No. 05-908 and 05-915

IN THE
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

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BRIEF OF HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are 60 scholars who have devoted much of our careers to the study of Reconstruction-era history, abolitionism, race relations, and civil rights.[1] We submit this brief as *amici curiae* in support of Respondents.[2]

We are not an organization, but individual scholars with a professional interest in ensuring that the Court is fully and accurately informed about the historical context surrounding the passage and early implementation of the Fourteenth Amendment. We have authored and edited numerous books and articles in scholarly journals on Reconstruction-era history and the Reconstruction Amendments. Many of us have served as presidents of the American Historical Association, Organization of American Historians, and Southern Historical Association.

In our professional judgment, the school assignment policies at issue in these cases are fully consistent with the original purpose of the Fourteenth Amendment. Indeed, the same Congress that passed the Fourteenth Amendment enacted a wide range of race-conscious programs and funded deliberate efforts to integrate schools. Therefore, to the extent that the Court finds probative the intentions of those who passed the Fourteenth Amendment, it should affirm the decisions below.

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[1] This brief is filed with the written consent of both parties. No counsel for a party wrote this brief in whole or in part. *Amici* recognize a generous contribution by the Yale Civil Rights Project and the Project for Law and Education at Yale to cover the cost of printing this brief.

[2] A list of the *amici* scholars, their academic affiliations, and publications is included in the Appendix. The views expressed herein are those of the scholars alone and do not necessarily reflect the views of their institutions.

SUMMARY OF ARGUMENT

In these cases, Petitioners urge the Court to hold, in effect, that integration and segregation are equally offensive to the Fourteenth Amendment insofar as they involve any consideration of race. Some *amici* in support of Petitioners further suggest that this novel reading of the Fourteenth Amendment is consistent with the original understanding of the Amendment's framers. *See, e.g.*, Brief for Project on Fair Representation at the American Enterprise Institute as *Amici Curiae* Supporting Petitioners, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (filed Aug. 17, 2006) [hereinafter AEI Brief]. This suggestion rests on a deep misunderstanding of those framers' aims. We submit this brief to correct that misunderstanding.

In fact, the Reconstruction Congresses viewed deliberate efforts to integrate schools as wholly consistent with their broader goals of incorporating blacks into the civic, economic, and political mainstream of American society. The same Reconstruction Congresses that passed and enforced the Fourteenth Amendment funded race-conscious school integration efforts in Kentucky and elsewhere. In addition, Congress raised no objection when Louisiana wrote a "mixed schools" clause into its state constitution in 1868 and deliberately sought to integrate schools in New Orleans. Indeed, a variety of state and local officials across the nation appear to have taken the Fourteenth Amendment's passage as a signal that the door was open to desegregate—and even to use race-conscious means to integrate—their schools.

There is simply no evidence from the Reconstruction period to suggest that those who framed and ratified the Fourteenth Amendment ever meant for it to limit voluntary, race-conscious integrative measures like those adopted in

Seattle and Louisville. Instead, the relevant historical record points powerfully in the opposite direction. The Seattle and Louisville integration policies are fully consistent with both the goals of the Reconstruction project and the means Congress deemed permissible to effectuate those goals.

Congress passed the Thirteenth Amendment in order to erase all badges and incidents of slavery. When this Amendment proved inadequate to prevent the isolation of, and discrimination against, black citizens, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Acts, and then drafted the Fourteenth Amendment to constitutionalize those statutes. The Fifteenth Amendment extended the goal of inclusion into the political realm. Understood in the context of this Reconstruction project, the purpose of the Fourteenth Amendment was to fully incorporate blacks into the fabric of civic, economic, and political life.

Petitioners' *amici* insist, instead, that the original intent of the Reconstruction Amendments was to establish "color-blind" government, meaning that the words "black" or "white" would henceforth never appear in a piece of legislation. AEI Brief at 3. It is difficult even to know what to make of *amici*'s claim, given that the Reconstruction Congresses themselves passed *A Resolution Respecting Bounties to Colored Soldiers*, No. 46, 14 Stat. 357, 357-58 (1866) and myriad other explicitly race-conscious statutes, and supported state and local race-conscious efforts to integrate schools. Congress considered such race-conscious means wholly permissible, and often necessary, to build a society without "caste"—a society that was "color-blind" in the sense that it allowed "no superior, dominant, ruling class of citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court should not allow the original intent of the framers of the Fourteenth Amendment to be misconstrued to impugn racial classifications whose indisputable purpose and effect is to educate students of different racial and ethnic backgrounds together. In the K-12 context, no scarce good is being distributed between racial groups. There are only children going to school, in public systems that make room for them all. The question in these cases is simply whether students with different racial backgrounds will have an opportunity to attend school together, or separately—whether local officials in Louisville and Seattle can continue their efforts to advance toward a truly colorblind society, or will be forced by an ahistorical doctrinal framework to ignore the realities of race. Whatever may be said for the proposition that voluntary integration must cease, let the record show that this proposition has no basis in the original intent of the framers of the Fourteenth Amendment.

ARGUMENT

From the day Berea College opened its doors as a one-room schoolhouse in Kentucky in 1855, its abolitionist founders insisted on teaching black and white children together. On September 3, 1867, a black minister addressed the student body: "[L]et there be Bereas planted throughout the nation, institutions in which the youth of the land white and colored shall study together, play together, sing together, worship together, and there will be no war of races." Richard Sears, *A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904*, at 57 (1996). This dream of integration was alive—but still only a dream—in 1963, when Dr. King preached, "I have a dream that one day, down in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers." Martin Luther King. Jr., I Have a Dream, Keynote Address at the March on Washington for

Jobs and Freedom (Aug. 28, 1963), *in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* 217 (James M. Washington ed., 1986). Many Americans of all races are still waiting for that day. After a period of progress, rising de facto segregation has left our schools more segregated than they were in 1970. Gary Orfield, The Civil Rights Project at Harvard University, *Schools More Separate: Consequences of a Decade of Resegregation* (2001). Against this backdrop, the locally-elected school boards in Louisville and Seattle have voluntarily chosen to address de facto segregation and move closer to the long-delayed dream of integration.

Some of the framers of the Fourteenth Amendment believed the Amendment mandated the integration of schools. Others may not have understood the Fourteenth Amendment to *require* such school integration. In *Brown*, this Court concluded that the evidence on whether the framers of the Fourteenth Amendment intended to mandate school integration was "inconclusive." *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954). We do not ask the Court to revisit that difficult question.[3] But what is beyond serious historical dispute is that the Congress that passed the Fourteenth Amendment did not intend or even contemplate that their Reconstruction project would one day be used as a cudgel to beat back the dream of integration that Berea College epitomized, that Dr. King championed, and that

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[3] *Compare* Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, *Brown v. Bd. of Educ.*, 347 U.S. 483 [hereinafter *Brown* brief] and Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (arguing that the Fourteenth Amendment was understood to bar school segregation) *with* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 58 (1955) and Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995) (arguing against McConnell's conclusions).

many of those framers themselves passionately advocated. The framers of the Reconstruction Amendments did not strive for the antiseptic race-neutrality that *amici* in support of Petitioners advance. AEI Brief at 5. Instead, they vigorously enacted race-conscious legislation which they understood as wholly consistent with the Fourteenth Amendment—and indeed, sometimes, the only way to realize that Amendment's purpose. The voluntary integration plans in Louisville and Seattle are consistent with that purpose, and employ race-conscious means that are well within the scope of actions deemed permissible by the Reconstruction Congresses.

I. The Reconstruction Congresses Supported Deliberate Efforts by States and Localities to Integrate Schools

The Reconstruction Congresses did not believe that the Fourteenth Amendment barred states and localities from choosing to deliberately integrate their schools. As an initial matter, many members of Congress and state legislatures understood the Fourteenth Amendment to actually *require* school integration. Moreover, only a year after passing the Fourteenth Amendment, Congress began funding ambitious race-conscious school integration efforts in Kentucky and other states. There is simply nothing in the historical record to suggest that Congress understood the Fourteenth Amendment to bar such voluntary integration efforts.[4]

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[4] To be sure, the Reconstruction Congresses did not go so far as to withhold all funding from segregated schools. But given the context of the Reconstruction period, Congress's willingness to affirmatively fund race-conscious school integration is powerful evidence that it understood such efforts as permissible means to achieve the Reconstruction Amendments' inclusionary goals. Indeed, the fact that the modern notion of race-conscious school integration constituted a small segment of the congressional debates should not be surprising, given that most of the fight during this period was over the then-radical proposition that blacks

Many members of the Congress that passed the Fourteenth Amendment supported the goal of integrated education. In 1865, Senator Charles Sumner introduced a resolution demanding that former slave states, as a requirement for readmission to the Union, integrate their schools.[5] Cong. Globe, 39th Cong., 1st Sess. 2 (Dec. 4, 1865). Representative John Baker introduced a similar resolution in the House later that day. *Id.* at 69. Many Radical Republicans likewise "lined up in favor of a bill by Senator Trumbull to enlarge the powers of the Freedmen's Bureau . . . to force the integration of Southern schools." *Brown* brief at 18; *see also* Cong. Globe, 39th Cong., 1st Sess. 541 (Jan. 31, 1866) (statement of Rep. Dawson) (explaining that the bill's supporters believed "the white and black race are equal. . . . *Their children are to attend the same schools with white children, and to sit side by side with them*.") (emphasis added).

In the debates over the adoption of the Civil Rights Act of 1875, once again many members of Congress pressed for integrated schools. *See, e.g.*, 2 Cong. Rec. 4116 (May 21, 1874) (statement of Sen. Boutwell) ("The theory of human equality cannot be taught in families," but "in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions."). Senator Sumner offered a version

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should be afforded the opportunity to attend school at all. *See Brown* brief at 120-25.

[5] Senator Sumner had long advocated for school integration. Years earlier he had argued in *Roberts v. City of Boston*, 59 Mass. (1 Cush.) 198 (1849) that "[t]he law contemplates not only that all be taught, but that *all* shall be taught *together* . . . . The school is the little world where the child is trained for the larger world of life." Charles Sumner, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*, *in* 2 *The Works of Charles Sumner* 327, 371 (1849).

of the Act that was uniformly understood to require integration. Cong. Globe, 42d Cong., 2d Sess. 244 (Dec. 20, 1871). Senator Allen Thurman said of a later version of the bill: "I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools." 2 Cong. Rec. 4088 (May 20, 1874).

Although the provision specifically mandating school integration was narrowly defeated in the House and dropped from the final version of the Civil Rights Act of 1875,[6] the message in favor of integration over segregation emanated from the federal level to the states. In 1881, a Pennsylvania court struck down a school segregation law on the basis of the Fourteenth Amendment. J. Morgan Kousser, *Dead End: The Development of Nineteenth Century Litigation on Racial Discrimination in Schools* 22-23 (1986). Other states, while not explicitly acknowledging a federal constitutional mandate, passed legislation integrating their schools. These states included Rhode Island (1866), Michigan (1867), Connecticut (1868), New York (1873), Nevada (1873), Illinois (1874), California (1880), Pennsylvania (1881), New Jersey (1881), and Ohio (1887). *See* J. Morgan Kousser, *"The Onward March of Right Principles": State Legislative Actions on Racial Discrimination in Schools in Nineteenth-Century America*, 35 Hist. Methods 177, 183 (2002).

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[6] Shortly before close of session in 1874 the Senate passed the "mixed schools" bill by a vote of 29-16. 2 Cong. Rec. 4176 (May 22, 1874). While a substantial majority of the House also supported the bill, its supporters could not muster the requisite two-thirds vote to get the bill to the floor. 2 Cong. Rec. 4242-43 (May 25, 1874); *see also* McConnell, *supra*, at 1053-79 (discussing the Senate and House votes on these bills).

A. During Reconstruction, States and Localities Took Voluntary Steps to Achieve Integrated Schools, and Congress Raised No Objection

During Reconstruction, some states not only outlawed school segregation to integrate their schools, but took deliberate steps to ensure that their schools would actually be integrated. Federal authorities were well aware of these efforts and raised no constitutional objection.

In 1868, Louisiana ratified a new constitution which not only banned segregation, but included the most ambitious integration clause of any southern state. Roger A. Fischer, *The Segregation Struggle in Louisiana 1862-77*, at 51 (1974) (noting that Article 135 of the Louisiana Constitution mandated mixed schools by banning "separate schools or institutions of learning established exclusively for any race" and directing the legislature to establish new, free public schools in each parish for children of all races to attend together); *see also* Dale A. Somers, *Black and White in New Orleans: A Study in Urban Race Relations*, *1865-1900*, 40 J. S. Hist. 19, 24-25 (1974). In 1870, the Louisiana legislature established new criminal penalties for school officials who impeded integration efforts. Paul A. Kunkel, *Modifications in Louisiana Legal Status Under Louisiana Constitutions, 1812-1957*, 44 J. Negro Hist. 1, 13 (1959). The State Republican Party promised to "enforce the opening of all schools, from the highest to the lowest . . . to all children."[7] Fischer, *supra*, at 43.

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[7] One white Republican party supporter drew constitutional support for school integration from the integrationist goals of the Fifteenth Amendment: "If my colored brother and I touch elbows at the polls, why should not his child and mine stand side by side in the school room?" Fischer, *supra*, at 43.

After integrationists gained control of the New Orleans School Board, Superintendent Thomas W. Conway began integrating the city's schools:

> I had fully concluded to put the system of mixed schools to a thorough, practical test, and I did. The white pupils all left . . . and the school-house was virtually in the hands of the colored pupils. This was the picture one day . . . . [the next day] before I reached my office . . . the children of both races who, on the school question, seemed like deadly enemies, were, many of them, joined in a circle, playing on the green . . . . In a few days I went back to see how the school was progressing, and, to my surprise, found nearly all the former pupils returned to their places.

Louis R. Harlan, *Desegregation in New Orleans Public Schools During Reconstruction*, 67 Am. Hist. Rev. 663, 664 (1962).

At the height of desegregation in New Orleans, one-third of schools were racially integrated—a remarkable feat in a city where whites outnumbered blacks three-to-one. "[B]etween five hundred and one thousand Negroes and several thousand whites attended mixed schools." Harlan, *supra*, at 666; *see also* Fischer, *supra*, at 110 (concluding that the New Orleans public school system was a "remarkable experiment in interracial coexistence"). "Black students remained in predominately white schools in New Orleans in fairly large numbers until the federal soldiers were withdrawn and the Radical Republican government collapsed in 1877."[8] Fischer, *supra*, at 131.

[8] After 1877 both blacks and whites in New Orleans continued to fight to maintain integrated schools. While these efforts were ultimately

During the debates leading up to the Civil Rights Act of 1875, Congress evinced knowledge of voluntary integration in New Orleans and across Louisiana. Cong. Rec. App. 478 (June 16, 1874) (statement of Rep. Darrall) ("[C]olored children attend . . . all the public schools of that State . . . . The school law attaches heavy penalties to the refusal of colored children admission into any of the public schools . . . "). During the congressional debate, Representative Darrall quoted the President of the New Orleans City Board, Judge Henry C. Dibble, as explaining that the school integration project was "proceeding harmoniously." *Id.*

South Carolina's 1868 constitution also included a mixed school clause. S.C. Const. art. X, § 10 (1868). After the constitution came into effect, the state-run University of South Carolina—which at the time offered primary and secondary, as well as college, education—took deliberate steps to create a truly mixed school. *See* William Preston Vaughn, *Schools for All: The Blacks and Public Education in the South, 1865-1877*, at 111-16 (1974); *see also id*. at 114 ("[I]nformation still extant indicates that the student body was 50 percent or more black."). "The new faculty's attitude toward integration was . . . highly favorable." *Id.* at 113.

The South Carolina legislature supported the university's efforts to "integrate on an extensive scale," *id*. at 108, by "establish[ing] 124 state-financed scholarships." *Id.* at 114. "Faculty chairman Benjamin B. Babbitt insisted the

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unsuccessful, it is notable that in the Louisiana court challenges to segregation during that period, no defendant ever advanced the claim that the Fourteenth Amendment *prohibited* the state from integrating schools. *See* J. Morgan Kousser, *Before* Plessy, *Before* Brown*: The Development of the Law of Racial Integration in Louisiana and Kansas* 213, 226-33 *in Toward a Usable Past: Liberty Under State Governments* (Paul Finkelman & Stephen C. Gottlieb eds., 1991).

scholarship students came from 'all classes and conditions of men and fairly represent[ed] the population.'" [9] *Id.* One legislator explained of the efforts to integrate schools, "we are laying the foundation of a new structure here, and the time has come when we shall have to meet things squarely, and we must meet them now or never. The day is coming when we must decide whether the two races shall live together or not." David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am. J. Educ. 236, 248 (1986).

Not only did these deliberate integration efforts have the support of state legislatures that ratified the Fourteenth Amendment, but they raised no constitutional concerns during a period when the level of federal monitoring, especially in the South, was extraordinarily high. William Richter, *American Reconstruction 1862-1877*, at 176 (1996) (explaining that Freedmen's Bureau officials maintained a strong presence in these locales).

B. The Reconstruction Congresses Funded Race-Conscious School Integration Plans

On March 2, 1867, less than a year after passing the Fourteenth Amendment, Congress passed a charter incorporating Howard University—an ambitious race-conscious effort to establish an integrated higher education institution in the nation's capital.[10] Congress funded Howard

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[9] Governor Moses of South Carolina "also indicated his pleasure with integration of the university and was certain that the 'narrow spirit of bigotry and prejudice' had been banished from its halls forever." Vaughn, *supra*, at 112.

[10] Although the primary goal was to offer increased educational opportunities to freedmen, Howard University was, from its inception, open to all races and both sexes, and actively recruited an integrated student body. John A. Carpenter, *Sword and Olive Branch: Oliver Otis*

through the Freedmen's Bureau, which spent an estimated $500,000 on Howard University—nearly five percent of the Bureau's total budget over its lifetime.[11] Dwight O. W. Holmes, *Fifty Years of Howard University: Part I*, 3 J. Negro Hist. 128, 136 (1918).

During this period, the Freedmen's Bureau provided direct financial assistance to other ambitious race-conscious school integration programs. In 1867, the Freedmen's Bureau provided a $7,000 grant to Berea College in Kentucky, a school that would become the "longest-running, most thorough going experiment in integrated education that the United States had yet seen."[12] Sears, *supra*, at 44.

Berea College was reincorporated in early 1866, as Congress was reauthorizing the Freedmen's Bureau Act and drafting the Fourteenth Amendment. During the summer of that year voters in the town of Berea elected district trustees who established this "mixed" school as the district's public school. *Id.* at 53. The school's founders implemented an ambitious integration program, "insist[ing] that the[] educational program . . . incorporate as basic racial principles the total equality of the Negro and a fifty-fifty ratio of black and white students."[13] Paul David Nelson,

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Howard 170 (1964). In fact, Howard University's first students were white women. *Id*. at 171.

[11] General Oliver Otis Howard, for whom the University was named, was the Commissioner of the Freedmen's Bureau in 1867 and an avowed integrationist. He made affirmative efforts to integrate his church and to attract black parishioners. *Id*. at 197.

[12] Chief Justice Salmon P. Chase, Ohio Governor J. Dolson Cox and others contributed to Berea College and publicly supported Berea's integration plan. Sears, *supra*, at 51.

[13] Integration in Berea went far beyond the school context. For founder John G. Fee, "[i]t was never enough . . . to teach equality without having the means to practice it . . . . He considered it pointless to speak of a person having a right if that right could not be enjoyed." *Id*. at 70. The community also engaged in race-conscious housing integration, termed

Experiment in Interracial Education at Berea College, 1858-1908, 59 J. Negro Hist. 13, 13 (1974). In 1869, the Freedmen's Bureau awarded Berea a second grant, of $18,000 to construct Howard Hall, an integrated dormitory.[14] *Berea College, Kentucky: An Interesting History* 48 (1883). Berea's black graduates had an important effect on integrating the teaching corps in Kentucky and across the South, some becoming "the most prominent black professors, administrators, and school founders of their day."[15] Sears, *supra*, at 92-94.

The Freedmen's Bureau similarly supported Maryville College in Tennessee, an integrated primary and secondary school which maintained integrated classes until state law made it illegal in 1901.[16] *See* Scott Blakeman, *Night Comes to Berea College: The Day Law and African American Reaction*, 70 Filson Club Hist. Q. 3, 26 n.45 (1996).

"interspersion" by its leaders. *Id*. at 80. "The region around Berea [was] divided almost equally between whites and blacks . . . virtually no black family own[ed] land without a boundary on some white person's property. The reverse [was] also true: virtually all white people around Berea had freeholding black neighbors." *Id.* at 82.

[14] The new grant was prompted by a trip to Berea by the Assistant Commissioner of the Freedmen's Bureau of Kentucky, who wrote to Commissioner Howard that the school was "one of the most singular sights I ever witnessed . . . all shades and colors, all ages and conditions and all intent on one object, to escape from the bonds of ignorance." Sears, *supra*, at 89.

[15] One such graduate was Frank L. Williams. Sears, *supra*, at 93. Born in Louisville, Williams went on to teach on the integrated faculty at Berea until the school was forced to segregate by Kentucky's Day Law in 1904. Williams spent the remainder of his professional career teaching in the segregated Louisville school system. Williams was the great-grandfather of one of the authors of this brief.

[16] The Freedmen's Bureau also funded Fisk University in Nashville, which like Howard, admitted students of all races. Joe M. Richardson, *A History of Fisk University, 1865-1946*, at 13 (1980).

In sum, the historical record shows that the Reconstruction Congresses did not intend the Fourteenth Amendment to prohibit race-conscious efforts to integrate schools. Congress did not object to deliberate state and local efforts to integrate schools. Indeed numerous congressmen believed the Fourteenth Amendment required school integration, and the federal government itself funded race-conscious integration programs through the Freedmen's Bureau.

II. The Primary Purpose of the Reconstruction Amendments Was to Incorporate Blacks into the Civic, Economic, and Political Mainstream of American Society

Viewed in light of the Reconstruction Amendments' inclusionary purpose, it is not surprising that these voluntary efforts to integrate schools during Reconstruction raised no constitutional objection. In fact, these efforts aimed to achieve the same goals that the Congresses that passed the Thirteenth, Fourteenth, and Fifteenth Amendments sought: to break down discrimination and incorporate blacks into the civic, economic, and political mainstream of American society. *Slaughter-House Cases*, 83 U.S. 36, 71-72 (1872) ("[O]n the most casual examination of the language of [the Thirteenth, Fourteenth, and Fifteenth] amendments, no one can fail to be impressed with the one pervading purpose found in them all . . . the security and firm establishment of . . . freedom . . . and . . . protection [of] the newly-made freeman and citizen from . . . oppression[]."). Louisville and Seattle's voluntary school integration plans are similarly consistent with that goal.

The Fourteenth Amendment, with its guarantee of equal protection of the laws, was a direct outgrowth of Congress's affirmative efforts to secure the rights guaranteed by the

Thirteenth Amendment. Joseph H. Taylor, *The Fourteenth Amendment, the Negro, and the Spirit of the Times*, 45 J. Negro Hist. 1, 27 (1960) ("Following the adoption of the Thirteenth Amendment there was 'the conviction that something more was necessary in the way of constitutional protection' . . . . The statesmen accordingly 'passed through Congress the proposition for the Fourteenth Amendment.'") (internal citations omitted).

The Thirteenth Amendment did more than prohibit slavery; Congress intended that Amendment to eliminate all badges and incidents of slavery as well.[17] *See* Cong. Globe, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866) (statement of Rep. Thayer) ("[W]hat kind of freedom is that which is given by the amendment of the Constitution if it is confined simply to the exemption of the freedmen from sale and barter?"). Congress understood the pervasive denial of education to blacks as an incident of slavery that the Thirteenth Amendment empowered Congress to address. Cong. Globe, 39th Cong., 1st Sess. 322 (Jan. 19, 1866) (statement of Sen. Trumbull) ("Those laws . . . that did not allow [blacks] to be educated, were all badges of servitude. . . . When slavery goes, all this system of legislation . . . goes with it."); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (explaining that Frederick Douglass believed that "education . . . means emancipation").

Following the ratification of the Thirteenth Amendment, many southern states enacted repressive "Black Codes"

[17] Justice Harlan recognized the scope of this constitutional authority in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (explaining that the Thirteenth Amendment "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude").

aimed at isolating blacks from whites.[18] *See* 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) (explaining that the purpose of the Black Codes was "confining [blacks] to the bottom rung of the social ladder"); Margaret Washington, *African American History and the Frontier Thesis*, 13 J. Early Republic 230, 237 (1993) (referring to the Black Codes as "exclusionary"). In response, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Act. Senator Lyman Trumbull, the principal drafter of the Civil Rights Act of 1866, explained that it was necessary to "give effect" to the Thirteenth Amendment's "abstract truths and principles" and to "secure to all persons within the United States practical freedom." Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (statement of Sen. Trumbull).

Likewise, the Freedmen's Bureau Act was intended to give blacks an equal opportunity to participate in the civic and economic life of the country. During debates on the Act's reauthorization, Representative Samuel Moulton explained that "[t]he very object of the bill is to break down the discrimination between whites and blacks." Cong. Globe,

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[18] The Joint Committee on Reconstruction, authorized in December 1865 to investigate conditions in the South, concluded that, given the emergence of the Black Codes, it would be unwise to "abandon" the former slaves "without securing them their rights as free men and citizens." Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. Resolution and Report of the Committee, at xiii (1866). On the committee were long-time proponents of racial equality and integration, John Bingham, the principal author of Section 1 of the Fourteenth Amendment, and Thaddeus Stevens, a central proponent of the Amendment. Also included were George S. Boutwell of Massachusetts and Justin Morrill of Vermont. "Both had been life-long opponents of slavery and both came from states that gave free blacks full legal rights, including suffrage." Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 400 (2004).

39th Cong., 1st Sess. 632 (Feb. 3, 1866) (statement of Rep. Moulton).

Congress passed the Fourteenth Amendment both to ensure the constitutionality of these two statutes and to write them into the fabric of the Constitution so they could not be easily overturned. *See* Jacobus tenBroek, *Equal Under Law* 201 (1965) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt."); Cong. Globe, 39th Cong., 1st Sess. 2462 (May 8, 1866) (statement of Rep. Garfield) ("[E]very gentleman knows that [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."); Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 570 (1989) (noting that the Fourteenth Amendment was passed to secure the rights enumerated in the Civil Rights Act because Congress understood these rights as "essential to political and economic freedom and individual autonomy").

The ratification debates in the Pennsylvania Legislature—the only state whose debates were fully reported—indicate that state legislators shared this view. State Representative J.R. Day stated: "We propose in the first place, to write, in substance, the Civil Rights Bill, the essence of justice." Chester James Antieau, *The Intended*

Significance of the Fourteenth Amendment 180 (1997) (citation omitted).

Beyond constitutionalizing the Civil Rights Act of 1866 and Freedmen's Bureau Acts, the Congress that passed the Fourteenth Amendment aimed to include blacks within the circle of full citizenship through a "national guarantee of equality before the law." Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 257 (1988). The Fourteenth Amendment "uprooted the caste system" and placed blacks on an equal footing with whites in the civic and economic sphere. Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism* 5 (1968); *see also* Charles Sumner, *Promises of the Declaration of Independence, and Abraham Lincoln*, *in* 9 *The Works of Charles Sumner* 367, 424-25 (1874) (stating that the "demon of Caste" must be destroyed and "[t]he same national authority that destroyed Slavery must see that this other pretension is not permitted to survive"). Proponents and opponents alike understood that what was at stake was whether blacks would be "admitted to the rights of citizenship." Cong. Globe, 39th Cong., 1st Sess. 498 (Jan. 30, 1866) (statement of Rep. Van Winkle).

The Fourteenth Amendment's commitment to including blacks as citizens is even clearer when viewed in light of the final element of the Reconstruction project: the Fifteenth Amendment's affirmative grant of political rights. The Fifteenth Amendment guaranteed much more than the right to cast a ballot: it was an inherently integrationist effort to bring people of all races together in the nation's political institutions, including the jury box and the town square.[19]

[19] The First Military Reconstruction Act of 1867, an important precursor to the Fifteenth Amendment, went beyond a colorblind conception of "universal suffrage" to integrate blacks into the political community. Act

Akhil Reed Amar, *America's Constitution: A Biography* 400 (2005) (explaining that the right to vote necessarily encompassed the right to vote as members of juries, to vote inside legislatures—and thus to run for office—and other political rights). After passage of the Fifteenth Amendment, Congress paved the way for integrated juries by banning discrimination in jury service on the basis of "race, color, or previous condition of servitude"—the language of the Fifteenth Amendment itself. 18 U.S.C. § 243 (2000). In addition, while Georgia was initially readmitted into the Union upon agreeing to eliminate racial discrimination at the polls, its representatives were excluded from Congress when the state legislature attempted to deny the right of blacks to hold office. 2 James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield* 464-65 (1884).

Thus understood in light of the Reconstruction project, the Fourteenth Amendment aimed to include blacks in the full benefits of American citizenship. *See* Foner, *supra*, at 251-60. As Justice Harlan articulated in his canonical dissent in *Plessy*, the Fourteenth Amendment's goal was to eliminate the evils of "caste," so that society could become "color-blind" in the sense of abolishing any "superior, dominant, ruling class of citizens," and ensuring that "all citizens are equal before the law." 63 U.S. at 559-60 (Harlan, J., dissenting). Although often misrepresented to suggest that the state must never take account of race, *see, e.g.*, AEI Brief at 10-11, Justice Harlan's argument was not about government means, but about ends. He argued that the segregation of the Louisiana railcar in *Plessy* was unconstitutional because it perpetuated a caste system that

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of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429 (1867). While the Act was motivated by both philanthropic purpose and political partisanship, it was an explicitly race-conscious attempt to fully incorporate blacks into all aspects of political life. C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. Negro Educ. 231, 234-35 (1957).

offended the core purpose of the Fourteenth Amendment. Indeed, Justice Harlan later argued that the Fourteenth Amendment would prohibit "mak[ing] it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested."[20] *Berea College v. Kentucky*, 211 U.S. 45, 69 (1908) (Harlan, J., dissenting).

III. The Reconstruction Congresses Used Race-Conscious Means to Implement the Goals of the Reconstruction Amendments

The Reconstruction Congresses enacted a vast system of federal programs and regulations to achieve the integrative goals of the Reconstruction project. Race pervaded this effort. Still, some have claimed that the Reconstruction Congresses intended to prohibit the state from using any race-conscious means, even to achieve those goals. *See, e.g.*, AEI Brief at 3. This assertion has no basis in the history of Reconstruction. Not only did Congress fund race-conscious school integration efforts during this period, *see infra* Part I.B, but the same Congress that passed the Fourteenth Amendment enacted myriad other race-conscious measures, which it clearly understood as not only permissible but often necessary to achieve the Amendment's goals.[21]

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[20] Justice Harlan also understood the integrative implications of the Fifteenth Amendment's grant of political rights, explaining that, after the Amendment's passage, a state could not "prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day." *Plessy*, 163 U.S. at 558 (Harlan, J., dissenting).

[21] Indeed, Congress rejected an alternative version of the Fourteenth Amendment that might have prohibited all racial distinctions. *See* Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (indicating that only

In 1866, the Reconstruction Congress clashed with President Andrew Johnson over the permissibility of race-conscious legislation. In his message vetoing the Freedmen's Bureau Act, Johnson explained that he opposed the Act because it created "distinction[s] of race and color." 5 *Messages and Papers of the Presidents* 3610-11 (1914). For the first time in history, Congress overrode a presidential veto, passing an emboldened version of the legislation that was even more race-conscious than the original bill.[22]

The same Congress passed numerous other statutes explicitly aimed at giving blacks meaningful opportunities to participate in post-bellum society, many of which employed facially race-conscious means. Congress in 1866 and again in 1867 passed facially race-conscious legislation to ensure black soldiers could secure the financial benefits they earned during service. *See* Act of July 26, 1866 no. 86, §§ 2-4, 14 Stat. 367, 368 (1866) (providing for the payment of bounties to "colored" soldiers and their representatives); Act of Mar. 29, 1867, no. 25, 15 Stat. 26 (1867) (providing for the

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seven senators voted for proposed language expressly prohibiting any law or regulation that drew distinctions based on race).

[22] The new bill contained race-conscious provisions not included in the earlier proposal. While congressional drafters had broadened the statute's scope from "freedmen" to "refugees and freedmen," Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. S. Hist. 271, 275-78 (1995), the new bill gave the two groups different benefits. The bill authorized the Bureau to aid blacks in almost any manner related to their newly-won freedom, while white refugees could only receive the assistance necessary to achieve self-sufficiency. While the earlier bill had authorized construction of schools "for refugees and freedmen," the new bill limited educational programs to blacks. *Compare* S. 60, 39th Cong. (1866) *with* H.R. 613, 39th Cong. (1866). Furthermore, congressmen commonly understood that the bill was intended to benefit blacks. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 513-16 (Jan. 30, 1866) (statements of Reps. Eliot and Smith); *id*. at 544 (statement of Rep. Taylor); *id*. at 634 (statement of Rep. Ritter).

payment due to "colored" soldiers, sailors, and Marines). Opponents criticized these statutes as "class legislation," unfairly "applicable to colored people and not . . . to the white people," Cong. Globe, 40th Cong., 1st Sess. 79 (Mar. 13, 1867) (statement of Sen. Grimes), yet Congress overrode these objections and passed these race-conscious measures in the weeks leading up to and immediately following the adoption of the Fourteenth Amendment. *Id*. at 294 (recording the vote of the Senate); *id*. at 445 (recording the vote of the House). The Thirty-Eighth Congress also established a bank to provide financial services to freedmen and their descendents. Act of Mar. 3, 1865, ch. 92, § 5, 13 Stat. 510, 511 (1865) (incorporating the Freedman's Savings and Trust Company). And Congress passed numerous facially race-conscious statutes to assist impoverished black citizens. *See, e.g.*, Act of Feb. 14, 1863, ch. 33, 12 Stat. 650 (1863) (incorporating the National Association for the Relief of Destitute Colored Women and Children); Act of June 23, 1864, ch. 169, 13 Stat. 201 (1864) (incorporating the Colored Catholic Benevolent Society); Act of Mar. 3, 1865, ch. 118, 13 Stat. 535 (1865) (incorporating the Colored Union Benevolent Association); Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20 (1867) (appropriating welfare benefits to blacks in the District of Columbia).

In addition, the Civil Rights Act of 1866 itself contained facially race-conscious provisions to guarantee enforcement of civil rights for blacks. Ch. 31, 14 Stat. 27, 27 (1866). The Act established new criminal penalties for subjecting blacks or other non-whites to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of *white* persons." Ch. 31, § 2, 14 Stat. 27, 27 (1866) (emphasis added). President Andrew Johnson vetoed the bill because "[t]he object of [that provision] is to afford discriminating protection to colored persons." 6 *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 408

(James Richardson ed., 1899). But Senator Trumbull countered that "protecting the rights of freedmen" required singling out race as the trigger for protection. *See* Cong. Globe, 39th Cong., 1st Sess. 475 (Jan. 29, 1866) (statement of Sen. Trumbull).

Finally, in June 1866, as Congress was approving the Fourteenth Amendment, it also passed the Southern Homestead Act to provide blacks an opportunity to become landowners. Senator Samuel Pomeroy explained that "it need not be disguised that [the Act] is aimed particularly for the benefit of the colored man . . . the 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 (May 22, 1866) (statement of Sen. Pomeroy). The Act offered blacks preferential access to land[23] in an effort to "draw them into the American mainstream." Michael L. Lanza, *Agrarianism and Reconstruction Politics: The Southern Homestead Act* 27 (1990). Representative George W. Julian, the Act's principal sponsor, designed the Act to encourage blacks to develop homesteads alongside white southern loyalists and immigrants. Paul Wallace Gates, *Federal Land Policy in the South: 1866-1888*, 6 J. S. Hist. 303, 306 (1940).

IV. Respondents' Voluntary School Integration Plans are Fully Consistent with the Original Understanding of the Reconstruction Amendments

One hundred and forty years after the Reconstruction Congress and the abolitionist founders of Berea College

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[23] The Act established a six-month window in which freedmen had preferential access to available land. Southern Homestead Act, ch. 127, 14 Stat. 166 (1866); *see also* George R. Bentley, *A History of the Freedmen's Bureau* 134 (1974).

began their work towards a more inclusive society, Respondents in Louisville and Seattle have chosen to continue pursuing the same inclusionary goals. To allow Petitioners "[t]o use the Fourteenth Amendment as a sword against such State power would stultify that Amendment," *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring), and turn the Amendment's original purpose on its head. This Court has never credited Petitioners' ahistorical argument in the school integration context. Instead, this Court has wisely chosen a path consistent with the original goals of the Fourteenth Amendment. Rather than treating segregation and integration as constitutional equivalents, this Court has preserved the right of states and localities to pursue integration through voluntary race-conscious means. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 459 (1982) (concluding that Seattle's "elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State").

Other *amici* have documented the Court's unbroken practice of upholding the use of race in voluntary school integration cases. *See* Brief for NAACP Legal Defense and Educational Fund as *Amicus Curiae* Supporting Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (filed Oct. 10, 2006). We add only that the Court's longstanding approach of distinguishing between integration and segregation in these and other cases is consistent with the original purpose of the Reconstruction Amendments. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 595-96 (1983) (holding that a government agency can deny tax-exempt status to an organization engaged in private segregation even though such *private* action—like de facto segregation—is not constitutionally prohibited); *see also Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003)

(upholding, in the redistricting context, state and local race-conscious efforts to build what Congressman John Lewis called "a truly interracial democracy . . . . the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens").

Louisville and Seattle's plans are clearly consistent with the Reconstruction Amendments' goals of incorporating all citizens into the civic, economic, and political life of the nation. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring) ("[W]ithout education one can hardly exercise the civic, political and personal freedoms conferred by the Fourteenth Amendment"). These plans seek to achieve these goals through limited race-conscious means that fall squarely within the category of integration measures that the Reconstruction Congresses themselves embraced—and that this Court has consistently upheld. Therefore, if the Court chooses to strike down voluntary race-conscious school integration plans as inherently suspect, it should not do so in the name of the original purpose of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, as well as arguments advanced by Respondents, *amici curiae* respectfully urge the Court to affirm the decisions below.

Respectfully submitted,

October 10, 2006

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