White people had centuries of educational advantages from which Black people were excluded *by law*. *See supra* 5. Just as at the time of *Brown*, the inequality present in America today is not due to some defect in Black students; it is in fact due to persistent structural and institutional racism. *See supra* 14, 19 n.4.[5] That racism further supports the need for race to be a consideration in educational admissions policies. Without a remedy like affirmative action, Black people will once again be relegated to second-class citizenship, without sufficient tools to cope with ongoing systemic racial disadvantage stemming from hundreds of years

[5] These forms of racism persist in part because of limitations this Court has placed on the remedies available to address racial disparities and wealth discrimination. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

of slavery and segregation that affects every facet of their lives.

Race-neutral measures are insufficient to further the purposes of the Fourteenth Amendment when it comes to equalizing opportunities in higher education. Petitioner's ahistorical push to return to our "color-blind Constitution," Pet. Br. 47 (internal quotation marks omitted), is grounded in revisionism that ignores the realities of history and its persistent impacts on Black Americans. Petitioner's submission thus rests on a fantasy—"a world free of the structural inequities forged during the era of American apartheid." Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 Mich. L. Rev. First Impressions 123, 128 (2006). Supposedly, "the present is so attenuated from that past that we have to speculate whether the social realities in which we now live bear anything but the most coincidental relation to our nations recent past." *Id.* American history and the Fourteenth Amendment's purposes reveal why it is a grave mistake to treat color-blindness as an excuse to abandon efforts to grapple with present inequalities and discrimination's lasting effects. *See supra* § I.

2. Petitioner disputes affirmative action's efficacy in achieving diversity in educational institutions. Pet. Br. 61-62; *see also* Okla. Amicus Br. 13-14. However, empirical evidence shows that race-sensitive policies have facilitated critical gains that would be taken away if these policies are rescinded. Two obvious examples are recent trends in public secondary education in California and Texas, where judicial and legislative intervention prohibited the use of race-sensitive admissions policies.

In the years since Californians passed Proposition 209 in 1996, the University of California saw a decline in admissions for underrepresented groups—including African Americans, Hispanics, and American Indians—at "*every* UC campus." Acad. Affs., *The Impact of Proposition 209 in California*, Univ. of Cal. 1 (Sept. 4, 2020), https://tinyurl.com/bdvvvb3r. The University also saw a decrease in enrollment for admitted students from underrepresented groups and an increase for White students. *Id.*; *see also* Larry Gordon, *UC programs in lieu of affirmative action show limited success*, L.A. Times (June 30, 2013), https://tinyurl.com/bytf5tud ("California public universities have tried new efforts to boost ethnic diversity without using affirmative action, providing a possible example for other states to follow. But those efforts have had only limited success."). Banning affirmative action programs in California also resulted in an annual wage drop of 5% for minority applicants, who "cascade[d] into lower-quality public and private universities." Acad. Affs., *Research and Analyses on the Impact of Proposition 209 in California*, Univ. of Cal., https://tinyurl.com/mufayuhj (last visited July 31, 2022).

Similarly, in Texas, after the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), ended consideration of race in admissions, the enrollment of minority students dropped drastically at the University of Texas School of Law. Admission of Black students plummeted more than 90% in the first year of the decision, from 38 to 4 students. Tarlton L. Libr., Jamail Ctr. for Legal Rsch., *Hopwood v. Texas: What Happened Next—A Chilling Effect*, Univ. Tex. Austin, https://tinyurl.com/49ku5zvk (last updated Mar. 16,

2018); *see* William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 Harv. BlackLetter L.J. 1, 31-32 (2003) (at the University of Texas Law School, African American enrollment dropped from an average of about thirty-three students per class in the four years preceding the decision to an average of eleven students per class in the five years after *Hopwood*)

Opponents of affirmative action claim that no stark differences are seen in states where race-sensitive policies have been banned. *See* Okla. Amicus Br. 13-14. The data, however, do not support this. The Oklahoma Advisory Committee to the United States Commission on Civil Rights, for example, examined the effects of Oklahoma's 2012 constitutional amendment prohibiting affirmative action and concluded that there was insufficient data to "study the potential effects of this constitutional amendment" and "recommend[ed] that the Commission encourage public colleges and universities and the State of Oklahoma to collect more data." U.S. Comm'n on Civ. Rts., Statement of the Oklahoma Advisory Committee to the U.S. Commission on Civil Rights Regarding Study of Changes to Affirmative Action in Public Education 1 (Apr. 21, 2020), https://tinyurl.com/5fx2s9ry.

Another study found affirmative action bans had a "devastating impact" on diversity in educational institutions. UCLA Health, *supra* (citing Dan P. Ly et al., *Affirmative Action Bans and Enrollment of Students from Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools, Annals of Internal Medicine* (June 2022),

https://tinyurl.com/2p8hvxm3). And studies have concluded that "black students who probably benefited from affirmative action — because their achievement data is lower than the average student at their colleges — do better in the long-run than their peers who went to lower-status universities and probably did not benefit from affirmative action." Leah Shafer, *The Case for Affirmative Action*, Harv. Graduate Sch. of Educ. (July 11, 2018), https://tinyurl.com/2e9725yz. "So affirmative action acts as an engine for social mobility for its direct beneficiaries." *Id.* Research also shows that classmates of direct beneficiaries of affirmative action also benefit from affirmative action, as they end up with "more positive racial attitudes toward racial minorities" and "greater cognitive capacities," and they even "participate more civically when they leave college." *Id.*

* * *

To appreciate the importance and constitutional vitality of affirmative action, one must think critically about the concept of "preferential treatment." *See* Crenshaw, *supra*, at 132. Affirmative action has popularly been explained in terms of a race where some runners are placed ahead of others such that they get a head start. Some consider it unfair for minorities to be placed ahead and believe such runners are damaged and unable to compete on their own, attaching a stigma to those who benefit from affirmative action. *Id.* at 131-32. On their view, these runners are harmed by using affirmative action as a crutch. That perspective fails to appreciate the full reality—affirmative action is a tool designed not to fix damaged runners "but damaged lanes that make the race more

difficult for some competitors to run than others." *Id.* at 132. Understanding affirmative action "to account for the unequal conditions of the lanes on the track—the debris that runners must avoid, the craters over which they must climb, the crevices that they must jump and the detours that they must maneuver—suggests that affirmative action is not about providing preferences at all." *Id.*

On a day-to-day basis, these unequal conditions include structural inequalities, implicit biases, and trans-generational disadvantages. *See id.* And these conditions are "neither mysterious nor unverifiable." *Id.* They are sadly embedded in our country's history and exist *even today*. Take, for example, legacy admissions–admitting applicants whose ancestors are alumni creates a cycle where White applicants are essentially given preference. *See* Jasmine Harris, *A new bill in Congress would end 'legacy' college preferences. Here's why that matters* (Feb. 15, 2022), https://tinyurl.com/ee7ffs4u ("'Legacy' admissions were introduced to keep elite schools White. My research finds that that's hurting Black and Brown students today."). Thus, the stigma should be attached to the conditions that have been imposed on historically oppressed groups, not on the groups themselves.

Any concern that affirmative action would create permanent racial entitlement in education is unfounded and untimely given the daily incidents of discrimination this country is experiencing and the data supporting the need for continued efforts toward racial equality. "It is regrettable that affirmative action programs are still needed in our society. However, until society sufficiently overcomes the effects of its

lengthy history of pervasive racism, affirmative action is a necessity." *Hopwood v. Texas*, 861 F. Supp. 551, 583 (W.D. Tex. 1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). These are still early days in America's volatile journey toward racial equality, and affirmative action is an effective measure that educational institutions must continue to have in their toolkit in order to achieve the goals of the Fourteenth Amendment.

No one likes the fact that racial classifications are needed; not even those who benefit from them. However, as Justice Blackmun put it, "it would be impossible to arrange an affirmative-action program in a racially neutral way and have it [be] successful. To ask [this] is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way." *Bakke*, 438 U.S. at 407 (Blackmun, J.).

It is understandable that those who do not benefit from race-sensitive policies may object to them. But lest this Court allow its missteps of the past to "come full circle," *Bakke*, 438 U.S. at 402 (Marshall, J.), those objections must not impede the ongoing process of remedying the effects of slavery and discrimination through effective race-sensitive policies that help to achieve the Fourteenth Amendment's central aim.

CONCLUSION

The judgments of the courts below should be affirmed.

Respectfully submitted,

Max Carter-Oberstone
Amari L. Hammonds
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Upnit K. Bhatti
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
ubhatti@orrick.com

Counsel for Amici Curiae

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