To be Argued by:
NICHOLAS O. STEPHANOPOULOS
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.: 2024-11753

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO and DOROTHY FLOURNOY,

Plaintiffs-Appellants,

-against-

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Respondents.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Appellant.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

This argument may sound familiar:

> Where, as here, a [municipality] has chosen [an electoral system] based on race-neutral … principles, can [a voting rights law] constitutionally mandate that the [municipality] go back to the drawing board and adjust [its method of election] solely to hit a certain racial target? No. A statute that requires [municipalities] to substitute neutrally [selected systems] with [other methods] would not satisfy strict scrutiny.

This is the central claim that Defendants make in their brief, time and again. It is why Defendants believe they have capacity to challenge the NYVRA: because, if they are found liable under the statute, they will supposedly violate the Equal Protection Clause by replacing their at-large electoral system with another electoral method for a race-related reason. It is also why Defendants think the NYVRA classifies by race and so is subject to strict scrutiny: because the law requires liable municipalities to change their electoral systems, putatively on a race-related basis.

But Defendants are not the author of this passage. It was actually penned by counsel for Alabama in the U.S. Supreme Court's recent blockbuster case about Section 2 of the federal VRA, *Allen v. Milligan*. *See* Reply Br. for Appellants/Petitioners, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087), 2022 WL 3719169, at *30. And Alabama's position—which is also Defendants' position—did not carry the day in *Allen*. To the contrary, the Court squarely rejected it, explaining that, "for the last four decades, this Court and the lower federal courts

… have authorized race-based redistricting as a remedy for state districting maps that violate § 2." *Allen*, 599 U.S. at 41 (emphasis added). The argument on which Defendants base their entire attack on the NYVRA is therefore doctrinally precluded. A race-conscious remedy for a voting rights violation is, in fact, perfectly lawful. So the specter of being forced to adopt such a remedy neither entitles Defendants to challenge the NYVRA nor amounts to a racial classification.

As the U.S. Supreme Court observed in *Allen*, Defendants' claim cannot be reconciled with voting rights history. In hundreds upon hundreds of suits under both the federal VRA and its state counterparts, jurisdictions have been compelled to revise or replace their electoral systems. Were all these remedies affronts to the Equal Protection Clause because they took race-related concepts into account? That is the implication of Defendants' theory. But that implication is untenable. It would mean that every successful voting rights case for four decades presumptively violated—not vindicated—the federal Constitution's prohibition of racial discrimination in voting.

Indeed, the staggering consequences of Defendants' theory extend far beyond the electoral context. Myriad antidiscrimination statutes require liable parties to amend or eliminate their illegal policies through race-conscious remedies. Title VII of the Civil Rights Act ("Title VII") does so with respect to racially discriminatory employment practices. The Fair Housing Act ("FHA") does so with respect to

racially discriminatory housing practices. New York's own landmark Human Rights Law does so with respect to racially discriminatory employment, housing, education, public accommodation, and credit practices. According to Defendants, all these acts and many more are presumptively unconstitutional. After all, they share the NYVRA's alleged flaw of obliging liable parties to consider race when replacing unlawful policies.

Defendants' major premise, then, is both doctrinally barred and incompatible with the whole body of antidiscrimination law. Their other arguments are deficient as well. Like the Supreme Court, Defendants remain unable to identify any NYVRA provisions that classify by race because they distribute burdens or benefits to individuals on the basis of their race. Defendants mainly point to the statute's use of the term, "protected class." *E.g.*, Br. for Defs. ("Defs.-Br.") 24-25, 28-29, 33-34. But this is a quintessential *reference to*—not *classification by*—race. "[A] statute is [not] automatically subject to strict scrutiny [merely] because it involves race consciousness." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681 (Cal. Ct. App. 2006).

Defendants' version of strict scrutiny is also unrecognizable. Defendants ask this Court to ignore the NYVRA's indisputably compelling objective—ending racial discrimination in voting—because plaintiffs do not have to prove prior discrimination in every vote dilution case. But prior discrimination is not an element

of a claim under the federal VRA or any other state VRA either. Yet no one denies that these laws are "ban[s] on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Defendants further contend that the NYVRA's modest divergence from the *Gingles* framework that applies to federal vote dilution suits negates the statute's narrow tailoring. But every aspect of the *Gingles* framework *is* present, in some form, in the NYVRA. And when the NYVRA results in liability but the federal VRA would not, the NYVRA is *more* effective than its federal analogue at stopping vote dilution.

Lastly, even Defendants cannot support the Supreme Court's sweeping nullification of the *entire* NYVRA with respect to *every political subdivision* in the State. Defendants "take[] no position" on the portions of the Court's decision "invalidating … other aspect[s] of the NYVRA." Defs.-Br. 4. Those portions are unjustifiable and warrant reversal no matter what this Court concludes about the NYVRA's prohibition of vote dilution.

Accordingly, this Court should reverse the Supreme Court's order, deny Defendants' motion for summary judgment, and remand this case for further proceedings on Plaintiffs' vote dilution claims. If this Court reaches the constitutionality of the NYVRA, it should hold that the statute is facially valid, as Justice Paul I. Marx, sitting in the Supreme Court, Nassau County, recently ruled.

See Coads v. Nassau Cnty., No. 611872/2023 (Sup. Ct., Nassau Cnty. [Paul I. Marx, J.] Dec. 6, 2024).

ARGUMENT

I. Defendants Lack Capacity to Challenge the NYVRA.

A. The Supreme Court Was Required—but Failed—to Evaluate the Merits of Defendants' Claim that the Dilemma Exception Applies Here.

As they must, Defendants concede that municipalities, being creatures of the State, generally cannot attack the State's own laws. Defs.-Br. 14. Defendants nevertheless maintain that they qualify for the "dilemma exception" to this rule, which applies when it is likely that a municipality will be compelled to violate a clear constitutional proscription if the municipality is not allowed to proceed with its claim. *Id.* at 15. Defendants give (and then continuously repeat) one reason why this exception is supposedly triggered. In their view, *any action* they might take if found liable in this suit would *necessarily* infringe the Equal Protection Clause because such a remedy would be conscious of race. "To be absolutely clear," Defendants say, "the Town's position is that any forced change of its race-neutral at-large election system to *comply with the NYVRA* would violate the Equal Protection Clause." *Id.* at 16; *see also id.* at 17-20 (reiterating this argument).

On the merits, as the next section demonstrates, Defendants' stance is precluded by precedent and radical in its implications. *But the Supreme Court never*

evaluated those merits. It simply noted Defendants' assertion that the dilemma exception applies and then immediately deemed the exception applicable. NYSCEF-Doc-147 at 12-13. This was pure legal error that requires reversal. Under the case law on the exception, the Court should have examined whether a constitutional violation is likely or "steps removed" and "speculative," *Merola v. Cuomo*, 427 F. Supp. 3d 286, 293 (N.D.N.Y. 2019); whether Defendants' reasoning is sound or "not persuasive" and "unconvincing," *Cnty. of Nassau v. State,* 32 Misc. 3d 709, 713 (Sup. Ct., Albany Cnty. [Michael C. Lynch, J.] 2011); and whether the future action invoked by Defendants is "expressly forbidden" or of uncertain legality, *Blakeman v. James*, No.2:24-cv-1655, 2024 WL 3201671, at *14 (E.D.N.Y. Apr. 4, 2024) (internal quotation marks omitted). The Court did none of this. It merely registered Defendants' claim that the exception is triggered and then ended its discussion of this issue.

Defendants "respectfully submit[] that," in their opinion, their "core theory is compelling." Defs.-Br. 20. But it was the Supreme Court's job to *assess* Defendants' theory and *find* it compelling. Defendants' (misplaced) confidence in the strength of their position cannot substitute for the Court's failure to engage with that position in any way in its section on the dilemma exception.

Defendants also try to distinguish *Merola*, *County of Nassau*, and *Blakeman*. They say their argument about a future constitutional violation is more cogent than

that of each municipality in these cases. *Id.* at 19-20. That is incorrect. *See* Br. for Pls.' ("Pls.-Br.") 20-21. Additionally, each court in these cases carefully analyzed the municipality's claim. None simply accepted the municipality's say-so that it would be forced to violate the Constitution. *See Blakeman*, 2024 WL 3201671, at *14; *Merola*, 427 F. Supp. 3d at 291-93; *Cnty. of Nassau*, 32 Misc. 3d at 712-14. Defendants further contend that none of these cases involved "a defense grounded in the U.S. Constitution." Defs.-Br. 20. That is legally irrelevant. In any event, two of the cases did feature a federal constitutional claim. The county clerk in *Merola* cited the Supremacy Clause, *see* 427 F. Supp. 3d at 292, and the county in *Blakeman* relied on the Equal Protection Clause—the same provision wielded by Defendants here, *see* 2024 WL 3201671, at *1.

B. Defendants' Claim That Race-Conscious Remedies Are Necessarily Unconstitutional Is Wrong.

Turning to the merits, an initial problem[1] with Defendants' stance is their inability to cite any authority for it. Defendants *say*, over and over, that the Equal

[1] Another threshold problem is Defendants' inability to *specify* which purportedly unconstitutional actions they may be forced to take. Compare Defendants' silence on this matter with the county's listing of six particular acts in *County of Nassau*, 32 Misc. 3d at 712-13, which *still* did not suffice to trigger the dilemma exception. Moreover, the most plausible remedy in this case—a court order that Newburgh switch to a different electoral system—would not require Defendants to do anything at all since they do not administer the Town's elections.

Protection Clause would necessarily be violated if they had to adopt any remedy because of this NYVRA vote dilution suit. But none of these many statements is followed by a reference to any court decision, statute, or other source corroborating this view. Defs.-Br. 16-20. To be sure, there *is* abundant authority for the proposition that a racially-gerrymandered single-member district is an improper remedy for a voting rights violation. *See, e.g.*, *Allen*, 599 U.S. at 27-28 (describing several such districts from earlier U.S. Supreme Court cases). But Defendants overtly refuse to "limit[] [their] arguments in any way to a narrow *Shaw* theory." Defs.-Br. 17. This is because Defendants are after bigger game: the recognition of a new theory that forbids any race-conscious relief for an infringement of a voting rights law.

Unfortunately for Defendants, not only is there no authority *for* this theory, many cases conclude that race-conscious relief *is* appropriate after a court has found a violation of a voting rights or other antidiscrimination law. Again, this is exactly what *Allen* held just last year. Echoing Defendants, Alabama averred that the federal Constitution "does not authorize race-based redistricting as a remedy for § 2 violations." 599 U.S. at 41. The U.S. Supreme Court emphatically rejected this claim. "[F]or the last four decades, this Court and the lower federal courts ... have authorized race-based redistricting as a remedy for state districting maps that violate § 2." *Id.* Plaintiffs highlighted this ruling in their opening brief, Pls.-Br. 26-27, but Defendants' response is to act as if *Allen* never happened.

Allen is also far from the only case to hold that race-conscious relief in the wake of a civil rights violation is valid. In another challenge to the NYVRA, Defendants' counsel made the same argument they press here. Justice Marx rebuffed this argument and upheld the statute, commenting that "race consciousness does not lead inevitably to impermissible race discrimination." *Coads*, slip op. at 15 (internal quotation marks omitted). In response to a facial attack on the California VRA, the California Court of Appeal similarly remarked that, "to be successful," a municipality would have to show "not only that unconstitutional remedies are consistent with the [California VRA], but that they are mandated by it. They are not." *Sanchez*, 145 Cal. App. 4th at 688.

Outside the electoral context, too, Defendants' theory runs into a wall of judicial opposition. Title VII imposes liability on employers whose practices have a disparate impact on members of a protected class. *See* 42 U.S.C. §2000e-2(k). The U.S. Supreme Court allows remedial "actions that are themselves based on race" not only "when there is a provable, actual violation" of Title VII. *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009). Rather, such relief is also permissible when there is merely "a strong basis in evidence of disparate-impact liability." *Id.* Likewise, the FHA prohibits housing practices that have a disparate impact on protected class members. *See* 42 U.S.C. §§3605-06. Again, to remedy established or strongly suspected violations, "race may be considered." *Tex. Dep't of Hous. & Cmty. Affairs v.*

Inclusive Cmties. Project, Inc., 576 U.S. 519, 545 (2015). "[M]ere awareness of race in attempting to solve [disparate-impact] problems … does not doom that endeavor at the outset." *Id.*

There is a good explanation for this judicial agreement that Defendants' theory is wrong. If it were right, then an enormous number of race-conscious remedies for civil rights violations over the years must have been unconstitutional. As noted earlier, hundreds and hundreds of jurisdictions have been compelled to alter their electoral methods under both the federal VRA and its state counterparts. Pls.-Br. 25-26. In *every one* of these cases, a jurisdiction had to "chang[e] its election system with the express goal of permitting citizens statutorily lumped together by race to elect more candidates of their choice," as Defendants derisively characterize the act of curing vote dilution. Defs.-Br. 16. Far from being unlawful, this act "is the whole point of the enterprise." *Allen*, 599 U.S. at 33. "The contention that [vote dilution remedies] must be entirely 'blind' to race has no footing in our … law." *Id.*

Analogously, in countless more disparate-impact cases under Title VII and the FHA, employers and housing providers, respectively, have been obliged to modify their employment and housing practices. *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1632-36 (2019) (tallying disparate-impact claims under Title VII, the FHA, and other statutes). In each of these cases, too, a liable defendant had to "lump[] together"

individuals "by race" in order to analyze how they would be affected by an alternative policy. Defs.-Br. 16. After all, this is the only way to know whether a given remedy will, in fact, eliminate or alleviate the original racial disparity.

Defendants' assertion that they will necessarily violate the Equal Protection Clause if they are found liable in this suit is thus "not persuasive" and "unconvincing." *Cnty. of Nassau*, 32 Misc. 3d at 713. The logic underlying this assertion has been spurned by a long series of court decisions, because any other outcome would eradicate vast swaths of antidiscrimination law. Consequently, the dilemma exception does not apply here, meaning that Defendants lack capacity to challenge the NYVRA.[2]

II. The NYVRA Is Facially Constitutional.

A. The NYVRA Employs No Racial Classifications.

1. The NYVRA Does Not Require Municipalities to Classify by Race.

Due to Defendants' lack of capacity, this Court need not reach the facial constitutionality of the NYVRA. If the Court does address this issue, it should hold,

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[2] Defendants' lack of capacity at this juncture hardly insulates the NYVRA from judicial review. Defendants themselves may renew their challenge, on an as-applied basis, if and when they are ordered to do anything that is likely unconstitutional. Parties other than political subdivisions are not bound by the no-capacity rule in the first place.

as Justice Marx recently did, that the statute "does not use racial classifications" and "passes rational basis review." *Coads*, slip op. at 12, 21. The law does not classify by race because none of its elements allocates anything on a racial basis or even pertains to individuals (as opposed to political subdivisions). Pls.-Br. 31-41. The law is therefore subject only to rational basis review, which it easily survives.

While Defendants make a variety of claims about why the NYVRA purportedly classifies by race, their core argument is the same reason why Defendants believe they have capacity to attack the statute. In Defendants' view, the law requires municipalities to classify their residents on a racial basis in order to cure or avoid NYVRA violations. In so doing, municipalities allegedly confer "electoral success" to some voters while taking it away from others. Defs.-Br. 24-27, 29-33 (presenting and repeating this position).

To see why this argument is wrong, focus on what municipalities may actually do to remedy or prevent NYVRA violations. Under the statute, one kind of vote dilution claim is based on proof of racially polarized voting. N.Y. Election Law §17-206(2)(b)(i)(A). So, to determine whether this claim is viable, municipalities may estimate the voting behavior of different groups using well-established empirical methods. In their opening brief, Plaintiffs showed that racially polarized voting is different from anyone's race per se because it involves voters' *actions*, not their *racial identities*. Pls.-Br. 37. Defendants never contest this distinction. So if

municipalities choose to analyze racially polarized voting, they do not thereby classify by race.[3]

Next, the other kind of vote dilution claim under the NYVRA is based on the totality of the circumstances, which revolve around historical and ongoing racial discrimination. N.Y. Election Law §§17-206(2)(b)(i)(B), (3). To evaluate the strength of this claim, municipalities may study their past and present records with respect to racial discrimination. Discrimination against protected class members—*conduct* taken with the intent or effect of harming them—is obviously not the same as anyone's race as such. Pls.-Br. 38. So, again, municipalities that assess this element do not classify by race.

Lastly, under either vote dilution theory, there must be a reasonable alternative policy that would improve the protected class's representation relative to the status quo. N.Y. Election Law §17-206(2)(a). To find out if such a policy exists, municipalities may investigate how different electoral systems—at-large election,

[3] Defendants repeatedly suggest that racially polarized voting is ubiquitous based on a line from a 2017 U.S. Supreme Court decision. Defs.-Br. 3, 26, 31, 47, 49-50, 52-53 (citing *Cooper v. Harris*, 581 U.S. 285, 304 n.5 (2017)). However, the prevalence of a condition that calls for no racial classification is legally irrelevant. It is also an empirical issue, and the latest evidence indicates that racially polarized voting is decreasing in most areas. *See, e.g.*, Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 Am. Pol. Sci. Rev. 922, 930 (2024).

single-member districts, ranked-choice voting, and so on—would likely perform given the size and voting behavior of different groups. Once more, this quantitative examination of the probable *actions* of voters and candidates is not collapsible to anyone's racial identity alone. Pls.-Br. 39-40. So it, too, entails no racial classification.

Municipalities considering their potential liability for vote dilution do not classify by race for one more reason. Any steps they take to reform or replace their existing methods of election are necessarily and exclusively implemented *at the municipal level*. None of these steps requires *individuals* to do anything at all. Both before and after the steps are taken, all voters cast their ballots in precisely the same way. Accordingly, the NYVRA does not compel municipalities to do anything on the basis of race, *and* it does not force them to do anything *to individuals*. *See, e.g.*, *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982) (a law "embod[ies] a racial classification" only if it "says or implies that *persons* are to be treated differently on account of their race" (emphasis added)).

All these points hold using Defendants' terminology of "electoral success."[4] Of course, the NYVRA, like any voting rights law, is concerned with the likely representation of different groups. To reiterate, "[t]hat is the whole point of the enterprise." *Allen*, 599 U.S. at 33. But the NYVRA does *not* distribute electoral success on the basis of anyone's race. Instead, it assigns liability, and demands relief, based on the elements discussed above—racially polarized voting, historical and ongoing racial discrimination, and the existence of a reasonable alternative policy—none of which boils down to race per se. Nor does the NYVRA allocate electoral success *to individual voters*. "[I]ndividual voters" have no "interest in the overall composition of the legislature." *Gill v. Whitford*, 585 U.S. 48, 68 (2018). "Group political interests"—which the NYVRA may affect—are distinct from "individual legal rights." *Id.* at 72.

The fallacy of Defendants' logic is also exposed by applying it to Section 2 of the federal VRA, which has bound every municipality in the country for decades.

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[4] On the topic of Defendants' terminology, they refer to "lumping" voters by race dozens of times. However, the NYVRA is much *less* conducive to "lumping" than disparate impact statutes in other areas (like employment and housing). In those areas, individuals of the same race are *automatically* grouped for analysis. Under the NYVRA, in contrast, voters are grouped only if—and to the extent that—their voting behavior is cohesive. If there is no political cohesion, then there is no racially polarized voting—and hence no possibility of liability under the theory for which this is an element. N.Y. Election Law § 17-206(2)(b)(i)(A).

Proof of racially polarized voting is necessary to make out a vote dilution claim under Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 52-74 (1986). So every municipality in America *already* has to analyze racially polarized voting to evaluate its potential Section 2 liability, without anyone supposing this constitutes racial classification on a national scale. Similarly, the totality of the circumstances is part of a Section 2 claim, *see* 52 U.S.C. §10301(b), as is the existence of a "reasonable alternative voting practice," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). So every municipality must already scrutinize the NYVRA's other elements, too, yet this has never been thought to be a vast program of racial classification. Indeed, Section 2 requires *more* contemplation of race-related concepts than does the NYVRA, because the first *Gingles* prong also obliges municipalities to assess the geographic distribution of protected class members. *See Gingles*, 478 U.S. at 50. If anything is "a racial-classification scheme, from top to bottom," under Defendants' reasoning, it is Section 2—but that would come as news to every court in the land. Defs.-Br. 25.

It is revealing as well to compare the NYVRA to an *actual* "racial-classification scheme" like affirmative action. Unlike the NYVRA, affirmative action advantages minority members *because of their race as such*. Solely because they identify with one race rather than another, certain applicants get a boost in their odds of being admitted to a university or hired by an employer. *See, e.g.*, *Students*

for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181, 192-97 (2023). Also unlike the NYVRA, affirmative action advantages *individual minority members*. Particular, identifiable people are more likely to be admitted or hired. The benefits accrue to them specifically, not to groups to which they belong or municipalities where they live. These critical contrasts are why Justice Marx recently concluded, correctly, that "[a]ffirmative action … provide[s] an inapt analogy to the NYVRA." *Coads*, slip op. at 17.

Defendants further observe that, to cure or avoid NYVRA violations, municipalities must have the "goal" or "purpose" of improving the likely representation of protected class members. Defs.-Br. 30-32. This point is irrelevant to the issue of whether the NYVRA *classifies* by race. A racial classification is one reason why strict scrutiny would apply to a statute; "an invidious discriminatory purpose" is a completely separate basis for such stringent review. *Washington v. Davis*, 426 U.S. 229, 242 (1976). Moreover, the intention that municipalities exhibit when remedying or preventing NYVRA violations is the polar opposite of "invidious." It is *stopping* racial discrimination in voting, *ending* vote dilution, *enabling* citizens of all races to cast equally effective votes. This "intent to remedy a race-related harm" simply does not "constitute[] a racially discriminatory purpose." *Sanchez*, 145 Cal. App. 4th at 687.

2. The NYVRA Does Not Classify by Race in Any Other Way.

Defendants' core argument why the NYVRA supposedly classifies by race is thus meritless. The statute does not compel municipalities to racially classify (or to act with an invidious purpose). Defendants' other claims about racial classifications are faulty as well. Start with their discussion of Section 2 of the federal VRA. Realizing that their theory means that Section 2 must classify by race, Defendants double down and assert that "Section 2 must satisfy 'strict scrutiny.'" Defs.-Br. 36. But no court has ever held Section 2 to this standard. *See, e.g.*, *Sanchez*, 145 Cal. App. 4th at 682 ("No court has ever suggested … that strict scrutiny applies to section 2 of the FVRA …"); *Coads*, slip op. at 15 ("Section 2 of the VRA has not been … required to pass strict scrutiny.").

Lacking any apposite precedent, Defendants cherry-pick language from the background section of one U.S. Supreme Court opinion, in which the Court happened to use "VRA" and "strict scrutiny" in the same sentence. But the Court never stated, or even hinted, that the former is subject to the latter. Here is the sole passage that Defendants cite for their position:

> In technical terms, we have assumed that complying with the VRA is a compelling state interest, and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has good reasons for believing that its decision is necessary in order to comply with the VRA.

Abbott v. Perez, 585 U.S. 579, 587 (2018) (cleaned up). This plainly does not say that strict scrutiny applies to Section 2. It actually says close to the opposite: that compliance with Section 2 is presumably "*a compelling state interest*" that can *rescue* a district drawn for a racially predominant reason—*save* it from invalidity—if the district is, in fact, "necessary in order to comply with the VRA." *Id.* (emphasis added). Defendants pluck the terms "VRA" and "strict scrutiny" and combine them in a way that flips the passage's meaning on its head. In reality, the passage merely confirms that a racially predominant districting decision—not Section 2—is subject to strict scrutiny.

Defendants also try to avoid their theory's implication that all antidiscrimination laws (not just Section 2) must satisfy strict scrutiny by contending that the NYVRA "do[es] not prohibit racial discrimination." Defs.-Br. 30. Of course it does. True, the NYVRA does not forbid *intentional* racial discrimination *alone*. Instead, it is a conventional disparate impact statute, barring electoral practices that have discriminatory *effects* on protected class members. Such laws fill the codes of Congress and state legislatures alike. Among their ranks, they include the federal VRA, all state VRAs, Title VII, the FHA, New York's Human Rights Law, and many more. *See, e.g.*, *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 348 (1983) (noting that a practice that causes "a disparate impact upon a protected class of persons violates the Human Rights Law"). Defendants are entitled to their opinion

that some other label should attach to disparate impact discrimination. But that opinion is shared by neither the political branches nor the courts, which consider "disparate-impact discrimination" to be perfectly cognizable. *Ricci*, 557 U.S. at 578.

Reaching beyond their core racial classification argument, Defendants claim that the NYVRA classifies by race because it refers to a "protected class," that is, "a class of individuals who are members of a race, color, or language-minority group." Defs.-Br. 24-25, 28-29, 33-34 (citing Election Law §17-204(5)). In their opening brief, Plaintiffs pointed out that this is a paradigmatic *reference to*—not *classification by*—race, which the NYVRA has in common with the federal VRA and innumerable other laws. Pls.-Br. 36-37. Defendants never grapple with these objections, which, Justice Marx recently ruled, are fatal to their position. *See Coads*, slip op. at 14 ("[T]he same term is used in Section 2 of the VRA in the same manner, and [this usage] has repeatedly been upheld by the [U.S.] Supreme Court.").

Lastly, Defendants make puzzling comments about white voters and vote dilution law. They declare that white voters cannot bring vote dilution claims under the NYVRA. Defs.-Br. 34. But they clearly can because they are "members of a race … group," N.Y. Election Law §17-204(5), just as they can allege vote dilution under the federal VRA, *see, e.g.*, *United States v. Brown*, 494 F. Supp. 2d 440, 444 (S.D. Miss. 2007) ("Section 2 provides no less protection to white voters than any other class of voters."). Moreover, there is nothing "unreasonable" or "absurd" about this

situation. Defs.-Br. 34. Some claims by white voters will succeed, as when voting is racially polarized and a reasonable alternative policy would improve their representation. Other claims of theirs (as of Black, Latino, or other voters) will fail. In Newburgh, for example, white voters would be unable to satisfy the reasonable-alternative-policy requirement because they already enjoy the maximum possible representation—four seats out of four—on the Town Board. NYSCEF-Doc-72 ¶42.

Because the NYVRA does extend to white voters, Defendants' hypothetical law advantaging them is perplexing. Defs.Br. 26-27, 32. In some circumstances, the NYVRA *already* "require[s] [a] town to change its election system" to "allow white-favored candidates to have a greater chance of electoral success." *Id.* at 26. Now, if a one-sided statute permitted *only* white voters to bring vote dilution claims, it would likely have an invidious purpose and thus be subject to strict scrutiny. But this one-sided law is not the NYVRA, whose protections apply to *all* "members of a race, color, or language-minority group." Election Law §17-204(5).

B. The NYVRA Is Narrowly Tailored to Preventing and Remedying Racial Discrimination in Voting.

1. The Compelling Interest Advanced by the NYVRA Cannot Be Ignored Because It Is Not an Element in Each Case.

If this Court became the first appellate body to subject a state VRA to strict scrutiny, the NYVRA would still be constitutional. The state interest it furthers—preventing and remedying racial discrimination in voting—is among the most

compelling imaginable. Each element of the statute also dovetails with what the U.S. Supreme Court has described as the "essence" of vote dilution. *Gingles*, 478 U.S. at 47.

Defendants argue that the NYVRA's antidiscrimination interest should be discounted because past discrimination does not have to be proven in each vote dilution case. Defs.-Br. 40-41. In their opening brief, Plaintiffs explained that the ultimate interest served by a statute is rarely an explicit element of a claim. For instance, past discrimination does not have to be shown in a vote dilution suit under Section 2 of the federal VRA either. Yet no one doubts that Section 2 is a "ban on racial discrimination in voting." *Shelby Cnty.*, 570 U.S. at 557; *see* Pls.Br. 45-47. Defendants fail to acknowledge, much less rebut, these points.

Defendants also complain about a lack of "identified discrimination" substantiating the State's antidiscrimination interest. Defs.-Br. 40-41. In their opening brief, Plaintiffs summarized the voluminous evidence about New York's "extensive history of discrimination against racial, ethnic, and language minority groups in voting." N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022). This evidence includes legislative committee reports, detailed white papers, past coverage under Section 5 of the federal VRA, and dozens of Section 2 suits. Pls.Br. 44-45. Again, Defendants are silent in the face of this mountain of material, which makes clear that voting discrimination *has* been "identified" here.

Defendants further maintain that states are more limited than the federal government in the steps they may take to stop discrimination. Defs.Br. 42. This may have been true in an earlier era. Since the 1990s, however, "congruence between the standards applicable to federal and state racial classifications" has been one of the "general propositions" on which equal protection law is based. *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223, 226 (1995). Today, "all racial classifications, imposed by whatever federal, state, or local governmental actor, [are] analyzed" identically. *Id.* at 227. [5]

2. The NYVRA's Modest Divergence from the *Gingles* Framework Improves Its Tailoring.

Proceeding to the tailoring stage of strict scrutiny, Defendants fixate on the NYVRA's modest divergence from the *Gingles* framework that governs vote dilution claims under Section 2 of the federal VRA. According to Defendants, these subtle differences somehow attenuate the statute's connection to its compelling goal of curbing racial discrimination in voting that takes the form of vote dilution.

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[5] New York's authority to combat discrimination also stems from its own constitution, not the Reconstruction Amendments. "In … express exercise of the police power, and in fulfillment of the guaranty of the [New York] Constitution for civil rights, the Legislature [has repeatedly] found that the practice of discrimination against any of New York's inhabitants because of race … is both a threat to the rights of inhabitants and a menace to the democratic state." *Holland v. Edwards*, 122 N.Y.S.2d 353, 357 (App. Div. 1953)

Defs.Br. 43-53. To begin with, the contrasts between the *Gingles* framework and the NYVRA are minor indeed. The below table lists each element of the *Gingles* framework and the corresponding NYVRA element. Three of the four elements are *identical*. The one element that is different under the NYVRA, its analogue to the first *Gingles* prong, simply expands the set of reasonable alternative policies that are sufficient to satisfy this condition.

Section 2 Element	Corresponding NYVRA Element
Gingles prong one: Is a reasonably-configured majority-minority district available as a remedy?	Is a reasonable alternative policy that would improve the representation of protected class members available as a remedy?
Gingles prong two: Are protected class members politically cohesive?	Identical
Gingles prong three: Do other members of the electorate vote as a bloc?	Identical
Totality of the circumstances considering past and present discrimination	Identical

Focusing on the first *Gingles* prong, Defendants note that the NYVRA lacks its requirement that protected class members be "geographically compact." *Gingles*, 478 U.S. at 50; *see* Defs.Br. 43. But the very same NYVRA clause that disavows this condition says that the geographic distribution of protected class members "may be a factor in determining an appropriate remedy." Election Law §17-206(c)(viii). The statute thus explicitly guards against the only possible unlawful outcome here: the creation of a noncompact remedial district that amounts to an illegal racial

gerrymander. This contrast with the *Gingles* framework also significantly *improves* the NYVRA's tailoring to its goal of ending vote dilution. Even Defendants seem to concede that geographically dispersed individuals can suffer from vote dilution. Defs.-Br. 53. These people are out of luck under the federal VRA but still have a chance to prevail under the NYVRA.

Defendants further observe that claims based on the availability of crossover and influence districts, which are barred by U.S. Supreme Court constructions of the first *Gingles* prong, are allowed by the NYVRA. *Id.* at 43-45, 51-52.[6] This case, however, involves no such claims. In Newburgh, it is possible to draw at least one reasonably-configured majority-minority Town Board district—exactly the showing required by the first *Gingles* prong. NYSCEF-Doc-92. Moreover, when the Court examined crossover and influence district claims, it did so as a matter of statutory interpretation. The plurality that held that "§ 2 does not require crossover districts [did] not consider the permissibility of such districts as a matter of legislative choice

[6] Defendants also mention *coalition* district claims, Defs.Br. 44-45, 52, but their availability has been assumed by the U.S. Supreme Court, *see Growe v. Emison*, 507 U.S. 25, 41 (1993), and they are permitted in the Second Circuit, *see, e.g.*, *NAACP Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020), *aff'd*, 984 F.3d 213 (2d Cir. 2021).

or discretion." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality opinion).[7] Likewise, when the Court first confronted an influence district claim, it "assume[d], *arguendo*, [the claim] to be actionable," and did not suggest that the claim's recognition would raise any constitutional problems. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

On to the second *Gingles* prong—the political cohesion of protected class members—which Defendants wrongly claim is not an element of the NYVRA. Defs.-Br. 44, 52. It certainly is. "[V]oting patterns … are racially polarized," Election Law §17-206(2)(b)(i)(A), only if protected class members vote cohesively for certain candidates, other members of the electorate vote cohesively for other candidates, and a large gulf exists between these groups' preferences. Protected class members who are *not* politically cohesive cannot be racially polarized from other members of the electorate. *See, e.g.*, *Coads*, slip op. at 23 ("[T]he requirement of showing racially polarized voting merges the second and third *Gingles* preconditions."). To confirm the point, the NYVRA stipulates that members of

[7] Defendants play fast and loose with *Bartlett*, neglecting to mention that it was a plurality opinion and wrongly suggesting that it involved *all* the *Gingles* prongs—not just whether the first *Gingles* prong allows crossover district claims. Defs.Br. 40, 43, 50. Additionally, the "serious constitutional concerns" invoked by the *Bartlett* plurality, 556 U.S. at 21, are simply those that arise when districts are drawn for racially predominant reasons.

multiple protected classes "may be combined" only if they are *jointly* "politically cohesive." Election Law §17-206(2)(c)(iv). This provision would be inexplicable if members of a *single* protected class did *not* need to be cohesive.

The last difference between the *Gingles* framework and the NYVRA is that, under the former, plaintiffs must prove racially polarized voting *and* the totality of the circumstances, while under the latter, plaintiffs may establish *either* of these elements. Contrary to Defendants' assertions, Defs.Br. 45-46, 52-53, this difference, too, is constitutionally irrelevant. The totality of the circumstances must be considered under the federal VRA merely because the statute says so. *See* 52 U.S.C. §10301(b). This is a *statutory* command, not a *constitutional* one. And, in fact, the totality-of-circumstances stage often adds little to Section 2 vote dilution suits. According to the definitive study of Section 2 litigation, the vast majority of court decisions that deemed the *Gingles* prongs satisfied "proceeded to a favorable outcome for the plaintiff," frequently with "only a perfunctory review of the" totality of the circumstances. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 660 (2006).

Finally, Defendants return to their idiosyncratic view that only intentional discrimination is "real" discrimination that states may choose to combat. "'[V]ote dilution,'" the evil the NYVRA seeks to eradicate, "is not even arguably racial

discrimination," Defendants say. Defs.-Br. 47. The *Gingles* Court—the very Court whose framework Defendants exalt—would beg to differ. That Court understood that "[f]ocusing on … discriminatory intent … asks the wrong question." 478 U.S. at 73. This is because the "essence" of vote dilution is not intentional discrimination but, rather, that an electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [different voters] to elect their preferred representatives." *Id.* at 47. In turn, these critical "social and historical conditions" are racially polarized voting, *see, e.g.*, *id.* at 68, and/or historical and ongoing discrimination, *see, e.g.*, *id.* at 70. Of course, these conditions are the very elements of vote dilution liability under the NYVRA. Consequently, contra Defendants, each element squarely addresses a facet of "'vote dilution,' as understood by the Supreme Court in *Gingles*." Defs.-Br. 49.

C. This Court May Consider the NYVRA's Undeniably Lawful Applications.

Plaintiffs argued in their opening brief that the NYVRA's "facial nullification" is also improper because the statute is not unconstitutional "in every conceivable application." *Cohen v. State*, 94 N.Y.2d 1, 8 (1999) (internal quotation marks omitted); *see* Pls.-Br. 57-58. For instance, everyone agrees that the law is valid in circumstances where a successful claim under Section 2 of the federal VRA could have been brought. Defendants object that "Plaintiffs' experts never conducted

any *Gingles* preconditions analysis," Defs.-Br. 54. They actually did. Dr. Matt Barreto assessed whether a reasonably-configured majority-minority Town Board district can be drawn (the first *Gingles* prong), the extent of political cohesion among Black and Latino voters in Newburgh (the second prong), and the extent of white bloc voting in the Town (the third prong). NYSCEF-Doc-87; NYSCEF-Doc-92. And Dr. Sandoval-Strausz evaluated the totality of the circumstances with respect to Newburgh. NYSCEF-Doc-84.

Defendants also note that Plaintiffs did not raise this argument below. Defs.-Br. 53-54. But Plaintiffs did not do so because Defendants never claimed that the NYVRA's vote dilution provisions are *facially* unconstitutional—unlawful in *every* conceivable application. In all their summary judgment briefing, Defendants never attacked these provisions in such sweeping terms. NYSCEF-Doc-70; NYSCEF-Doc-129. Instead, it was the Supreme Court that decreed, sua sponte, that both these provisions and all the NYVRA's other sections must be "stricken in [their] entirety." NYSCEF-Doc-147 at 2. Plaintiffs cannot be faulted for not anticipating a ruling for which Defendants did not even ask.

III. Even Defendants Do Not Support the Supreme Court's Nullification of the Rest of the NYVRA.

As just noted, the Supreme Court facially nullified the *entire* NYVRA, including myriad provisions in no way implicated in this case. The Court did so

without identifying these provisions, receiving briefing about them, or mentioning the statute's robust severability clause. Even Defendants do not support this extraordinary action, "tak[ing] no position on" the portions of the Court's decision "invalidating … other aspect[s] of the NYVRA." Defs.-Br. 4. Those portions should be reversed no matter how this Court analyzes the statute's prohibition of vote dilution.

CONCLUSION

For the foregoing reasons, this Court should reverse the Supreme Court's decision and remand this case for further proceedings on Plaintiffs' vote dilution claims.

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/s/ Ruth Greenwood

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Arkansas State Conference NAACP v. Arkansas Board of Apportionment, 8th Cir.(Ark.), November 20, 2023

138 S.Ct. 2305
Supreme Court of the United States

Greg ABBOTT, Governor of Texas, et al., Appellants
v.
Shannon PEREZ, et al.
Greg Abbott, Governor of Texas, et al., Appellants
v.
Shannon Perez, et al.

Nos. 17–586, 17–626
|
Argued April 24, 2018.
|
Decided June 25, 2018.

Synopsis

Background: Voters, state and federal legislators, and voting rights organizations brought actions alleging that Texas's redistricting plans for United States House of Representatives, Texas House of Representatives, and Texas Senate violated Constitution and Voting Rights Act (VRA). After the District Court issued interim redistricting plans, the Texas Legislature adopted court's interim plans without change, the cases were consolidated, and bench trial was held. A three-judge panel of the United States District Court for the Western District of Texas, Xavier Rodriguez, J., 267 F.Supp.3d 750, 274 F.Supp.3d 624, entered orders barring Texas from using districting plans in effect to conduct the current year's elections, and appeal was taken.

Holdings: The Supreme Court, Justice Alito, held that:

[1] orders were effectively injunctions and thus were appealable to the Supreme Court;

[2] District Court disregarded presumption of legislative good faith and improperly reversed burden of proof;

[3] evidence was insufficient to establish that the Texas Legislature acted in bad faith and engaged in intentional discrimination when it adopted interim redistricting plan approved by the district court;

[4] one congressional district did not violate VRA;

[5] two Texas House districts making up entirety of one Texas county did not violate VRA; and

[6] Texas House district created by moving Latinos into the district to bring the Latino population above 50% was an impermissible racial gerrymander.

Affirmed in part, reversed in part, and remanded.

Justice Thomas filed a concurring opinion in which Justice Gorsuch joined.

Justice Sotomayor filed a dissenting opinion in which Justices Ginsburg, Breyer, and Kagan joined.

West Headnotes (30)

[1] **Constitutional Law** Electoral districts and gerrymandering

The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a congressional district on the basis of race without sufficient justification. U.S.C.A. Const.Amend. 14.

15 Cases that cite this headnote

[2] **Constitutional Law** Electoral districts and gerrymandering

The Equal Protection Clause prohibits intentional "vote dilution" — invidiously minimizing or canceling out the voting potential of racial or ethnic minorities. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[3] **Election Law** Majority-minority districts

The Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice means that, under certain circumstance, States must draw "opportunity" districts in which minority groups form effective majorities. 52 U.S.C.A. § 10301.

6 Cases that cite this headnote

[4] **Constitutional Law** Electoral districts and gerrymandering

Election Law Apportionment and Reapportionment

Since the Equal Protection Clause restricts consideration of race and the Voting Rights Act (VRA) demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

18 Cases that cite this headnote

[5] **Federal Courts** Three-judge courts

Orders of a three-judge district court barring Texas from using districting plans in effect to conduct current year's elections were effectively injunctions and thus were appealable to the Supreme Court; although the district court did not call the orders "injunctions," the orders were unequivocal that the current legislative plans violated the Fourteenth Amendment and that those violations had to be remedied before the current year's elections. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 1253.

7 Cases that cite this headnote

[6] **Federal Courts** Injunction

Where an order has the practical effect of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. 28 U.S.C.A. §§ 1253, 1292(a)(1).

34 Cases that cite this headnote

[7] **Federal Courts** Three-judge courts

A failure to meet the specificity requirements of requiring that an injunction state its terms specifically does not deprive the Supreme Court of jurisdiction under statute permitting an appeal from an order of a three-judge district court granting or denying an interlocutory or permanent injunction. 28 U.S.C.A. § 1253; Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

9 Cases that cite this headnote

[8] **Federal Courts** Three-judge courts

The Supreme Court has jurisdiction under statute permitting an appeal from an order of a three-judge district court granting or denying an interlocutory or permanent injunction to hear an appeal from an order that has the same practical effect as one granting or denying an injunction. 28 U.S.C.A. § 1253.

36 Cases that cite this headnote

[9] **Election Law** Judicial Review or Intervention

Federal Courts Three-judge courts

Because statute permitting an appeal from an order of a three-judge district court granting or denying an interlocutory or permanent injunction expressly authorizes "interlocutory" appeals, there can be more than one appeal in a case challenging a redistricting plan. 28 U.S.C.A. § 1253.

3 Cases that cite this headnote

[10] **Election Law** Judicial Review or Intervention

A finding on liability in an action challenging a redistricting plan cannot be appealed unless an injunction is granted or denied, and in some cases a district court may see no need for interlocutory relief. 28 U.S.C.A. § 1253.

1 Case that cites this headnote

[11] **Election Law** Relief in General

Injunction Redistricting and reapportionment

If a redistricting plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed, and if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time. 28 U.S.C.A. § 1253.

4 Cases that cite this headnote

[12] **Federal Courts** Three-judge courts

Statute permitting an appeal from an order of a three-judge district court granting or denying an interlocutory or permanent injunction must be strictly construed, but it also must be sensibly construed. 28 U.S.C.A. § 1253.

1 Case that cites this headnote

[13] **United States** Judicial review and enforcement

District Court disregarded presumption of legislative good faith and improperly reversed burden of proof in action challenging Texas' congressional redistricting plan when it required the State to show that the Legislature somehow purged the "taint" that the court attributed to defunct and never-used plans enacted by a prior legislature; later legislature enacted, with only very small changes, plans that had been developed by a Texas district court pursuant to instructions from the Supreme Court not to incorporate any legal defects in the earlier plans. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

36 Cases that cite this headnote

[14] **Constitutional Law** Particular Issues and Applications

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.

44 Cases that cite this headnote

[15] **Election Law** Relief in General

States Power and Duty to Apportion

States Judicial Review and Enforcement

Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.

15 Cases that cite this headnote

[16] **Election Law** Presumptions and burden of proof

In assessing the sufficiency of a challenge to a districting plan, a court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus, and the good faith of the state legislature must be presumed.

34 Cases that cite this headnote

[17] **Election Law** Presumptions and burden of proof

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination in an acting challenging a districting plan; past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.

55 Cases that cite this headnote

[18] **Election Law** Apportionment and Reapportionment

Election Law Presumptions and burden of proof

Election Law Weight and sufficiency

The ultimate question in an action challenging a districting plan remains whether a discriminatory intent has been proved in a given case; the historical background of a legislative enactment is one evidentiary source relevant to the question

of intent, but past discrimination does not flip the evidentiary burden on its head.

33 Cases that cite this headnote

[19] **Election Law** Scope of review

While a district court's finding of fact on the question of discriminatory intent in an action challenging a districting plan is reviewed for clear error, whether the court applied the correct burden of proof is a question of law subject to plenary review.

11 Cases that cite this headnote

[20] **Federal Courts** Findings

When a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand.

6 Cases that cite this headnote

[21] **States** Equality of Representation and Discrimination; Voting Rights Act

United States Equality of representation and discrimination; Voting Rights Act

Both intent of prior Legislature and district court's adoption of interim redistricting plans were relevant in action challenging later plans under the Voting Rights Act (VRA) to extent that they naturally gave rise to—or tended to refute—inferences regarding intent of subsequent Legislature that adopted the challenged plan; they had to be weighed together with any other direct and circumstantial evidence of that Legislature's intent. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

4 Cases that cite this headnote

[22] **United States** Equality of representation and discrimination; Voting Rights Act

Evidence in action under the Voting Rights Act (VRA) was insufficient to establish that the Texas Legislature acted in bad faith and engaged in intentional discrimination when it adopted interim congressional redistricting plan approved by the district court; direct evidence indicated the Legislature adopted interim plans in order to bring litigation about the plans to an end as expeditiously as possible, Legislature had good reason to believe that the interim plans were legally sound, and there was no evidence that its aim was to gain acceptance of plans that it knew were unlawful. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[23] **Election Law** Presumptions and burden of proof

The burden of proof in a preclearance proceeding under the Voting Rights Act (VRA) was on the State. Voting Rights Act of 1965, § 3, 52 U.S.C.A. § 10302(c).

8 Cases that cite this headnote

[24] **United States** Judicial review and enforcement

Bad faith could not be inferred in Voting Rights Act (VRA) action challenging Texas's congressional redistricting plan from Texas's decision to take an appeal to the Supreme Court from a district court's decision denying preclearance, absent showing that Texas's arguments on appeal were frivolous. Voting Rights Act of 1965, § 3, 52 U.S.C.A. § 10302(c).

1 Case that cites this headnote

[25] **Election Law** Vote Dilution

To make out an "effects" claim under Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, a plaintiff must establish the three "*Gingles* factors": (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

19 Cases that cite this headnote

[26] **Election Law** Vote Dilution

If a plaintiff in an action under the Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice makes the required showing under the "*Gingles* factors," it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

9 Cases that cite this headnote

[27] **United States** Equality of representation and discrimination; Voting Rights Act

Texas congressional district did not violate Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice because it had a nearly one-third Latino population but was not made a Latino opportunity district; geography and demographics of south and west Texas did not permit the creation of any more than the seven Latino opportunity districts that existed under the current plan, and the Legislature justifiably thought that it had placed a viable opportunity district in the same area. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

[28] **Election Law** Power and duty to apportion

Redistricting analysis in a Voting Rights Act (VRA) action must take place at the district level. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

3 Cases that cite this headnote

[29] **States** Population as basis and deviation therefrom

Two Texas House districts making up entirety of one Texas county did not violate Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, although Latinos made up approximately 56% of the voting age population of the county, but only one of the districts was a Latino opportunity district, where two performing Latino districts could not have been created without "breaking the county line" in violation of the Texas Constitution. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301; Vernon's Ann.Texas Const. Art. 3, § 26.

4 Cases that cite this headnote

[30] **States** Population as basis and deviation therefrom

Texas House district created by moving Latinos into the district to bring the Latino population above 50% was an impermissible racial gerrymander in violation of the Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice; race was predominant factor in design of the district, and although one advocacy group demanded that design and previous primary elections had not favored the Latino candidate of choice, Texas pointed to no actual legislative inquiry that would establish need for its manipulation of the district's racial makeup. Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301.

5 Cases that cite this headnote

****2309** *Syllabus*[*]

***579** In 2011, the Texas Legislature adopted a new congressional districting plan and new districting maps for the two houses of the State Legislature to account for population growth revealed in the 2010 census. To do so, Texas had to comply with a complicated legal regime. The Equal Protection Clause of the Fourteenth Amendment forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Shaw v. Reno,* 509 U.S. 630, 641, 113 S.Ct. 2816,

125 L.Ed.2d 511. But other legal requirements tend to require that state legislatures consider race in drawing districts. Like all States, Texas is subject to § 2 of the Voting Rights Act of 1965(VRA), which is violated when a state districting plan provides "less opportunity" for racial minorities "to elect representatives of their choice," *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609. And at the time, Texas was also subject to § 5, which barred it from making any districting changes unless it could prove that they did not result in retrogression with respect to the ability of racial minorities to elect the candidates of their choice, *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 259, 135 S.Ct. 1257, 1263, 191 L.Ed.2d 314. In an effort to harmonize these conflicting demands, the Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes, see, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 193, 137 S.Ct. 788, 800–801, 197 L.Ed.2d 85; and a State's consideration of race in making a districting decision is narrowly tailored if the State has "good reasons" for believing that its decision is necessary in order to comply with the VRA, ****2310** *Cooper v. Harris,* 581 U.S. 285, 293, 137 S.Ct. 1455, 1464, 197 L.Ed.2d 837.

The Texas Legislature's 2011 plans were immediately tied up in litigation and never used. The case was assigned to a three-judge court (Texas court). Texas also submitted the plans for preclearance to the District Court for the District of Columbia (D.C. court). The Texas court drew up interim plans for the State's rapidly approaching primaries, giving no deference to the Legislature's plans. Texas challenged ***580** the court-ordered plans in this Court, which reversed and remanded with instructions for the Texas court to start with the Texas Legislature's 2011 plans but to make adjustments as required by the Constitution and the VRA. The Texas court then adopted new interim plans. After the D.C. court denied preclearance of the 2011 plans, Texas used the Texas court's interim plans for the 2012 elections. In 2013, the Legislature repealed the 2011 plans and enacted the Texas court's plans (with minor modifications). After *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651, was decided, Texas, no longer covered by § 5, obtained a vacatur of the D.C. court's preclearance order. But the Texas court did not dismiss the case against the 2011 plans as moot. Instead, it allowed the plaintiffs to amend their complaint to challenge the 2013 plans and held that their challenges to the 2011 plans were live. Texas conducted its 2014 and 2016 elections under the 2013 plans. In 2017, the Texas court found defects in several of the districts in the 2011 federal congressional and State House plans (the State Senate plan is not at issue here). Subsequently, it also invalidated multiple Congressional (CD) and House (HD) Districts in the 2013 plans, holding that the Legislature failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. And the court relied on that finding to invalidate several challenged 2013 districts. The court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the *effect* of depriving Latinos of the equal opportunity to elect their candidates of choice. And it found that HD90 was a racial gerrymander based on changes made by the 2013 Legislature. It gave the state attorney general three days to tell the court whether the Legislature would remedy the violations; and if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

Held :

1. This Court has jurisdiction to review the orders at issue. Pp. 2318 – 2324.

(a) The Texas court's orders fall within 28 U.S.C. § 1253, which gives the Court jurisdiction to hear an appeal from an order of a three-judge district court "granting or denying ... an interlocutory or permanent injunction." The Texas court did not *call* its orders "injunctions," but where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson v. American Brands, Inc.,* 450 U.S. 79, 83, 101 S.Ct. 993, 67 L.Ed.2d 59. Pp. 2318 – 2322.

(b) The text of the orders and the context in which they were issued make clear that they qualify as interlocutory injunctions under § 1253. The orders were unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations ***581** "must be remedied." And the short timeframe the attorney general was given to act is strong evidence that the court did not intend to allow the elections to go ahead under the plans it had just condemned. The unmistakable import of these actions is that the court intended to have new plans ready for use in this year's ****2311** elections. Texas also had reason to fear that if it tried to conduct elections under those plans, the court would infer an evil motive and perhaps subject the State to the strictures of preclearance under § 3(c) of the VRA. These cases differ from *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684, where the order did not have the same practical effect as an injunction. Nor does it matter that the remedy is not yet known. The issue

here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies should ultimately be ordered if it is determined that the current plans are flawed. Section 1253 must be strictly but sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions. Thus, § 1253 provides jurisdiction. Pp. 2321 – 2324.

2. The Texas court erred in requiring the State to show that the 2013 Legislature purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011. Pp. 2324 – 2330.

(a) Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730. In redistricting cases, the "good faith of [the] state legislature must be presumed." *Miller v. Johnson,* 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination, which is but "one evidentiary source" relevant to the question of intent. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450. Here, the 2011 plans were repealed, and not reenacted, by the 2013 Legislature. Nor did it use criteria that arguably carried forward the effects of the 2011 Legislature's discriminatory intent. Instead, it enacted, with only small changes, the Texas court plans developed pursuant to this Court's instructions. The Texas court contravened these basic burden of proof principles, referring, *e.g.,* to the need to "cure" the earlier Legislature's "taint" and concluding that the Legislature had engaged in no deliberative process to do so. This fundamentally flawed approach must be reversed. Pp. 2324 – 2327.

(b) Both the 2011 Legislature's intent and the court's interim plans are relevant to the extent that they give rise to—or tend to refute—inferences about the 2013 Legislature's intent, but they must be weighed together with other relevant direct and circumstantial evidence of the Legislature's intent. But when this evidence is taken into account, ***582** the evidence in the record is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination. Pp. 2326 – 2330.

3. Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. The Texas court's holding as to the three districts in which it relied on § 2's "effects" test are reversed, but its holding that HD90 is a racial gerrymander is affirmed. Pp. 2330 – 2335.

(a) To make out a § 2 "effects" claim, a plaintiff must establish the three "*Gingles* factors": (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Thornburg v. Gingles,* 478 U.S. 30, 48–51, 106 S.Ct. 2752, 92 L.Ed.2d 25. A plaintiff who makes that ****2312** showing must then prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. Pp. 2330 – 2334.

(1) The Texas court held that CD27 violates § 2 because it has the effect of diluting the votes of Nueces County Latino voters, who, the court concluded, should have been included in a Latino opportunity district rather than CD27, which is not such a district. Plaintiffs, however, could not show that an additional Latino opportunity district could be created in that part of Texas. Pp. 2330 – 2332.

(2) The Texas court similarly erred in holding that HD32 and HD34, which make up the entirety of Nueces County, violate § 2. The 2013 plan created two districts that lie wholly within the county: HD34 is a Latino opportunity district, but HD32 is not. The court's findings show that these two districts do not violate § 2, and it is hard to see how the ultimate *Gingles* vote dilution standard could be met if the alternative plan would not enhance the ability of minority voters to elect the candidates of their choice. Pp. 2332 – 2334.

(b) HD90 is an impermissible racial gerrymander. HD90 was not copied from the Texas court's interim plans. Instead, the 2013 Legislature substantially modified that district. In 2011, the Legislature, responding to pressure from counsel to one of the plaintiff groups, increased the district's Latino population in an effort to make it a Latino opportunity district. It also moved the city of Como, which is predominantly African–American, out of the district. When Como residents and their Texas House representative objected, the Legislature moved Como back. But that decreased the Latino population, so the Legislature moved more Latinos into the district. Texas argues that its use of race as the predominant factor in HD90's design was permissible because it had "*good reasons* to believe" that this was necessary to satisfy ***583** § 2, *Bethune–Hill,* 580

U.S., at 194, 137 S.Ct., at 794. But it is the State's burden to prove narrow tailoring, and Texas did not do so on the record here. Pp. 2333 – 2335.

No. 17–586, 274 F.Supp.3d 624, reversed; No. 17–626, 267 F.Supp.3d 750, reversed in part and affirmed in part; and cases remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined post, p. ----.

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Opinion

Justice ALITO delivered the opinion of the Court.

***584** Before us for review are orders of a three-judge court in the Western District of Texas effectively directing the State not to conduct this year's elections using districting plans that the court itself adopted some years earlier. The court developed those plans for use in the 2012 elections pursuant to our directions in *Perry v. Perez,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*). We instructed the three-judge court to start with the plans adopted by the Texas Legislature (or Legislature) in 2011 but to make adjustments as required by the Constitution and the Voting Rights Act. *Id.,* at 392–396, 132 S.Ct. 934. After those plans were used in 2012, the Texas Legislature enacted them (with only minor modifications) in 2013, and the plans were used again in both 2014 and 2016.

Last year, however, the three-judge court reversed its prior analysis and held that some of the districts in those plans are unlawful. After reviewing the repealed 2011 plans, which had never been used, the court found that they were tainted by discriminatory intent and that the 2013 Legislature had not "cured" that "taint."

We now hold that the three-judge court committed a fundamental legal error. It was the challengers' burden to

show that the 2013 Legislature acted with discriminatory intent when it enacted plans that the court itself had produced. The 2013 Legislature was not obligated to show that it had "cured" the unlawful intent that the court attributed to the ***585** 2011 Legislature. Thus, the essential pillar of the three-judge court's reasoning was critically flawed.

When the congressional and state legislative districts are reviewed under the ****2314** proper legal standards, all but one of them, we conclude, are lawful.

I

A

The 2010 decennial census revealed that the population of Texas had grown by more than 20% and the State was therefore apportioned four additional seats in the United States House of Representatives. C.J.S. 369a.[1] To accommodate this new allocation and the population changes shown by the census, the Legislature adopted a new congressional districting plan, as well as new districting maps for the two houses of the State Legislature.

Redistricting is never easy, and the task was especially complicated in Texas in 2011. Not only was the Legislature required to draw districts that were substantially equal in population, see *Perry, supra,* at 391–392, 126 S.Ct. 2594; *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), and to comply with special state-law districting rules,[2] but federal law imposed complex and delicately balanced requirements regarding the consideration of race.

[1] **[2]** Then, as now, federal law restricted the use of race in making districting decisions. The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient ***586** justification. *Shaw v. Reno,* 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). It also prohibits intentional "vote dilution"—"invidiously ... minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities." *Mobile v. Bolden,* 446 U.S. 55, 66–67, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion).

While the Equal Protection Clause imposes these important restrictions, its application in the field of districting is complicated. For one thing, because a voter's race sometimes correlates closely with political party preference, see *Cooper v. Harris,* 581 U.S. 285, 308, 137 S.Ct. 1455, 1473–1474, 197 L.Ed.2d 837 (2017); *Easley v. Cromartie,* 532 U.S. 234, 243, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), it may be very difficult for a court to determine whether a districting decision was based on race or party preference. Here, the three-judge court found that the two factors were virtually indistinguishable.[3]

At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965, 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* (VRA), pulls in the opposite direction: It often insists that districts be created precisely because of race. Two provisions of the VRA exert such demands, and in 2011, Texas was subject to both. ****2315** At that time, Texas was covered by § 5 of the VRA[4] and was thus barred from making any districting changes unless it could prove that they did not result in "retrogression" with respect to the ability of racial minorities to elect the candidates of their choice. ***587** *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 259, 135 S.Ct. 1257, 1263, 191 L.Ed.2d 314 (2015). That showing obviously demanded consideration of race.

[3] On top of this, Texas was (and still is) required to comply with § 2 of the VRA. A State violates § 2 if its districting plan provides " 'less opportunity' " for racial minorities " 'to elect representatives of their choice.' " *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*). In a series of cases tracing back to *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), we have interpreted this standard to mean that, under certain circumstances, States must draw "opportunity" districts in which minority groups form "effective majorit[ies]," *LULAC, supra,* at 426, 126 S.Ct. 2594.

[4] Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Bush v. Vera,* 517 U.S. 952, 977, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way

that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest, see, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 193, 137 S.Ct. 788, 800–801, 197 L.Ed.2d 85 (2017); *Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has " 'good reasons' " for believing that its decision is necessary in order to comply with the VRA. *Cooper, supra,* at 293, 137 S.Ct., at 1464.

B

Facing this legal obstacle course, the Texas Legislature in 2011 adopted new districting plans, but those plans were immediately tied up in litigation and were never used. Several plaintiff groups quickly filed challenges in the District Court for the Western District of Texas, arguing that some ***588** of the districts in the new plans were racial gerrymanders, some were based on intentional vote dilution, and some had the effect of depriving minorities of the equal opportunity to elect the candidates of their choice. This case was assigned to a three-judge court, as required by 28 U.S.C. § 2284(a). (We will call this court "the Texas court" or simply "the District Court.")

The situation was further complicated by the requirement that Texas obtain preclearance of its new plans. To do this, Texas filed for a declaratory judgment in the District Court for the District of Columbia. See *Texas v. United States,* 887 F.Supp.2d 133 (2012). (We will call this court "the D.C. court.") By early 2012, the D.C. court had not yet issued a decision, and Texas needed usable plans for its rapidly approaching primaries. Accordingly, the Texas court drew up interim plans for that purpose. *Perez v. Perry,* 835 F.Supp.2d 209 (W.D.Tex.2011). In ****2316** creating those plans, the majority of the Texas court thought that it was not "required to give any deference to the Legislature's enacted plan." *Id.,* at 213. Instead, it based its plans on what it called "neutral principles that advance the interest of the collective public good." *Id.,* at 212.[5]

Texas challenged those court-ordered plans in this Court, and we reversed. *Perry v. Perez,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*). Noting that "[r]edistricting is 'primarily the duty and responsibility of the State,' " we held that the Texas court should have respected the legislative judgments embodied in the 2011 plans to the extent allowed by the Constitution and the VRA. *Id.,* at 392–399, 132 S.Ct. 934.

We remanded the case with very specific instructions. The Texas court was told to start with the plans adopted by the Legislature but to modify those plans as needed so as "not to incorporate ... any legal defects." *Id.,* at 394, 132 S.Ct. 934. With ***589** respect to claims under the Constitution or § 2 of the VRA, the District Court was told to change a district if the plaintiffs were *likely* to succeed on the merits of their challenge. *Ibid.* And with respect to § 5 claims, the court was instructed to make whatever changes were needed to obviate any legal claim that was "not insubstantial."[6] *Id.,* at 395, 132 S.Ct. 934. Thus, our instructions, in an abundance of caution, demanded changes in the challenged 2011 plans without proof that those changes were actually required by either the Constitution or the VRA.

On remand, the Texas court ordered additional briefing and heard two more days of argument. App. 29a, 35a–50a; Order in Civ. No. 11–cv–00360, Doc. No. 616. It issued two opinions, totaling more than 70 pages, and analyzed disputed districts in detail. C.J.S. 367a–423a; H.J.S. 300a–315a. While stressing the preliminary nature of its determinations, see C.J.S. 368a; H.J.S. 314a–315a, the court found that some districts required change and that others were lawful, C.J.S. 367a–423a; H.J.S. 300a–315a. The court then adopted plans for the State's congressional districts and for both houses of the State Legislature. (The plan for the State Senate is not at issue.)

Both the congressional plan and the plan for the Texas House departed significantly from the State's 2011 plans. At least 8 of the 36 congressional districts were markedly altered, and 21 districts in the plan for the Texas House were "substantially" changed. *Id.,* at 314a; C.J.S. 397a–408a.

In August 2012, the D.C. court denied preclearance of the plans adopted by the Legislature in 2011, see *Texas v. United States, supra,* so the State conducted the 2012 elections under the interim plans devised by the Texas court. At the same time, Texas filed an appeal in this Court contesting the ***590** decision of the D.C. court,[7] but that appeal ultimately died for two reasons.

****2317** First, the 2011 plans were repealed. The Texas attorney general urged the Legislature to pass new redistricting plans, C.J.S. 429a, and in his view, the "best

way to remedy the violations found by the D.C. court" was to "adopt the [Texas court's] interim plans as the State's permanent redistricting maps." *Id.,* at 432a. Doing so, he said, would "confirm the legislature's intent" to adopt "a redistricting plan that fully comports with the law." *Id.,* at 429a.

The Governor called a special session to do just that, and the Legislature complied. One of the legislative sponsors, Senator Seliger, explained that, although " 'the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal ..., there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.' " 274 F.Supp.3d 624, 649, n. 40 (D.C.Cir.2017). Counsel for one of the plaintiff groups, the Mexican American Legal Defense and Education Fund (MALDEF), testified in favor of the plans. C.J.S. 436a–439a. The 2013 Legislature then repealed the 2011 plans and enacted the Texas court's interim plans with just a few minor changes. The federal congressional plan was not altered at all, and only small modifications were made to the plan for the Texas House. C.J.S. Findings 231a–232a.

On the day after the Legislature passed the new plans and the day before the Governor signed them, this Court issued its decision in *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), which invalidated the coverage formula in § 4 of the VRA. Now no longer subject to § 5, Texas obtained a vacatur of the D.C. court's order on preclearance. 274 F.Supp.3d, at 634–635, and n. 11.

***591** With the never-effective 2011 plans now repealed and any preclearance issues overcome by events, the State argued in the Texas court that the plaintiffs' case against the 2011 plans was moot. In September 2013, the Texas court allowed the plaintiffs to amend their complaints to challenge the 2013 plans, but the court held that their challenges to the 2011 plans were still alive, reasoning that the repeal of the 2011 plans represented the "voluntary cessation" of allegedly unconstitutional conduct.[8]

Texas conducted its 2014 and 2016 elections under the plans that had been preliminarily approved by the Texas court and subsequently adopted (with only minor changes) by the Legislature in 2013. But in March and April 2017, after multiple trials, the Texas court issued a pair of rulings on the defunct 2011 plans. The court reaffirmed the conclusions it had reached in 2012 about defects in the 2011 plans, and it went further. Contrary to its earlier decision, it held that Congressional District (CD) 35 is an impermissible racial gerrymander and that CD27 violates § 2 of the VRA because it has the effect of diluting the electoral opportunities of Latino voters. C.J.S. 181a, 193a–194a. Previously, the court had provided detailed reasons for rejecting the very arguments that it now accepted. *Id.,* at 409a–423a. Similarly, the court held that multiple districts in the plan for the Texas House were the result of intentional vote dilution. These included districts in the counties of Nueces (House District (HD) 32, HD34), Bell (HD54, HD55), and Dallas (HD103, HD104, HD105). H.J.S. 275a–276a.[9]

***592** ****2318** In August 2017, having ruled on the repealed 2011 plans, the Texas court finally turned its attention to the plans then in effect—*i.e.,* the plans that had been developed by the court, adopted by the Legislature in 2013, and used in both the 2014 and 2016 elections. The court invalidated the districts in those plans that correspond to districts in the 2011 plan that it had just held to be unlawful, *i.e.,* CD27, CD35, HD32, HD34, HD54, HD55, HD103, HD104, and HD105. See 274 F.Supp.3d 624 (No. 17–586) and 267 F.Supp.3d 750 (2017) (No. 17–626).

In reaching these conclusions, the court pointed to the discriminatory intent allegedly harbored by the 2011 Legislature, and it attributed this same intent to the 2013 Legislature because it had failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F.Supp.3d, at 645–652; 267 F.Supp.3d, at 757. The court saw "no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." 274 F.Supp.3d, at 649. And it faulted the State because it "did not accept [findings of the D.C. court] and instead appealed to the Supreme Court." *Ibid.* Seeing no evidence that the State had undergone "a change of heart," the court concluded that the Legislature's "decision to adopt the [District Court's] plans" was a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Id.,* at 649–650. Finally, summarizing its analysis, the court reiterated that the 2011 Legislature's "discriminatory taint was not removed by the [2013] Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.,* at 686.

The Texas court's decisions about CD35 and all but three of the Texas House districts were based entirely on its finding

that the 2013 Legislature had not purged its predecessor's ***593** discriminatory intent. However, the court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the effect of depriving Latinos of the equal opportunity to elect their candidates of choice. *Id.,* at 682–686; 267 F.Supp.3d, at 775–783. And the court found independent proof that HD90 was a racial gerrymander. *Id.,* at 788–794.

The court held that violations in all these districts "must be remedied." 274 F.Supp.3d, at 686; see also 267 F.Supp.3d, at 795 (describing State House district violations that "must be remedied"). Mindful that October 1 was the deadline for the Texas secretary of state to provide voter registration templates to the State's counties, App. 380a–381a, the court took steps to bring about prompt remedial action. In two orders issued on August 15 and 24, the Texas attorney general was instructed to advise the court, within three days, "whether the Legislature intends to take up redistricting in an effort to cure these violations." 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795. If the Legislature chose not to do so, the court warned, it would "hold a hearing to consider remedial plans." *Ibid.* After the Governor made clear that the State would not act, the ****2319** court ordered the parties to proceed with a hearing on the congressional plan on September 5, as well as a hearing on the plan for the Texas House on September 6. 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795; App. 134a–136a; Defendants' Opposed Motion To Stay Order on Plan C235 Pending Appeal or Final Judgment in Civ. No. 11–cv–00360, Doc. 1538, pp. 3–4; Defendants' Opposed Motion To Stay Order on Plan H358 Pending Appeal or Final Judgment, Doc. 1550, pp. 4–5.

Texas applied for stays of both orders, but the District Court denied the applications. App. 134a–136a. Texas then asked this Court to stay the orders, and we granted that relief. After receiving jurisdictional statements, we postponed consideration of jurisdiction and set the cases for consolidated argument. 583 U.S. 1088, 138 S.Ct. 735, 199 L.Ed.2d 601 (2018).

***594** II

[5] Before reaching the merits of these appeals, we must assure ourselves that we have jurisdiction to review the orders at issue. Appellants claim that the orders amount to injunctions and are therefore appealable to this Court under 28 U.S.C. § 1253. Appellees disagree, contending that the orders do not qualify as injunctions. We hold that we have jurisdiction because the orders were effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections.

A

The Judiciary Act of 1789, 1 Stat. 73, "established the general principle that only final decisions of the federal district courts would be reviewable on appeal." *Carson v. American Brands, Inc.,* 450 U.S. 79, 83, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) (emphasis deleted). But because "rigid application of this principle was found to create undue hardship in some cases," Congress created exceptions. *Ibid.* Two are relevant here. We have jurisdiction under 28 U.S.C. § 1253 to hear an appeal from an order of a three-judge district court "granting or denying ... an interlocutory or permanent injunction." Similarly, § 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" "granting, continuing, modifying, refusing or dissolving injunctions," "except where a direct review may be had in the Supreme Court."

[6] The orders in these cases fall within § 1253. To be sure, the District Court did not *call* its orders "injunctions"—in fact, it disclaimed the term, App. 134a–136a—but the label attached to an order is not dispositive. We have previously made clear that where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson, supra,* at 83, 101 S.Ct. 993; see also *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 287–288, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). We applied this test in ***595** *Carson,* holding that an order that declined to enter a consent decree prohibiting certain conduct could be appealed under § 1292(a)(1) because it was the practical equivalent of an order denying an injunction and threatened serious and perhaps irreparable harm if not immediately reviewed. 450 U.S., at 83–84, 86–90, 101 S.Ct. 993.

This "practical effect" rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and harmful conduct may be allowed to continue. Recognizing this, Congress authorized interlocutory appellate review of such orders. But if the availability of interlocutory ****2320** review depended on the district court's use of

the term "injunction" or some other particular language, Congress's scheme could be frustrated. The harms that Congress wanted to avoid could occur so long as the district court was careful about its terminology. The "practical effect" inquiry prevents such manipulation.

In analogous contexts, we have not allowed district courts to "shield [their] orders from appellate review" by avoiding the label "injunction." *Sampson v. Murray,* 415 U.S. 61, 87, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). For instance, in *Sampson,* we held that an order labeled a temporary restraining order (which is not appealable under § 1292(a)(1)) should be treated as a "preliminary injunction" (which is appealable) since the order had the same practical effect as a preliminary injunction. *Id.,* at 86–88, 94 S.Ct. 937.

Appellees and the dissent contend that the "practical effect" approach should be confined to § 1292(a)(1), but we see no good reason why it should not apply to § 1253 as well. Appellees note that we "narrowly construe[]" § 1253, *Goldstein v. Cox,* 396 U.S. 471, 478, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970), but we also construe § 1292(a)(1) "narrowly," *Carson, supra,* at 84, 101 S.Ct. 993. In addition, the relevant language in the two provisions is nearly identical; ***596** [10] both provisions serve the same purpose; and we have previously called them "analogous." *Goldstein, supra,* at 475, 90 S.Ct. 671.

The provisions are also textually interlocked. Section 1292(a)(1) does not apply where "direct review may be had in the Supreme Court," *i.e.,* where § 1253 applies. If the "practical effects" test applied under § 1292(a)(1) but not § 1253, the consequences would be unfortunate and strange. We would have to identify the magic language needed for an order to qualify as an order granting or denying an injunction, and that standard would hardly constitute the sort of "[s]imple" rule that the dissent prizes. See *Post,* at 2342 – 2343 (opinion of SOTOMAYOR, J.). Then, having developed that standard, we would have to apply it in any case in which a party took an appeal to us from an order of a three-judge court that clearly had the practical effect of an injunction. If we concluded that the magic-words test was not met, the order would appear to be appealable to one of the courts of appeals under § 1292(a)(1). In the language of that provision, the order would be an "orde[r] of [a] district cour[t] of the United States ... granting [an] injunctio[n]." And because this Court would lack jurisdiction under § 1253, the appeal would not fall within § 1292(1)'s exception for cases "where a direct review may be had in the Supreme Court." Having taken pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions Congress surely did not intend to produce that result.[11]

****2321** ***597** Appellees argue that an order denying an injunction (the situation in *Carson*) and an order granting an injunction (the situation here) should be treated differently, Brief for Appellees in No. 17–586, p. 27, but they offer no convincing reason for doing so. No authority supports their argument. The language of §§ 1253 and 1292(a)(1) makes no such distinction, and we have stated that the "practical effect" analysis applies to the "granting or denying" of injunctions. *Gulfstream, supra,* at 287–288, 108 S.Ct. 1133.

In addition, appellees' suggested distinction would put appellate courts in an awkward position. Suppose that a district court granted an injunction that was narrower than the one requested by the moving party. Would an appellate court (whether this Court or a court of appeals) have jurisdiction to rule on only part of that decision? Suppose the appellate court concluded that the district court was correct in refusing to give the movant all the injunctive relief it sought because the movant's entire claim was doomed to fail. Would the appellate court be limited to holding only that the lower court properly denied the relief that was withheld? The rule advocated by the appellees would needlessly complicate appellate review.[12]

[7] ***598** Finally, appellees point in passing to Rule 65(d) of the Federal Rules of Civil Procedure, which requires that an injunction "state its terms specifically" and "describe in reasonable detail ... the act or acts restrained or required." Rules 65(d)(1)(B), (C); see Brief for Appellees in No. 17–586, at 27. But as explained in *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 389, n. 4, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), we have never suggested that a failure to meet the specificity requirements of Rule 65(d) would "deprive the Court of jurisdiction under § 1253."

A contrary holding would be perverse. Rule 65(d) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing. Where a vague injunction does not comply with Rule 65(d), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance.

[8] For these reasons, we hold that we have jurisdiction under § 1253 to hear an appeal from an order that has the same practical effect as one granting or denying an injunction.

B

With these principles settled, we conclude that the orders in these cases qualify as interlocutory injunctions under § 1253. The text of the orders and the context in which they were issued make this clear.

The orders are unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." ****2322** 274 F.Supp.3d, at 686; see also, *e.g.,* 267 F.Supp.3d, at 795 ("[V]iolations found by this Court in its Order on [the State House plan] now require a remedy"); *ibid.* ("In Bell County, the intentional discrimination previously found by the Court must be remedied"); *ibid.* ("In Dallas County, the intentional discrimination previously found by the Court must be remedied").

***599** We do not suggest that this language alone is sufficient to show that the orders had the practical effect of enjoining use of the current plans in this year's elections, but the court did not stop with these pronouncements. As we have noted, the orders required the Texas attorney general to inform the court within three days whether the Legislature would remedy the violations, and the orders stated that if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

The short time given the Legislature to respond is strong evidence that the three-judge court did not intend to allow the elections to go ahead under the plans it had just condemned. The Legislature was not in session, so in order to take up the task of redistricting, the Governor would have been required to convene a special session—which is no small matter. And, when the Governor declined to call a special session, the court moved ahead with its scheduled hearings and invited the parties to continue preparing for them even after this Court administratively stayed the August 15 order.

The import of these actions is unmistakable: The court intended to have new plans ready for use in this year's elections. Nothing in the record even hints that the court contemplated the possibility of allowing the elections to proceed under the 2013 plans.

What is more, Texas had reason to believe that it would risk deleterious consequences if it defied the court and attempted to conduct the elections under the plans that the court had found to be based on intentional racial discrimination. In the very orders at issue, the court inferred discriminatory intent from Texas's choice to appeal the D.C. court's preclearance decision rather than immediately taking steps to bring its plans into compliance with that decision. 274 F.Supp.3d, at 649; see Part III, *infra*. Reading such an order, Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially ***600** discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the VRA.[13] This is a remedy that the plaintiffs hoped to obtain, see, *e.g.,* App. 177a, and that the District Court seemed inclined to consider, see C.J.S. 122a–123a (declining to declare moot the challenges to the long-since-repealed 2011 plans because "there remains the possibility of declaratory and equitable relief under § 3(c)").

Contending that the orders here do not qualify under § 1253, appellees analogize these cases to *Gunn,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684, but there is no relevant similarity. In *Gunn,* anti-war protesters were charged with violating a Texas "disturbing-the-peace statute," *id.,* at 384, 90 S.Ct. 2013 and they challenged the constitutionality of the statute in federal court. After the state charges were dismissed, ****2323** the District Court issued a "discursive" opinion "expressing the view that [the statute was] constitutionally invalid." *Id.,* at 386–387, 90 S.Ct. 2013. But the court then refrained from going any further, "pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements." *University Comm. to End War in Viet Nam v. Gunn,* 289 F.Supp. 469, 475 (W.D.Tex.1968). The defendants appealed to this Court, and at the time of our decision two years later, neither the Legislature nor the District Court had taken any further action. We therefore held that we lacked jurisdiction under § 1253. The District Court order in that case did not have the same practical effect as an injunction. Indeed, ***601** it had no practical effect whatsoever and is thus entirely different from the orders now before us.[14]

Appellees suggest that appellate jurisdiction is lacking in these cases because we do not know at this point "what a remedy would entail, who it would affect, and when it would be implemented." Brief for Appellees in No. 17–586, at 27. The dissent makes a similar argument with respect to two of the Texas House districts. *Post,* at 2342.[15] But the issue here is whether this year's elections can be held under the

plans enacted by the Legislature, not whether any particular remedies would have ultimately been ordered by the District Court.

[9] Appellees and the dissent also fret that this Court will be inundated with redistricting appeals if we accept jurisdiction ***602** here, Brief for Appellees in No. 17–626, p. 34; *post,* at 2342 – 2344, and n. 8, but there is no reason to fear such a flood. Because § 1253 expressly authorizes "interlocutory" appeals, there is no question that there can be more than one appeal in a case challenging a redistricting plan. District courts sometimes expressly enjoin the use of districting plans before moving on to the remedial phase. See, *e.g., Whitford v. Gill,* No. 3:15–cv–421, Doc. No. 190 (WD Wis., Feb. 22, 2017); *Harris v. McCrory,* No. 1:13–cv–949, Doc. No. 143 (MDNC, Feb. 5, 2016). But appeals from such orders have not overwhelmed our docket. Our holding here will affect only a small ****2324** category of additional cases.[16]

[10] **[11]** It should go without saying that our decision does not mean that a State can always appeal a district court order holding a redistricting plan unlawful. A finding on liability cannot be appealed unless an injunction is granted or denied, and in some cases a district court may see no need for interlocutory relief. If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed. And if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.

[12] We appreciate our obligation to heed the limits of our jurisdiction, and we reiterate that § 1253 must be strictly construed. But it also must be sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm[17] the State, and only an interlocutory ***603** appeal can protect that State interest. See Carson, 450 U.S., at 89–90, 101 S.Ct. 993. As a result, § 1253 provides jurisdiction.

III

[13] We now turn to the merits of the appeal. The primary question is whether the Texas court erred when it required the State to show that the 2013 Legislature somehow purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011.

A

[14] Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). This rule takes on special significance in districting cases.

[15] **[16]** Redistricting "is primarily the duty and responsibility of the State," and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson,* 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted). "[I]n assessing the sufficiency of a challenge to a districting plan," a court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.,* at 915–916, 115 S.Ct. 2475. And the "good faith of [the] state legislature must be presumed." *Id.,* at 915, 115 S.Ct. 2475.

[17] **[18]** The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile,* 446 U.S., at 74, 100 S.Ct. 1490 (plurality opinion). The "ultimate question remains whether a discriminatory intent has been proved in a given ****2325** case." *Ibid.* The "historical ***604** background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). But we have never suggested that past discrimination flips the evidentiary burden on its head.

Neither the District Court nor appellees have pointed to any authority that would justify shifting the burden. The appellees rely primarily on *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), but that case addressed a very different situation. *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. *Id.,* at 228–230, 105 S.Ct. 1916. The article disfranchised anyone convicted of any crime on a long list that included many minor offenses.

Id., at 226–227, 105 S.Ct. 1916. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. *Id.,* at 229, 105 S.Ct. 1916. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. *Id.,* at 232–233, 105 S.Ct. 1916. This Court rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. *Id.,* at 233, 105 S.Ct. 1916. But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today." *Ibid.*

In these cases, we do not confront a situation like the one in *Hunter*. Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court "not to incorporate ... any legal defects." *Perry,* 565 U.S., at 394, 132 S.Ct. 934.

***605** Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true "change of heart" and had "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F.Supp.3d, at 649.

The Texas court's references to the need to "cure" the earlier Legislature's "taint" cannot be dismissed as stray comments. On the contrary, they were central to the court's analysis. The court referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be ****2326** maintained but be safe from remedy." *Id.,* at 686.[18]

***606** The dissent labors to explain away all these references to the 2013 Legislature's supposed duty to purge its predecessor's allegedly discriminatory intent, but the dissent loses track of its own argument and characterizes the District Court's reasoning exactly as we have. Indeed, the dissent criticizes us on page 2346 of its opinion for saying precisely the same thing that it said 11 pages earlier. On page 2353, the dissent states:

> "[T]he majority quotes the orders as requiring proof that the Legislature ' "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." ' But the District Court did not put the burden on Texas to make that affirmative showing." *Post,* at 2353 (quoting *supra,* at 23-24, in turn quoting 274 F.Supp.3d, at 649; citations omitted).

But earlier, the dissent itself describes the District Court's analysis as follows:

> "Despite knowing of the discrimination in its 2011 maps, 'the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Post,* at 2347 (quoting 274 F.Supp.3d, at 649).

And this is not just a single slip of the pen. The dissent writes that the District Court was required "to assess how the 2013 Legislature addressed the known discrimination that motivated" the districts approved by that Court in 2012. *Post,* at 2351 – 2352. The dissent quotes the District Court's statement that " 'there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.' " *Post,* at 2348 (quoting 274 F.Supp.3d, at 649). And there is also this: "Texas was just 'not truly interested in fixing any remaining discrimination in [its 2011 maps].' " *Post,* at 2347 (quoting 274 F.Supp.3d, at 651, n. 45). The District Court's true mode of analysis is so obvious that the ***607** dissent cannot help but repeat it. And that approach was fundamentally flawed and demands reversal.

[19] **[20]** While a district court's finding of fact on the question of discriminatory intent is reviewed for clear error, see *Cromartie,* 532 U.S., at 242, 121 S.Ct. 1452 whether the court applied the correct burden of proof is a question of law subject to plenary review, *U.S. Bank N.A. v. Village at Lakeridge, LLC,* 583 U.S. 387, 393, 138 S.Ct. 960, 965, 200 L.Ed.2d 218 (2018); *Highmark Inc. v. Allcare Health Management System, Inc.,* 572 U.S. 559, 563, 134 S.Ct. 1744,

1748, 188 L.Ed.2d 829 (2014). And when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("An appellate cour[t has] power to correct errors of law, including those that ... infect ... a finding of fact that is predicated on a misunderstanding of the governing rule of law").

B

[21] **[22]** In holding that the District Court disregarded the presumption of legislative ****2327** good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.[19] See, *e.g.*, ***608** *Ricci v. DeStefano*, 557 U.S. 557, 585, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009); *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). There is thus no need for any further prolongation of this already protracted litigation.

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature's intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another. (The plaintiffs' conflicting positions with regard to some of the districts in the plans now before us bear this out.) Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper.

The court below discounted this direct evidence, but its reasons for doing so are not sound. The court stated that the "strategy" of the 2013 Legislature was to "insulate [the plans] from further challenge, regardless of [the plans'] legal infirmities." 274 F.Supp.3d, at 650; see also *id.*, at 651, n. 45. But there is no evidence that the Legislature's aim was to gain acceptance of plans that it knew were unlawful.[20] ***609** Indeed, there is no evidence that the Legislature thought that the plans were invalid—and as we will explain, the Legislature had sound reasons to believe just the opposite.[21]

****2328** The District Court found it significant that the Legislature must have realized that enacting the interim plans would not "end the litigation," because it knew that at least some plaintiffs would pursue their challenges anyway. *Id.*, at 651, n. 45. But even if, as seems likely, the Legislature did not think that all the plaintiffs would immediately abandon all their claims, it does not follow that the Legislature was insincere in stating that it adopted the court-approved plan with the aim of bringing the litigation to a close. It was reasonable for the Legislature to think that approving the court-approved plans might at least reduce objections and thus simplify and expedite the conclusion of the litigation.[22] That MALDEF, counsel for one of the plaintiff groups, testified in favor of the plans is evidence that the Legislature's objective was reasonable. C.J.S. 436a–439a.

Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstantial ***610** evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and § 2 of the VRA if those claims were merely likely to prevail. *Perry*, 565 U.S., at 394, 132 S.Ct. 934. And the Texas court was told to accommodate any claim under § 5 of the VRA unless it was "insubstantial." *Id.*, at 395, 132 S.Ct. 934. Fourth, the Texas court had made

a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

Is there any evidence from which a contrary inference can reasonably be drawn? Appellees stress the preliminary nature of the Texas court's approval of the interim plans, and as we have said, that fact is relevant. But in light of our instructions to the Texas court and the care with which the interim plans were developed, the court's approval still gave the Legislature a sound basis for thinking that the interim plans satisfied all legal requirements.

The court below and the dissent infer bad faith because the Legislature "pushed the redistricting bills through quickly in a special session." 274 F.Supp.3d, at 649. But we do not see how the brevity of the legislative process can give rise to an inference ****2329** of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith (a concept to which the dissent pays ***611** only the briefest lipservice, *post,* at 2346). The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.[23]

The District Court and the dissent also err when they charge that Representative Darby, the chair of the Texas House Redistricting Committee at the time in question, " 'willfully ignored those who pointed out deficiencies' " in the plans. *Post,* at 2346 – 2347 (quoting 274 F.Supp.3d, at 651, n. 45). This accusation is not only misleading, it misses the point. The Legislature adopted the interim plans in large part because they had the preliminary approval of the District Court, and Darby was open about the fact that he wanted to minimize amendments to the plans for that reason. See, *e.g.,* Joint Exh. 17.3, pp. S1–S2. That Darby generally hoped to minimize amendments—so that the plans would remain legally compliant—hardly shows that he, or the Legislature, acted with discriminatory intent. In any event, it is misleading to characterize this attitude as "willfu[l] ignor[ance]." The record shows that, although Darby hoped to minimize amendments, he did not categorically refuse to consider changes. This is illustrated by his support for an amendment to HD90, which was offered by the then-incumbent, Democrat Lon Burnam, precisely because it fixed an objection raised by the Mexican–American Legal Caucus ***612** (MALC) that the district's Latino population was too low. 267 F.Supp.3d, at 790.[24]

The Texas court faulted the 2013 Legislature for failing to take into account the problems with the 2011 plans that the D.C. court identified in denying preclearance, *ibid.,* but the basis for that criticism is hard to understand. One of the 2013 Legislature's principal reasons for adopting the court-approved plans was to fix the problems identified by the D.C. court. The attorney general advised the Legislature to adopt the interim plans because he thought that was the "best way to remedy the violations found by the D.C. court." C.J.S. 432a. Chairman Darby similarly stated that the 2013 plans fixed the errors found by the D.C. court, Tr. 1498, 1584–1585 (July 14, 2017), as did Senator Seliger, Joint Exh. 26.2, p. A–5.

There is nothing to suggest that the Legislature proceeded in bad faith—or even that it acted unreasonably—in pursuing this strategy. Recall that we instructed the Texas court, in developing the interim plans, to remedy any § 5 claim that was "not insubstantial." *Perry,* 565 U.S., at 395, 132 S.Ct. 934. And that is just ****2330** what the interim plans, which the Legislature later enacted, attempted to do. For instance, the D.C. court held that the congressional plan had one too few "ability to elect" districts for Latinos, largely because of changes to CD23, *Texas,* 887 F.Supp.2d, at 156–159; the interim plan (and, by extension, the 2013 plan) amended CD23, C.J.S. 397a–399a. Similarly, in the plan for the Texas House, the D.C. court found § 5 retrogression with respect to HD35, HD117, and HD149, *Texas, supra,* at 167–175, and all of those districts were changed in the 2013 plans, H.J.S. 305a–307a, 312a.

[23] ***613** Although the D.C. court found that the 2011 Legislature acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed. The D.C. court was concerned about the intent reflected in the drawing of CDs 9, 18, and 30, but all those districts were amended by the Texas court. *Texas, supra,* at 159–160; C.J.S. 406a–408a. With respect to the plan for the Texas House, the D.C. court made no intent findings, but its areas of concern were generally addressed by the Texas court and the 2013 plans. Compare *Texas, supra,* at 178 (noting evidence of unlawful intent in HD117), with H.J.S. 307a (amending HD117).[25]

[24] It is indicative of the District Court's mistaken approach that it inferred bad faith from Texas's decision to take an appeal to this Court from the D.C. court's decision denying preclearance. See 274 F.Supp.3d, at 649 ("Defendants did not accept [these findings] and instead appealed to the Supreme Court"). Congress gave the State the right to appeal, and no bad motive can be inferred from its decision to make use of this right—unless of course the State had no reasonable grounds for appeal. Before our decision in *Shelby County* mooted Texas's appeal to this Court from the D.C. court's preclearance decision, Texas filed a jurisdictional statement claiming that the D.C. court made numerous errors, but the Texas court made no attempt to show that Texas's arguments were frivolous.

As a final note, appellees assert that the 2013 Legislature should have either defended the 2011 plans in litigation or gone back to the drawing board and devised entirely new plans, Brief for Appellees in No. 17–626, at 45, but there is ***614** no reason why the Legislature's options should be limited in this way. It was entirely permissible for the Legislature to favor a legitimate option that promised to simplify and reduce the burden of litigation. That the Legislature chose this course is not proof of discriminatory intent.

IV

Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. For three of these districts, the District Court relied on the "effects" test of § 2. We reverse as to each of these, but we affirm the District Court's final holding that HD90 is a racial gerrymander.

A

[25] **[26]** To make out a § 2 "effects" claim, a plaintiff must establish the three so-called "*Gingles* factors." These are (1) a geographically compact minority population sufficient to constitute a majority in a ****2331** single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Gingles,* 478 U.S., at 48–51, 106 S.Ct. 2752; *LULAC,* 548 U.S., at 425, 126 S.Ct. 2594. If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. *Id.,* at 425–426, 126 S.Ct. 2594.

1

[27] The Texas court held that CD27 violates § 2 of the VRA because it has the effect of diluting the votes of Latino voters in Nueces County. C.J.S. 191a. CD27 is anchored in Nueces County (home to Corpus Christi) and follows the Gulf of Mexico to the northeast before taking a turn inland to the northwest in the direction of Austin. Nueces County contains a Latino population of roughly 200,000 (a little less than one-third the size of an ideal Texas congressional district), and the court held that the Nueces County Latinos ***615** should have been included in a Latino opportunity district, rather than CD27, which is not such a district. The court found that an area centered on Nueces County satisfies the *Gingles* factors and that, under the totality of the circumstances, the placement of the Nueces County Latinos in CD27 deprives them of the equal opportunity to elect candidates of their choice. C.J.S. 181a–195a.

The problem with this holding is that plaintiffs could not establish a violation of § 2 of the VRA without showing that there is a " 'possibility of creating more than the existing number of reasonably compact' " opportunity districts. *LULAC, supra,* at 430, 126 S.Ct. 2594. And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan. 274 F.Supp.3d, at 684, and n. 85.

Attempting to get around this problem, the Texas court relied on our decision in *LULAC,* but it misapplied our holding. In *LULAC,* we held that the State should have created six proper Latino opportunity districts but instead drew only five. 548 U.S., at 435, 126 S.Ct. 2594. Although the State claimed that the plan actually included a sixth opportunity district, that district failed to satisfy the *Gingles* factors. 548 U.S., at 430, 126 S.Ct. 2594. We held that a "State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Ibid.*

Here, the Texas court concluded that Texas committed the same violation as in *LULAC* : It created "an opportunity district for those without a § 2 right" (the Latinos in CD35), while failing to create such a district "for those with a § 2

right" (the Latinos of Nueces County). *Ibid.* This holding is based on a flawed analysis of CD35.

CD35 lies to the north of CD27 and runs along I–35 from San Antonio up to Austin, the center of Travis County. In the District Court's view, the Latinos of CD35 do not have a ***616** § 2 right because one of the *Gingles* factors, majority bloc voting, is not present. The Court reached this conclusion because the non-Latino voters of Travis County tend to favor the same candidates as the great majority of Latinos. There are two serious problems with the District Court's analysis.

[28] First, the Court took the wrong approach in evaluating the presence of majority bloc voting in CD35. The Court looked at only one, small part of the district, ****2332** the portion that falls within Travis County. 274 F.Supp.3d, at 683; C.J.S. 175a–176a. But Travis County makes up only 21% of the district. We have made clear that redistricting analysis must take place at the district level. *Bethune–Hill,* 580 U.S., at 191-192, 137 S.Ct., at 800. In failing to perform that district-level analysis, the District Court went astray.

Second, here, unlike in *LULAC,* the 2013 Legislature had "good reasons" to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors. CD35 was based on a concept proposed by MALDEF, C.J.S. Findings 315a–316a, and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by § 2. C.J.S. 174a. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State. C.J.S. Findings 467a. In addition, the District Court extensively analyzed CD35 in 2012 and determined that it was likely not a racial gerrymander and that even if it was, it likely satisfied strict scrutiny. C.J.S. 415a. In other words, the 2013 Legislature justifiably thought that it had placed a viable opportunity district along the I–35 corridor.

2

[29] The District Court similarly erred in holding that HD32 and HD34 violate § 2. These districts make up the entirety of Nueces County, which has a population that is almost exactly ***617** equal to twice the population of an ideal Texas House district. (It can fit 2.0295 ideal districts. H.J.S. Findings 91a.) In 2010, Latinos made up approximately 56% of the voting age population of the county. *Ibid.* The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not. 267 F.Supp.3d, at 767.

Findings made by the court below show that these two districts do not violate § 2 of the VRA. Under *Gingles,* the ultimate question is whether a districting decision dilutes the votes of minority voters, see *LULAC, supra,* at 425–426, 126 S.Ct. 2594 and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

The only plaintiff that pressed a § 2 claim with respect to HD32 and HD34 was MALC, 267 F.Supp.3d, at 767, and as the District Court recognized, that group's own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district. In his analysis, the expert relied on Nueces County election returns for statewide elections between 2010 and 2016. *Id.,* at 775–776. Based on this data, he calculated that when both HD32 and HD34 were maintained as Latino-majority districts, one performed for Latinos in only 7 out of 35 relevant elections, and the other did so in *none* of the 35 elections. *Ibid.* In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places, *id.,* at 778, but the District Court held that "breaking the County Line Rule" in the Texas Constitution, see Art. III, § 26, to "remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires," 267 F.Supp.3d, at 783. So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.

***618** The court refused to accept this conclusion, but its reasons for doing so cannot stand up. As an initial matter, the court ****2333** thought that the two districts would have to be redrawn based on its finding regarding the intent of the 2013 Legislature,[26] and it therefore deferred a final decision on the § 2 issue and advised the plaintiffs to consider at the remedial phase of the case whether they preferred to have two districts that might not perform or just one safe district. *Id.,* at 783. The court's decision cannot be sustained on this ground, since its finding of discriminatory intent is erroneous.

The only other reason provided by the court was the observation that MALC "failed to show" that two majority-Latino districts in Nueces County would not perform. *Id.,* at

782. This observation twisted the burden of proof beyond recognition. It suggested that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established.[27] ***619** Courts cannot find § 2 effects violations on the basis of *uncertainty*. In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the " 'broad discretion' " to comply as it reasonably saw fit in 2013, *LULAC, 548 U.S.,* at 429, 126 S.Ct. 2594.

The dissent charges us with ignoring the District Court's " 'intensely local appraisal' " of Nueces County, *post,* at 2358, but almost none of the "findings" that the District Court made with respect to HD32 and HD34 referred to present local conditions, and none cast any significant light on the question whether another opportunity district is possible at the present time. For instance, what the dissent describes as Texas's "long 'history of voting-related discrimination,' " *id., at 663,* in no way undermines—or even has any logical bearing on—the conclusions reached by MALC's expert about whether Latino voters would have a real opportunity to elect the candidates of their choice if the county were divided into two districts with narrow majorities of Latino citizens of voting age. The same is true with respect to the District Court's findings regarding racially polarized ****2334** voting in the county and Latinos' "continuing pattern of disadvantage" relative to non-Latinos. 267 F.Supp.3d, at 779 (internal quotation marks omitted). Perhaps recognizing as much, both the District Court and the dissent point to the anticipated future growth in the percentage of eligible voters of Latino descent, but the districts now at issue would not necessarily be used beyond 2020, after which time the 2020 census would likely require redistricting once again.

***620** B

[30] HD90 is a district in Tarrant County that, unlike the other districts at issue in this appeal, was not copied from the District Court's interim plans. Instead, the 2013 Legislature substantially modified the district developed by the District Court, and the District Court held that the 2013 Legislature's creation is an invalid racial gerrymander. 267 F.Supp.3d, at 794.

In drawing HD90, the Legislature was pulled in opposite directions by competing groups. In 2011, the Legislature, responding to pressure from MALDEF, increased the Latino population of the district in an effort to make it a Latino opportunity district. H.J.S. Findings 258a–262a. In the process of doing so, the Legislature moved the community of Como, which is predominantly African–American, out of the district. But Como residents and the member of the Texas House who represented the district, Lon Burnam, objected, and in 2013, the Legislature moved Como back into the district. 267 F.Supp.3d, at 788–789. That change was opposed by MALC because it decreased the Latino population below 50%. App. 398a–399a. So the Legislature moved Latinos into the district to bring the Latino population back above 50%. 267 F.Supp.3d, at 789–790.

In light of these maneuvers, Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had " '*good reasons* to believe' " that this was necessary to satisfy § 2 of the VRA." *Bethune–Hill,* 580 U.S., at 194, 137 S.Ct., at 801.

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what § 2 demands. So one group's demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Representative ***621** Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes. See Brief for Appellants 70. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

We have previously rejected proffers of evidence that were at least as strong as Texas's here. For example, in *Cooper,* 581 U.S., at 300, 137 S.Ct., at 1469, we analyzed North Carolina's justification for deliberately moving "African–American voters" into a district to "ensure ... the district's racial composition" in the face of its expansion in size. North Carolina argued that its race-based decisions were necessary to comply with § 2, but the State could point to "no meaningful legislative ****2335** inquiry" into "whether a

new, enlarged" district, "created without a focus on race, ... could lead to § 2 liability." *Id.,* at 304, 137 S.Ct., at 1471. North Carolina pointed to two expert reports on "voting patterns throughout the State," but we rejected that evidence as insufficient. *Ibid.,* n. 5. 137 S.Ct., at 1490. Here, Texas has pointed to no actual "legislative inquiry" that would establish the need for its manipulation of the racial makeup of the district.

By contrast, where we have accepted a State's "good reasons" for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune–Hill,* the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] ... considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. 580 U.S., at 194, 137 S.Ct., at 801. The State established that it had performed a "functional analysis" and acted to achieve an "informed ***622** bipartisan consensus." *Ibid*. Texas's showing here is not equivalent.

Perhaps Texas could have made a stronger showing, but it is the State's burden to prove narrow tailoring, and it did not do so on the record before us. We hold that HD90 is an impermissible racial gerrymander. On remand, the District Court will have to consider what if any remedy is appropriate at this time.

* * *

Except with respect to one Texas House district, we hold that the court below erred in effectively enjoining the use of the districting maps adopted by the Legislature in 2013. We therefore reverse with respect to No. 17–586; reverse in part and affirm in part with respect to No. 17–626; and remand for proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

I adhere to my view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting. See *Cooper v. Harris,* 581 U.S. 285, 327, 137 S.Ct. 1455, 1485–1486, 197 L.Ed.2d 837 (2017) (concurring opinion) (citing *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment)). Thus, § 2 cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90. Because the Court correctly applies our precedents and reaches the same conclusion, I join its opinion in full.

Justice SOTOMAYOR, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, dissenting.

The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps. ***623** In reaching its desired result, the majority commits three fundamental errors along the way.

First, the majority disregards the strict limits of our appellate jurisdiction and reads into the District Court orders a nonexistent injunction to justify its premature intervention. Second, the majority indulges Texas' distorted reading of the District Court's meticulous orders, mistakenly faulting the court for supposedly shifting the burden of proof to the State to show that it cured the taint of past discrimination, all the while ignoring the clear language and unambiguous factual findings of ****2336** the orders below. Third, the majority elides the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively parses through the facts. As a result of these errors, Texas is guaranteed continued use of much of its discriminatory maps.

This disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas—despite constituting a majority of the population within the State—will continue to be underrepresented in the political process. Those voters must return to the polls in 2018 and 2020 with the knowledge that their ability to exercise meaningfully their right to vote has been burdened by the manipulation of district lines specifically designed to target their communities and minimize their political will. The fundamental right to vote is too precious to be disregarded in this manner. I dissent.

I

A

The first obstacle the majority faces in its quest to intervene in these cases is jurisdictional. The statute that governs our jurisdiction over these appeals is 28 U.S.C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying ... an interlocutory ***624** or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Unlike the more typical certiorari process, for cases falling within § 1253, appellate review in this Court is mandatory. That is why, until today, this Court has repeatedly recognized and adhered to a "long-established rule" requiring "strict construction" of this jurisdictional statute "to protect our appellate docket." *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 375, 378, 69 S.Ct. 606, 93 L.Ed. 741 (1949); see, *e.g., Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 98, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974) (noting that "only a narrow construction" of our jurisdiction under § 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration"); *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 387, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970) (similar); *Goldstein v. Cox,* 396 U.S. 471, 477–478, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970) (rejecting a construction of § 1253 that would "involve an expansion of [our] mandatory appellate jurisdiction," even where the statutory text "is subject to [that] construction," in light of "canon of construction" requiring that § 1253 be "narrowly construed"); *Phillips v. United States,* 312 U.S. 246, 248–250, 61 S.Ct. 480, 85 L.Ed. 800 (1941) (explaining that § 1253 is an "exceptional procedure" and that "inasmuch as this procedure ... brings direct review of a district court to this Court, any loose construction ... would defeat the purposes of Congress ... to keep within narrow confines our appellate docket").

In line with that command, this Court has held that a ruling on the merits will not suffice to invoke our mandatory appellate jurisdiction in the absence of an order granting or denying an injunction. In fact, even if a three-judge district court unequivocally indicates that a state law must be enjoined as it stands, we have required more before accepting mandatory review. For example, the Court in ****2337** ***625** *Gunn* found no jurisdiction where the three-judge District Court held that a Texas disturbing-the-peace statute was " 'impermissibly and unconstitutionally broad,' " concluded that the plaintiffs were " 'entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of [the statute] as now worded, insofar as it may affect the rights guaranteed under the First Amendment,' " and stayed the mandate to allow the State to, " 'if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.' " 399 U.S., at 386, 90 S.Ct. 2013. Despite the District Court's resolution of the merits and its clear indication that, unless amended, the disturbing-the-peace statute would be enjoined, this Court dismissed an appeal from the State for want of jurisdiction, concluding that the District Court merely wrote a "rather discursive *per curiam* opinion" and "there was no order of any kind either granting or denying an injunction—interlocutory or permanent." *Id.,* at 387, 90 S.Ct. 2013. The Court explained that, in addition to the congressional command to " 'keep within narrow confines our appellate docket,' " other "policy considerations" counseled limiting "our power of review," including "that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided." *Id.,* at 387–388, 90 S.Ct. 2013. Those considerations, the Court thought, were "conspicuously evident" in that case, where the opinion did not specify, for instance, exactly what was to be enjoined or against whom the injunction would run. *Id.,* at 388, 90 S.Ct. 2013.

Similarly, *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), concerned a redistricting challenge in which a three-judge District Court held that "a redistricting of [the challenged county was] necessitated" and "that the evidence adduced ... and the additional apportionment requirements set forth by the Supreme Court call[ed] for a redistricting of the entire state as to both houses of the General Assembly," *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1391 (S.D.Ind.1969). Recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative apportionment and districting primarily to the state legislature," the District Court afforded the Governor "a reasonable ***626** opportunity to call a Special Session of the General Assembly of the State of Indiana so that it may enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with [its] opinion." *Id.,* at 1392. The District Court gave the State a little over two months to enact new statutes "to remedy the improper districting and malapportionment." *Ibid.* When the Governor appealed from that order, this Court dismissed for want of jurisdiction because "at [the] time no judgment had been entered and no injunction had been granted or denied." 403 U.S., at 138, n. 19, 91 S.Ct. 1858. The findings of liability on

the merits and the unequivocal indication that the redistricting and malapportionment violations had to be remedied were not enough.

B

Straightforward application of this precedent compels the conclusion that this Court lacks jurisdiction over these appeals. Here, Texas appeals from two orders entered by the three-judge District Court on August 15 and 24, 2017. Those orders concern the constitutional and statutory challenges to Texas' State House and federal congressional redistricting plans, enacted by the Texas Legislature (hereinafter Legislature) in 2013 (hereinafter the 2013 maps). As relevant here, the orders concerned Texas House districts in Bell County (HD54 and HD55), Dallas County (HD103, HD104, and HD105), Nueces ****2338** County (HD32 and HD34), and Tarrant County (HD90), as well as federal congressional districts encompassing Nueces County (CD27) and parts of Travis County (CD35). The District Court concluded that plaintiffs had proved intentional discrimination as to HD54, HD55, HD103, HD104, HD105, HD32, HD34, and CD27.[1] It also ***627** concluded that plaintiffs had proved a "results" violation under § 2 of the Voting Rights Act as to HD32, HD34, and CD27,[2] and had established a racial gerrymandering claim as to HD90 and CD35.[3]

Having ruled on the challengers' statutory and constitutional claims, the District Court stated that all but one of the "violations must be remedied by either the Texas Legislature or [the District] Court." 274 F.Supp.3d 624, 686 (W.D.Tex.2017); see also 267 F.Supp.3d 750, 795 (W.D.Tex.2017).[4] With respect to the § 2 results violation concerning HD32 and HD34, however, the District Court noted that it had yet to decide "whether § 2 requires a remedy for this results violation." *Id.,* at 783, 795. The District Court then ordered "the [Texas] Office of the Attorney General [to] file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." 274 F.Supp.3d, at 686; see also 267 F.Supp.3d, at 795. The court went on: "If the Legislature does not intend to take up redistricting, the [District] Court will hold a hearing to consider remedial plans" on September 5 and 6, 2017, respecting the congressional and Texas House districts. 274 F.Supp.3d, at 686–687; see also ***628** 267 F.Supp.3d, at 795. "In preparation for the hearing[s]," the District Court ordered the parties to confer and to "take immediate steps to consult with their experts and mapdrawers and prepare" maps to present at those hearings. 274 F.Supp.3d, at 687; 267 F.Supp.3d, at 795.

The District Court went no further. Though there had been a determination on the merits that Texas violated both the Equal Protection Clause and § 2 of the Voting Rights Act with respect to a number of districts in the 2013 maps, the District Court did not enjoin use of the 2013 maps for the upcoming 2018 elections. For instance, with respect to the congressional map, the District Court explained that its order "only partially addresse[d]" the challengers' claims, as it had "bifurcated the remedial phase" from the merits phase. 274 F.Supp.3d, at 687. Importantly, in denying Texas' motions for a stay, the District Court took care to make abundantly clear the scope of its orders: "Although the [District] Court found violations ****2339** [in the congressional and Texas House maps], the [District] Court has not enjoined [their] use for any upcoming elections." App. 134a–136a.

That is the end of the inquiry under our precedent, as our past cases are directly on point. Like in *Gunn* and *Whitcomb,* the District Court issued a ruling on the merits against the State. Like in *Gunn* and *Whitcomb,* the District Court was clear that those violations required a remedy. Like in *Gunn* and *Whitcomb,* the District Court stayed its hand and did not enter an injunction, instead allowing the State an opportunity to remedy the violations. Therefore, like in *Gunn* and *Whitcomb,* this Court lacks jurisdiction under § 1253 because there is "no order of any kind either granting or denying an injunction—interlocutory or permanent." *Gunn,* 399 U.S., at 387, 90 S.Ct. 2013.[5]

***629** C

1

Despite this precedent, the majority nonetheless concludes that our intervention at this early stage is not only authorized, but mandatory. None of the justifications that the majority offers for deviating from our precedent is persuasive.

The majority justifies its jurisdictional overreach by holding that § 1253 mandates appellate review in this Court if a three-judge district court order "has the 'practical effect'

of granting or denying an injunction." *Ante,* at 2319. It reasons that the Court has "previously made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* That reasoning, however, has no application here. Whereas this Court has applied the "practical effect" rule in the context of the courts of appeals' appellate jurisdiction under 28 U.S.C. § 1292(a)(1), it has never applied it to questions of its own mandatory appellate docket under § 1253. That explains why the only cases the majority can round up to support its position concern jurisdiction ***630** under § 1292(a)(1). *Ante,* at 2319 (citing *Carson v. American Brands, Inc.,* 450 U.S. 79, 83–84, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), and *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 287–288, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988)).

This distinction matters a great deal. Courts of appeals generally have jurisdiction ****2340** over direct appeals from the district courts. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 13 (3d ed. 1992) ("Courts of appeals jurisdiction extends to nearly every action that might be taken by a district court"). In contrast, exercising mandatory review over direct appeals in this Court is a truly "exceptional procedure," *Phillips,* 312 U.S., at 248, 61 S.Ct. 480 in no small part due to our "necessarily finite docket," 16B Wright, Federal Practice and Procedure § 4003, at 19. Reading § 1253 broadly risks transforming that exceptional procedure into a routine matter, when our precedent commands a strict construction precisely so that we can " 'keep within narrow confines our appellate docket.' " *Goldstein,* 396 U.S., at 478, 90 S.Ct. 671.

Brushing that distinction aside, the majority contends that "we also construe § 1292(a)(1) 'narrowly,' " and have referred to the statutes as " 'analogous.' " *Ante,* at 2319 – 2320. True, but that is no response to the jurisdictional obstacle of § 1253. The command from our precedent is not simply one to undertake the same narrow interpretation as we do for § 1292(a)(1). Rather, our "long-established rule" requires "strict construction" of § 1253, *Stainback,* 336 U.S., at 378, 69 S.Ct. 606 so that even where the statutory text could be read to expand our mandatory appellate docket, this Court will not adopt that reading if a narrower construction is available, *Goldstein,* 396 U.S., at 477–478, 90 S.Ct. 671. That "strict construction" rule exists for a purpose specific to this Court: to protect our "carefully limited appellate jurisdiction." *Board of Regents of Univ. of Tex. System v. New Left Ed. Project,* 404 U.S. 541, 543, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972). Unlike the courts of appeals, which hear cases on mandatory jurisdiction regularly, this Court hears ***631** cases on mandatory jurisdiction only rarely. The majority nowhere grapples with that vital contextual distinction between § 1253 and § 1292(a)(1). Nor does the majority acknowledge that, in interpreting § 1253, this Court has itself recognized that distinction, noting that "this Court *above all others* must limit its review of interlocutory orders." *Goldstein,* 396 U.S., at 478, 90 S.Ct. 671 (emphasis added).

2

Looking to escape that pitfall in its reasoning, the majority turns to the text of the two jurisdictional statutes. But the text provides no refuge for its position. The majority first states that "the relevant language in the two provisions is nearly identical." *Ante,* at 2320. But whereas § 1253 provides for appeal "from an order granting or denying ... an interlocutory or permanent injunction," § 1292(a)(1) provides for appeal from "[i]nterlocutory orders ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." It is a stretch, to say the least, to characterize these provisions as "nearly identical." *Ante,* at 2319 – 2320.

Next, the majority contends that § 1253 and § 1292(a)(1) are "textually interlocked," *ante,* at 2320, in that § 1292(a)(1) provides for appeal to the courts of appeals, "except where a direct review may be had in the Supreme Court." In its view, this demonstrates that the "practical effect" rule must apply under § 1253. The majority reasons that "the consequences would be unfortunate and strange" otherwise, imagining that an order from a three-judge district court that had the practical effect of an injunction but did not invoke § 1253 jurisdiction would "appear to be appealable to one of the courts of appeals" in light of the "excep[t]" clause, a result "Congress surely did not intend" given that it took "pains to provide for ****2341** review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions." *Ante,* at 2320.

***632** This reasoning rests on a mistaken premise. Congress did not provide for review of *every* three-judge court order in this Court. It provided for review of only certain narrow categories of orders, *i.e.,* those granting or denying an injunction. There is nothing "unfortunate" or "strange" about the proposition that orders from a three-judge court that do not fall within these narrow categories of actions made directly

appealable to this Court can be appealed only to the courts of appeals. In fact, this Court itself has recognized as much. See, *e.g., Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) (*per curiam*) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U.S.C. § 1253. The judgment of the District Court is vacated and the case is remanded to that court so that it may enter a fresh decree from which timely appeal may be taken to the Court of Appeals" (citation omitted)); see also*Mitchell v. Donovan,* 398 U.S. 427, 431–432, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) (*per curiam*) (concluding that "this Court lacks jurisdiction of the appeal" under § 1253 and directing "the District Court [to] enter a fresh order ... thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals").[6] And to the extent a party prematurely appeals to the court of appeals an order that would otherwise fall within § 1253, *e.g.,* ***633** if Texas had appealed the August 15 and 24 orders to the Court of Appeals for the Fifth Circuit, that court surely will be more than capable of identifying as much and instructing the party to wait for an actual injunction before bringing an appeal to this Court.

3

The majority attempts to bolster its jurisdictional conclusion with a passing reference to the "valuable purpose" served by the " 'practical effect' " rule, *i.e.,* preventing district courts from manipulating proceedings by avoiding labeling their orders as " 'injunction[s].' " *Ante,* at 2318 – 2319. Notably, the majority cites no evidence for the proposition that district courts are engaging in any kind of manipulation. Nor is there any indication that the District Court here attempted to manipulate the proceedings by shielding its orders from appellate review. Instead, the District Court carefully adhered to a common practice in cases implicating important state interests, staying its hand as to the remedy to allow the State an opportunity to act, as happened in *Gunn* and *Whitcomb*.

More important, the majority ignores the "valuable purposes" served by the longstanding rule requiring strict construction of § 1253. Not only does it comply with the congressional command to " 'keep within narrow confines our appellate docket,' ****2342** " but without strict enforcement of the requirement that an order grant or deny an injunction, "it is simply not possible to know with any certainty what the court has decided." *Gunn,* 399 U.S., at 387–388, 90 S.Ct. 2013. Such clarity "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State." *Id.,* at 389, 90 S.Ct. 2013. Orders coming to this Court on direct appeal under the "practical effect" rule will more often than not lack that clarity.

In these cases, for instance, what does the majority read the "practical effect" of the orders to have been with respect to HD32 and HD34? The District Court held that the challengers ***634** had "not proven that § 2 requires breaking the County Line Rule" in the Texas Constitution, Art. III, but that "§ 2 could require" drawing two majority-HCVAP[7] districts. 267 F.Supp.3d, at 783, 795. Does the majority read that to mean that the § 2 results violation could potentially go without a remedy? If so, there would have been no obstacle to use of the 2013 maps for those districts even after a remedial phase. Or does the majority read that to mean that the challengers still had more to show before the District Court "would" redraw the districts that § 2 "could" require to be redrawn? And what is the effect of the conclusion respecting the County Line Rule on the potential remedy for the intentional vote dilution holding as to HD32 and HD34? The majority conveniently avoids confronting this lack of clarity by ignoring the relevant record, instead stating without explanation that it believes "it clear that the District Court effectively enjoined use of these districts as currently configured." *Ante,* at 2323, n. 15. But it cannot escape the reality that its rule will "needlessly complicate appellate review," *ante,* at 2321, given that "it is simply not possible [absent an injunction] to know with any certainty what the court has decided," *Gunn,* 399 U.S., at 388, 90 S.Ct. 2013.

I do not disagree that "lack of specificity in an injunctive order would [not] alone deprive the Court of jurisdiction under § 1253." *Id.,* at 389, n. 4, 90 S.Ct. 2013; see also *ante,* at 2321 (quoting *Gunn*). "But the absence of any semblance of effort by the District Court to comply with [the specificity required of injunctive orders under the Federal Rules] makes clear that the court did not think its [orders] constituted an order granting an injunction." *Gunn,* 399 U.S., at 389, n.4. 90 S.Ct. 2013. If any doubt remained as to the effect of the orders here, moreover, the District Court explicitly assured the parties that, even though it had found violations, it was not enjoining use of the 2013 maps for the upcoming elections. App. 134a–136a.

***635** Finally, it is axiomatic that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v.*

Friend, 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010).

> "Complex jurisdictional tests complicate a case.... Complex tests produce appeals and reversals, [and] encourage gamesmanship.... Judicial resources too are at stake [as] courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability." *Ibid.* (citations omitted).

Simple is thus the name of the game when it comes to jurisdictional rules. The rule in the majority opinion is anything but. Although the majority claims that a mere "finding on liability cannot be appealed unless an injunction is granted or denied," ****2343** *ante,* at 2324, the rule it embraces today makes it hard to understand when a finding on liability would not be read, as the majority does here, as having the "practical effect" of an injunction. It is a worrisome prospect that, after today, whenever a three-judge district court expresses that a statutory or constitutional violation must be remedied, the party held liable will straightaway file an appeal in this Court and assert jurisdiction under § 1253, even where the district court is clear that no injunction has issued.[8]

***636** The majority opinion purports to add a limit by distinguishing between unappealable orders that find a plan "unlawful long before the next scheduled election" or "very close to the election date," and those (presumably) appealable orders that are entered neither "long before" nor "very close" to the next election. *Ante,* at 2323 – 2324.[9] What does that even mean? The orders at issue here were entered about 15 months before the 2018 elections, and according to the majority fall within the not "long before" but not "very close" appealable range. Why this is so, however, the majority never says. Without any definitions for its boundary posts, courts will be left to wonder: What about orders entered 17 or 18 months before an election? Are those considered "long before" so they would be unappealable? And are orders entered 14, 13, or 12 months before the election similarly unappealable because they were entered "very close" to the election date? And what does the majority mean by "the election date"? Does that include primaries? What about registration deadlines, or ballot-printing deadlines? It is not uncommon for there to be, at any given time, multiple impending deadlines relating to an upcoming election. Thinking through the many variations of jurisdictional disputes that will arise over the years following this novel reading of § 1253 should be enough to stop the majority from rewriting our long established jurisprudence in this area.

After today, our mandatory appellate docket will be flooded by unhappy litigants in three-judge district court cases, demanding our review. Given the lack of predictability, ***637** the rule will incentivize appeals and "encourage gamesmanship." *Hertz Corp.,* 559 U.S., at 94, 130 S.Ct. 1181. The Court will no doubt regret the day it opened its courthouse doors to such time-consuming and needless manipulation of its docket.

D

Even if the majority were correct to import the "practical effect" rule into the ****2344** § 1253 context, moreover, that would still not justify the Court's premature intervention in these appeals for at least two reasons. First, while taking from *Carson* the "practical effect" rule it likes, the majority gives short shrift to the second half of that case, in which the Court was explicit that "[u]nless a litigant can show that an interlocutory order ... might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 450 U.S., at 84, 101 S.Ct. 993. Texas has made no showing of a "serious, perhaps irreparable consequence" requiring our immediate intervention, nor has Texas shown that the orders could not be "effectually challenged" after the remedial stage was completed. In fact, when Texas sought a stay of those orders before this Court, the 2018 elections were more than a year away. For the majority, however, it is enough that the District Court found the Texas redistricting maps to be in violation of federal law. *Ante,* at 2323 – 2324. That cursory application of *Carson,* in particular whether the injunctions the majority reads into the August 15 and 24 orders could be "effectually challenged" absent immediate appeal to this Court, deprives that limit to our jurisdiction of much of its meaning when assessing Texas' request for our intervention in these cases. Nothing in our precedent supports that truncated approach. And in any event, if Texas wanted review of the orders after any injunction was entered by the District Court, it could have asked this Court for an emergency stay.

***638** Second, the August 15 and 24 orders at issue here simply did not have the "practical effect" of enjoining Texas' use of the 2013 maps. The majority thinks otherwise in

part because the District Court noted that the violations " 'must be remedied.' " *Ante,* at 2321 – 2322. In addition, the majority believes that "Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the Voting Rights Act." *Ante,* at 2322. But the majority forgets that the District Court made explicit that "[a]lthough [it] found violations [in the 2013 maps], [it] ha[d] not enjoined [their] use for any upcoming elections." App. 134a–136a. That the District Court requested the Texas attorney general to advise it, within "three business days," whether "the Legislature intends to take up redistricting in an effort to cure [the] violations," 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795, does not undermine that unequivocal statement. Nothing in that language indicates that the District Court required the Legislature to "redraw both maps *immediately* " or else "the court would do so itself." Brief for Appellants 20 (emphasis in original). Instead, recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative ... districting primarily to the state legislature," *Whitcomb,* 305 F.Supp., at 1392, the District Court gave Texas an opportunity to involve its Legislature and asked for a simple statement of intent so that the court could manage its docket accordingly. This request for a statement of intent, which was necessary for the District Court to manage its own docket, does not transform the orders into injunctions.

As to the second point, if Texas had any "fear" regarding the use of its maps, despite having been explicitly told that the maps were not enjoined, that would still not be enough. This Court recognized in *Gunn* that the State in that case, ***639** faced ****2345** with the order declaring its statute unconstitutional, "would no doubt hesitate long before disregarding it." 399 U.S., at 390, 90 S.Ct. 2013. That hesitation was not enough in *Gunn* to magically transform an order into an injunction for purposes of § 1253, and nothing about these cases justifies the majority taking out its wand today. Whatever "fear" Texas had does not transform the August 15 and 24 orders into injunctions. And absent an injunction, this Court lacks jurisdiction over these appeals. The cases should thus be dismissed.

II

Having rewritten the limits of § 1253, the majority moves to the merits. There again the Court goes astray. It asserts that the District Court legally erred when it purportedly shifted the burden of proof and "required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Ante,* at 2324. But that holding ignores the substantial amount of evidence of Texas' discriminatory intent, and indulges Texas' warped reading of the legal analysis and factual record below.[10]

A

Before delving into the content of the August 15 and 24 orders, a quick recap of the rather convoluted history of these cases is useful. In 2011, the Texas Legislature redrew its electoral districts. Various plaintiff groups challenged the 2011 maps under § 2 of the Voting Rights Act and the Fourteenth Amendment, and those lawsuits were consolidated before the three-judge District Court below pursuant to 28 U.S.C. § 2284(a). Because Texas then was subject to preclearance under § 5 of the Voting Rights Act, the 2011 ***540** maps did not take effect immediately, and Texas filed a declaratory action in the District Court for the District of Columbia to obtain preclearance.

"Faced with impending election deadlines and un-precleared plans that could not be used in the [2012] election, [the District] Court was faced with the 'unwelcome obligation' of implementing interim plans so that the primaries could proceed." 274 F.Supp.3d, at 632. In January 2012, this Court vacated the first iteration of those interim maps in *Perry v. Perez,* 565 U.S. 388, 394–395, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*), finding that the District Court failed to afford sufficient deference to the Legislature. In February 2012, the District Court issued more deferential interim plans, but noted that its analysis had been expedited and curtailed, and that it had only made preliminary conclusions that might be revised on full consideration. C.J.S. 367a–424a; H.J.S. 300a–315a.

In August 2012, the D.C. District Court denied preclearance of the 2011 maps. *Texas v. United States,* 887 F.Supp.2d 133 (2012). It concluded that the federal congressional map had "retrogressive effect" and "was enacted with discriminatory intent," *id.,* at 159, 161, and that the State House map was retrogressive and that "the full record strongly suggests that the retrogressive effect ... may not have been accidental," *id.,* at 178. Texas appealed, and the case was eventually dismissed following *Shelby County v. Holder,* 570 U.S.

529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (holding unconstitutional the formula used to subject States to the preclearance requirement).

**2346 In June 2013, the Texas Governor called a special legislative session, and that same month the Legislature adopted the 2012 interim maps as the permanent maps for the State. The Legislature made small changes to the maps, including redrawing the lines in HD90, but the districts at issue in these appeals all remained materially unchanged from the 2011 maps.

The District Court in these cases denied Texas' motion to dismiss the challenges to the 2011 maps, and the challengers *641 amended their complaints to assert claims respecting the 2013 maps. In April and May 2017, the District Court held that districts in Texas' 2011 maps violated § 2 and the Fourteenth Amendment. The August 15 and 24 orders respecting the 2013 maps followed.

B

The majority believes that, in analyzing the 2013 maps, the District Court erroneously "attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature" and required the 2013 Legislature to purge that taint. *Ante,* at 2317 – 2318. The District Court did no such thing. It engaged in a painstaking analysis of discriminatory intent under *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), which is critical to understanding why, as explained in Part II–D, *infra,* the District Court did not improperly presume that the Legislature acted with discriminatory intent.

Under *Arlington Heights,* "in determining whether racially discriminatory intent existed," this Court considers "circumstantial and direct evidence" of: (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) the "legislative or administrative history," including any "contemporary statements" of the lawmakers. 429 U.S., at 266–268, 97 S.Ct. 555. Although this analysis must start from a strong "presumption of good faith," *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), a court must not overlook the relevant facts. This Court reviews the "findings of fact" made by the District Court, including those respecting legislative motivations, "only for clear error." *Cooper v. Harris,* 581 U.S. 285, 293, 137 S.Ct. 1455, 1465, 197 L.Ed.2d 837 (2017); see also *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The Court therefore "may not reverse just because we 'would have decided the [matter] differently.'.... A finding that is 'plausible' in light of the *642 full record—even if another is equally or more so—must govern." *Harris,* 581 U.S., at 293, 137 S.Ct., at 1465.

The District Court followed the guidance in *Arlington Heights* virtually to a tee, and its factual findings are more than "plausible" in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the "specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects 'continu[ing] to this day.' " 274 F.Supp.3d, at 649 (alteration in original). Texas, moreover, has a long "history of discrimination" against minority voters. *Id.,* at 648, n. 37. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas,* 887 F.Supp.2d, at 161.

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. "The 2013 plans were enacted by a substantially similar **2347 Legislature with the same leadership only two years after the original enactment." 274 F.Supp.3d, at 648, n. 37. The Legislature was also well aware that "the D.C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose," H.J.S. 443a, and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, "the Legislature continued its steadfast refusal to consider [that] possibility," 274 F.Supp.3d, at 649.

Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below, see Part II–D, *infra*—the District Court concluded that Texas was just "not truly interested in fixing any remaining discrimination in the [maps]." 274 F.Supp.3d, at 651, n. 45. Despite knowing of the discrimination in its 2011 maps, "the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured *643 any taint from the 2011 plans."[11] *Id.,* at 649. For instance, Representative Darby, a member of the redistricting committee, "kept stating that he wanted to be informed of legal deficiencies so he could fix them," but "he did not

himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought 'from the start' that the interim plans were fully legal." *Id.,* at 651, n. 45.[12] The ***644** Legislature made no substantive changes to the challenged districts that ****2348** were the subject of the 2011 complaints, and "there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." *Id.,* at 649. In fact, the only substantive change that the Legislature made to the maps was to add *more* discrimination in the form of a new racially gerrymandered HD90, as the majority concedes. *Ante,* at 2334 – 2335.

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, "the Legislature pushed the redistricting bills through quickly in a special session," 274 F.Supp.3d, at 649, despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session, *id.,* at 634; see also H.J.S. 440a. By pushing the bills through a special session, the Legislature did not have to comply with "a two-thirds rule in the Senate or a calendar rule in the House," 274 F.Supp.3d, at 649, n. 38, and it avoided the "full public notice and hearing" that would have allowed " 'meaningful input' from all Texans, including the minority community," H.J.S. 444a. In addition, "necessary resources were not allocated to support a true deliberative process." 274 F.Supp.3d, at 649. For instance, the House committee "did not have counsel when the session started." *Ibid.,* n. 39.

Nor can Texas credibly claim to have understood the 2012 interim orders as having endorsed the legality of its maps so that adopting them would resolve the challengers' complaints. ***645** In its 2012 interim orders, "the [District] Court clearly warned that its preliminary conclusions ... were not based on a full examination of the record or the governing law and were subject to revision" "given the severe time constraints ... at the time" the orders were adopted. *Id.,* at 650. The District Court also explained that the "claims presented ... involve difficult and unsettled legal issues as well as numerous factual disputes." C.J.S. 367a. During the redistricting hearings, chief legislative counsel for the Texas Legislative Council in 2013, Jeff Archer, advised the Legislature that the District Court " 'had not made full determinations, ... had not made fact findings on every issue, had not thoroughly analyzed all the evidence,' " and had " 'made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues.' " 274 F.Supp.3d, at 650 (alterations in original); see also App. 441a–442a (testimony that interim plans were "impromptu" and "preliminary" and that the District Court "disclaimed making final determinations"). Archer explained that although the Legislature had " 'put to bed' " challenges regarding " 'those issues that the [District] Court identified so far,' " it had not " 'put the rest to bed.' " 274 F.Supp.3d, at 651, n. 45; see also App. 446a–447a (advising that, "on a realistic level," the Legislature had not "removed legal challenges" and that adopting the interim maps "in no way would inoculate the plans").

There was substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a "strategy [that] involved adopting the interim maps, however flawed," to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps. 274 F.Supp.3d, at 651. Texas hoped that, by adopting the 2012 interim maps, the challengers "would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects." *Ibid.* That strategy originated with the Texas attorney general, who was responsible for defending ***646** the State in the redistricting challenges. *Id.,* at 650, and n. 41. He advised the Legislature that adopting the interim plans was the " 'best way to ****2349** avoid further intervention from federal judges' " and to " '*insulate* [Texas'] redistricting plans from further legal challenge.' " *Id.,* at 650 (emphasis added); see also H.J.S. 443a. The Texas attorney general also drafted the "legislative fact findings accompanying the plans, *before* the Legislature had engaged in any fact findings on the bills," stating that the 2012 interim plans "complied 'with all federal and state constitutional provisions or laws applicable to redistricting plans.' " 274 F.Supp.3d, at 650, n. 41 (emphasis added). That the legislative factfindings were predrafted by the attorney defending Texas in these redistricting challenges—purporting to conclude that the 2012 interim plans complied with the law, when in fact the evidence showed that the Legislature did not engage in a true deliberative process or meaningfully consider evidence of the legality of the plans so that it could have endorsed such factfindings—demonstrates that the adoption of the interim plans was a mere pretext to insulate the discriminatory benefits of the 2011 plans. That explains why legislators thought that removal of those factfindings would " 'gu[t] the bill.' " *Ibid.*

In the end, having presided over years of litigation and seeing firsthand all of the evidence, the District Court thought it clear that Texas' "strategy involved adopting the interim maps, however flawed," so that the challengers "would have

no remedy, and [Texas] would maintain the benefit of such discrimination and unconstitutional effects." *Id.,* at 651. It is hard to imagine what a more thorough consideration of the *Arlington Heights* factors in these cases would have looked like. Review of the District Court's thorough inquiry leads to the inescapable conclusion that it did not err—let alone clearly err—in concluding that the "Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." 274 F.Supp.3d, at 652.

***647** C

In contrast to that thorough *Arlington Heights* inquiry, the majority engages in a cursory analysis of the record to justify its conclusion that the evidence "overwhelmingly" shows that Texas acted with legitimate intent. *Ante,* at 2328. Two critical things are conspicuously missing from its analysis: first, consideration of the actual factual record (or most of it, anyway),[13] and second, meaningful consideration of the limits of our review of facts on these appeals.[14]

The majority first makes reference to the fact that the Texas attorney general "advised the Legislature that the best way to [end the redistricting litigation] was to adopt the interim, court-issued plans," a position repeated by the sponsor of the plans. *Ante,* at 2327. And in its view, it was reasonable for the Legislature to believe that adopting the interim plans "might at least reduce objections and thus ****2350** simplify and expedite the conclusion of the litigation." *Ante,* at 2328. The majority also states that "there is no evidence that the Legislature thought that the plans were invalid." *Ante,* at 2327. In reaching those findings, however, the majority ignores all of the evidence in the record that demonstrates that the Legislature was aware of (and ignored) the infirmities in the maps, that it knew that adopting the interim plans would not resolve the litigation concerning the disputed districts, ***648** and that it nevertheless moved forward with the bills as a strategy to "insulate" the discriminatory maps from further judicial scrutiny and perpetuate the discrimination embedded in the 2012 interim maps. See Part II–B, *supra*.

Instead of engaging with the factual record, the majority opinion sets out its own view of "the situation when the Legislature adopted the court-approved interim plans." *Ante,* at 2328. Under that view, "the Legislature [had] good reason to believe that the court-approved interim plans were legally sound," particularly in light of our remand instructions in *Perry,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900. *Ante,* at 2328 – 2329. The majority nowhere considers, however, the evidence regarding what the Legislature *actually* had before it concerning the effect of the interim orders, including the explicit cautionary statements in the orders and the repeated warnings of the chief legislative counsel that the interim plans were preliminary, incomplete, and impromptu.[15] See Part II–B, *supra*.

The majority finds little significance in the fact that the Legislature " 'pushed the redistricting bills through quickly ***649** in a special session,' " reasoning that a special session was needed "because the regular session had ended." *Ante,* at 2329. That of course ignores the evidence that the Legislature disregarded requests by the Texas attorney general, months earlier, to take up redistricting during the regular session, that proceeding through a special session permitted the Legislature to circumvent procedures that would have ensured full and adequate consideration, and that resources were not sufficiently allocated to permit considered review of the plans. See Part II–B, *supra*.

Finally, the majority sees nothing wrong with the fact that the Legislature failed "to take into account the problems with the 2011 plans that the D.C. court identified in denying preclearance." *Ante,* at 2329. It maintains that the purpose of adopting the interim plans was to "fix the problems identified by the D.C. court" and reasons that the interim maps did just that by modifying any problematic districts. *Ibid.* ****2351** But of course the finding of discriminatory intent rested not only on what happened with particular districts. Rather, the evidence suggested that discriminatory motive permeated the entire 2011 redistricting process, as the D.C. court considered that "Texas has found itself in court every redistricting cycle [in the last four decades], and each time it has lost"; that "Black and Hispanic members of Congress testified at trial that they were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored"; that the redistricting committees "released a joint congressional redistricting proposal for the public to view only after the start of a special legislative session, and each provided only seventy-two hours' notice before the sole public hearing on the proposed plan in each committee"; that minority members of the Texas Legislature "raised concerns regarding their exclusion from the drafting process and their inability to influence the plan"; and that the Legislature departed from normal procedure in the "failure to release a redistricting ***650** proposal during the regular session, the limited time for review, and the failure to provide counsel with the necessary election data to evaluate

[Voting Rights Act] compliance." 887 F.Supp.2d, at 161. The majority also ignores the findings of retrogression concerning the previous version of CD25, which of course are relevant to the challengers' claims about CD27 and CD35 in this litigation and were not addressed in the 2012 interim plans. See Part III–A, *infra*. That the 2012 interim maps addressed some of the deficiencies identified by the D.C. court in the preclearance litigation does not mean that the Legislature in 2013 was free to wholly disregard the significance of other evidence of discrimination that tainted its 2011 maps and were entrenched in the 2012 interim maps.

Even had the majority not ignored the factual record, it still would be wrong in concluding that the District Court erred in finding that the 2013 Legislature acted with the intent to further and benefit from the discrimination in the 2011 maps. In light of the record before this Court, the finding of invidious intent is at least more than " 'plausible' " and thus "must govern." *Harris,* 581 U.S., at 293, 137 S.Ct., at 1465. The majority might think that it has a "better view of the facts" than the District Court did, but "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.' " *Id.,* at 299, 137 S.Ct., at 1468.

D

The majority resists the weight of all this evidence of invidious intent not only by disregarding most of it and ignoring the clear-error posture but also by endorsing Texas' distorted characterizations of the intent analysis in the orders below. Specifically, the majority accepts Texas' argument that the District Court "reversed the burden of proof" and "imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that ***651** the 2013 plans cured any taint from the 2011 plans.' " *Ante,* at 2325 (alteration in original). The District Court did no such thing, and only a selective reading of the orders below could support Texas' position.

It is worth noting, as a preliminary matter, that the majority does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, the majority leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the " 'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question ****2352** of intent." *Ante,* at 2325 (quoting *Arlington Heights,* 429 U.S., at 267, 97 S.Ct. 555). With respect to these cases, the majority explicitly acknowledges that, in evaluating whether the 2013 Legislature acted with discriminatory purpose, "the intent of the 2011 Legislature [is] relevant" and "must be weighed together with any other direct and circumstantial evidence" bearing on intent. *Ante,* at 2327.

If consideration of this " 'historical background' " factor means anything in the context of assessing intent of the 2013 Legislature, it at a minimum required the District Court to assess how the 2013 Legislature addressed the known discrimination that motivated the drawing of the district lines that the Legislature was adopting, unchanged, from the 2011 maps. Therefore, the findings as to whether the 2013 Legislature engaged in a good-faith effort to address any known discrimination that tainted its 2011 plans were entirely apposite, so long as the District Court "weighed [this factor] together with any other direct and circumstantial evidence" bearing on the intent question, and so long as the burden remained on the challengers to establish invidious intent. *Ibid.*

The majority faults the District Court for not adequately engaging in that weighing and giving too "central" a focus to the historical factor in its intent analysis. *Ante,* at 2325 – 2326; see also *Ibid.,* That alleged "central" focus, the majority contends, led the District Court to shift the ***652** burden of proof on the intent inquiry away from the challengers, instead requiring Texas to show that the Legislature cured its past transgressions. *Ante,* at 2325 – 2326. Those conclusions can only be supported if, as Texas and the majority have done, one engages in a highly selective reading of the District Court orders.

To begin, entirely absent from the majority opinion is any reference to the portions of the District Court orders that unequivocally confirm its understanding that the burden remained on the challengers to show that the 2013 Legislature acted with invidious intent. The District Court was explicit that the challengers bore the burden to "establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination." 274 F.Supp.3d, at 646; see also *id.,* at 645 (discussing Circuit precedent regarding the showing needed for "a plaintiff [to] meet the purpose standard").[16]

Even when it does look at the actual language of the orders, the majority picks the few phrases that it believes support its **2353 argument, choosing to disregard the rest. For instance, *653 the majority quotes the District Court order as having required Texas to show that the 2013 Legislature had a " 'change of heart.' " *Ante,* at 2325 (quoting 274 F.Supp.3d, at 649). When that sentence is read in full, however, it is evident that the District Court was not imposing a "duty to expiate" the bad intent of the previous Legislature, as the majority contends, *ante,* at 2325 – 2326, but instead was describing what the weighing of the direct and circumstantial evidence revealed about the motivations of the 2013 Legislature: "The decision to adopt the interim plans was not a change of heart concerning the validity of [the challengers'] claims ... —it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." 274 F.Supp.3d, at 649–650.

Likewise, the majority quotes the orders as requiring proof that the Legislature " 'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Ante,* at 2325 – 2326 (quoting 274 F.Supp.3d, at 649). But the District Court did not put the burden on Texas to make that affirmative showing. Instead, that partial quote is lifted from a sentence in which the District Court, having held a trial on these factual issues, concluded that the challengers had met their burden to show that "the Legislature did not engage in a deliberative process," which it supported later in that paragraph with findings that the Legislature "pushed the redistricting bills through quickly in a special session" without allocating the "necessary resources ... to support a true deliberative process." Id., at 649.

The majority finally asserts that the District Court "drove the point home" when it "summarized its analysis" as follows: " 'The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but safe from remedy.' " *Ante,* at 2325 – 2326 (quoting 274 F.Supp.3d, at 686). The majority no *654 doubt hopes that the reader will focus on the portion of the sentence in which the District Court concludes that the discriminatory taint found in the 2011 maps " 'was not removed' " by the enactment of the interim maps " 'because the Legislature engaged in no deliberative process to remove any such taint.' " *Ante,* at 2325 (quoting 274 F.Supp.3d, at 686).[17] But the majority ignores the import of the remaining part of the sentence, in which the District Court held that the Legislature "in fact intended any such taint to be maintained but be safe from remedy." *id.,*at 652; see also *id.,* at 686. The majority also conveniently leaves out the sentence that immediately follows: "The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." *Id.,* at 652. When read in full and in context, it is clear that the District Court remained focused on the evidence proving the intent of the 2013 Legislature to shield its plans from a remedy and thus further the discrimination, rather than simply presuming invidious intent **2354 from the failure to remove the taint, as the majority claims.

In selectively reviewing the record below, the majority attempts to shield itself from the otherwise unavoidable conclusion that the District Court did not err. If forced to acknowledge the true scope of the legal analysis in the orders below, the majority would find itself without support for its insistence that the District Court was singularly focused on whether the Legislature "removed" past taint. And then the majority would have to contend with the thorough analysis of the *Arlington Heights* factors, Part II–B, *supra,* that *655 led the District Court to conclude that the 2013 Legislature acted with invidious intent.

III

The majority fares no better in its district-by-district analysis. In line with the theme underlying the rest of its analysis, the majority opinion overlooks the factual record and mischaracterizes the bulk of the analysis in the orders below in concluding that the District Court erred in finding a § 2 results violation as to CD27, HD32, and HD34. I first address CD27, and then turn to HD32 and HD34.

A

1

To put in context the objections to the District Court's conclusion regarding CD27, a brief review of the District Court's factual findings as to that district is necessary. Before 2011, CD27 was a Latino opportunity district, *i.e.,* a majority-HCVAP district with an opportunity to elect a Hispanic-preferred candidate. When the Legislature reconfigured the district in 2013, it moved Nueces County, a majority-HCVAP county, into a new Anglo-majority district to protect an

incumbent "who was not the candidate of choice of those Latino voters" and likely would have been "ousted" by them absent the redistricting. C.J.S. 191a. The District Court found that the "placement of Nueces County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area." *Id.,* at 189a–190a. It also found that "the political processes are not equally open to Hispanics" in Texas as a result of its "history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process [that] is well documented," and that "Latinos bear the effects of past discrimination in areas such as education and employment/income, which hinder their ***656** ability to participate effectively in the political process." *Id.,* at 190a–191a. Given those findings, the District Court concluded that the newly constituted CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity." *Id.,* at 191a.

Texas nevertheless contended (and maintains here) that no § 2 results violation existed because only "seven compact Latino opportunity districts could be drawn in South/West Texas," *id.,* at 181a, and that all seven districts already existed under its maps. To explain how it counted to seven, Texas pointed to the creation of CD35 as a supposed new Latino opportunity district that joined Travis County Hispanics with Hispanics in San Antonio. The District Court agreed that only seven such districts could be drawn in the area, but rejected Texas' invocation of CD35 as a defense. The District Court concluded that because Travis County "[did] not have Anglo bloc voting," 274 F.Supp.3d, at 683, § 2 did not require the placement of Travis County Hispanics in an opportunity district, C.J.S. 176a; see also *Thornburg v. Gingles,* 478 U.S. 30, 51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The District Court ****2355** found that Texas had moved Travis County Hispanics from their pre–2011 district, CD25, to the newly constituted CD35, not to comply with § 2, but "to use race as a tool for partisan goals ... to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25)." 274 F.Supp.3d, at 683. Thus, it concluded that "CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest." *Ibid.*

Importantly, the District Court concluded that, without CD35, Texas could have drawn one more Latino opportunity district in South/West Texas that included Nueces County Hispanics. C.J.S. 181a; see also *id.,* at 190a ("Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority ***657** HCVAP"); *id.,* at 192a ("Numerous maps also demonstrated that accommodating the § 2 rights of all or most Nueces County Hispanic voters would not compromise the § 2 rights of any other voters, and in fact including it substantially accommodates the § 2 rights of Hispanic voters in South/West Texas"). Indeed, "[p]lans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters." *Id.,* at 181a, n. 47.

2

Nothing in the record or the parties' briefs suggests that the District Court clearly erred in these findings of fact, which unambiguously support its conclusion that there is a § 2 results violation with respect to CD27. Nevertheless, the majority offers two reasons for reversing that conclusion. First, the majority contends that the District Court erred because "in evaluating the presence of majority bloc voting in CD35," it "looked at only one, small part of the district, the portion that falls within Travis County." *Ante,* at 2331 – 2332. It cites to *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 192, 137 S.Ct. 788, 800, 197 L.Ed.2d 85 (2017), an equal protection racial gerrymandering case, for the proposition "that redistricting analysis must take place at the district level." *Ante,* at 2332. According to the majority, then, the District Court should have looked at the existence of majority bloc voting in CD35 as a whole after the 2011 redistricting.

But the majority confuses the relevant inquiry, as well as the relevant timeline. The particular § 2 question here does not concern the status of Travis County Latinos in the newly constituted CD35 after the 2011 redistricting. Rather, it concerns the status of Travis County Latinos in the old CD25, prior to the 2011 redistricting. That is because the challengers' § 2 claim concerns the choices before the Legislature *at the time of the 2011 redistricting,* when it was deciding which Latinos in Southwest Texas to place in the ***658** new opportunity district to be created in that area of the State. The Legislature chose to include Travis County Latinos in an opportunity district at the expense of the Nueces County Latinos, who were instead moved into a majority-Anglo district. So the question is whether, knowing that Nueces

County Latinos indisputably had a § 2 right, the Legislature's choice was nevertheless justified because the Travis County Latinos also had a § 2 right that needed to be accommodated. In other words, did the Legislature actually create a new § 2 opportunity district for persons with a § 2 right, or did it simply move people without a § 2 right into a new ****2356** district and just call it an opportunity district? To answer that question, the status of Travis County Latinos in 2011 is the only thing that matters, and the District Court thus correctly focused its inquiry on whether bloc voting existed in Travis County *prior* to the 2011 redistricting, such that Travis County Latinos could be found to have a § 2 right. Whether the newly constituted CD35 *now* qualifies as a § 2 opportunity district—an inquiry that would, as the majority suggests, call for district wide consideration—is beside the point.

Second, the majority reasons that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Ante,* at 2332. For this, the majority cites to the fact that the district "was based on a concept proposed by MALDEF" and that one group of plaintiffs "argued that the district [was] mandated by § 2," and vaguely suggests that, contrary to the District Court's finding, "there is ample evidence" of majority bloc voting in CD35. *Ibid.*[18]

The majority forgets, yet again, that we review factual findings for clear error. *Harris,* 581 U.S., at 293, 137 S.Ct., at 1464–1465. Indeed, ***659** its analysis is too cursory even for *de novo* review. The majority does not meaningfully engage with the full factual record below. Instead, it looks only to the handful of favorable facts cited in Texas' briefs. Compare Brief for Appellants 46 with *ante,* at 2332. Had the majority considered the full record, it could only have found that the District Court cited ample evidence in support of its conclusion that the Legislature had no basis for believing that § 2 required its drawing of CD35. In fact, the District Court noted that Texas in 2011 "actually asserted that CD35 is not required by § 2," C.J.S. 174a, n. 40, that the main plan architect testified that he was not sure whether § 2 required drawing the district, and that testimony at trial showed that the district was drawn because, on paper, it would fulfill the requirement of being majority-HCVAP while providing Democrats only one new district, and "not because all of the *Gingles* factors were satisfied," *id.,* at 179a, n. 45. The District Court also concluded that "there is no evidence that any member of the Legislature ... had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status." *Ibid.*

Had the majority properly framed the inquiry and applied the clear-error standard to the full factual record, it could not convincingly dispute the existence of a § 2 results violation as to CD27. Texas diluted the voting strength of Nueces County Latinos by transforming a minority-opportunity district into a majority-Anglo district. The State cannot defend that result by pointing to CD35, because its "creation of an opportunity district for [Travis County Latinos] without a § 2 right offers no excuse for its failure to provide an opportunity district for [Nueces County Latinos] with a § 2 right." *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 430, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).[19]

****2357** ***660** B

1

I turn now to HD32 and HD34. Before the 2011 redistricting, Nueces County had within it two Latino opportunity districts and part of one Anglo-represented district. 267 F.Supp.3d, at 767. Due to slower population growth reflected in the 2010 census, however, Nueces County was entitled to have within it only two districts. Accordingly, during the 2011 redistricting, the Legislature opted to "eliminate one of the Latino opportunity districts ... and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect [an] incumbent." *Ibid.* "Based on an analysis of the *Gingles* requirements and the totality of the circumstances," however, the District Court found that the Legislature could have drawn two compact minority districts in Nueces County. *Id.,* at 780. Namely, the evidence demonstrated that it was possible to draw a map with "two districts with greater than 50% HCVAP," that "Latinos in Nueces County are highly cohesive, and that Anglos vote as a block usually to defeat minority preferred candidates." *Id.,* at 777–778.

***661** The District Court then considered two proposed configurations for those districts: one with two HCVAP-majority districts located wholly within Nueces County, and another that required breaking the County Line Rule. *Id.,* at 777. The challengers preferred the latter configuration because, according to their expert, "an exogenous election index" revealed that the two HCVAP-majority districts wholly within Nueces County did "not perform sufficiently." *Id.,* at 778. The District Court did not accept that

expert's assessment at face value. Instead, it explained that "an exogenous election index alone will not determine opportunity," and so evaluated the expert testing and ample other evidence and ultimately concluded that the challengers had "not adequately demonstrated that they lack equal opportunity in [an alternative] configuration ... such that a county line break is necessary." *Id.,* at 778, 781. Thus, although it found that "two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that § 2 could require those two districts," because § 2 did not require the challengers' requested remedy (*i.e.,* breaking the County Line Rule), the District Court had to "consider whether § 2 requires a remedy" and directed the challengers to "consider their preferred configuration for the remedy stage" that was to follow (before Texas prematurely appealed). *Id.,* at 783.

2

The majority purports to accept these factual findings and contends that they "show that [HD32 and HD34] do not violate § 2." *Ante,* at 2332. Specifically, the majority points to the fact that the challengers' "own expert determined that it ****2358** was not possible to divide Nueces County into more than one *performing* Latino district" without breaking the County Line Rule, a remedy the District Court concluded was not required by § 2. *Ante,* at 2332 – 2333 (emphasis in original). "So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines," the ***662** majority reasons, "the logical result is that Texas did not dilute the Latino vote." *Ibid.* (emphasis in original). In its view, a districting decision cannot be said to dilute the votes of minority voters "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Ibid.*

At bottom, then, the majority rests its conclusion on one aspect of the challengers' expert evidence, *i.e.,* that it was not possible to place within Nueces County more than one performing Latino district without breaking county lines. The majority acknowledges the District Court's finding that the challengers had " 'failed to show' that two majority-Latino districts in Nueces County would not perform," but waves away that finding by concluding that the District Court "twisted the burden of proof beyond recognition" by "suggest [ing] that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established." *Ante,* at 2333. That conclusion is only possible because the majority closes its eyes to significant evidence in the record and misrepresents the District Court's conclusion about the potential for creating two performing Latino-majority districts in Nueces County.

The majority, of course, is right on one thing: The District Court recognized that the challengers' expert opined that the two HCVAP-majority districts would not perform based on the results of an exogenous election index. See *ante,* at 2332 – 2333. But the majority ignores that the District Court rejected that expert's conclusion because "the results of an exogenous election index alone will not determine opportunity," as "[s]uch indices often do not mirror endogenous election performance." 267 F.Supp.3d, at 778. Instead of "just relying on an exogenous election index to measure opportunity," the District Court "conduct[ed] an intensely local appraisal to determine whether real electoral opportunity exists." *Ibid.*

***663** That "intensely local appraisal" resulted in a lengthy analysis that considered, among other facts: that Texas had a long "history of voting-related discrimination"; that "racially polarized voting exist[s] in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates"; "that Hispanics, including in Nueces County, suffer a 'continuing pattern of disadvantage' relative to non-Hispanics"; that population growth in the county "was [driven by] Hispanic growth" and that the "HCVAP continues to climb"; that the districts "include demographic distributions strongly favoring Hispanic voters," and that the "numbers translate into a significant advantage in house district elections"; and that data analysis showed that "performance for Latinos increased significantly in presidential election years," which "indicates that the districts provide potential to elect." *Id.,* at 778–782.[20]

****2359** The District Court's focus on the history of the county as well as its potential performance going forward was an important point of departure from the challengers' expert, who considered only the former. See *LULAC,* 548 U.S., at 442, 126 S.Ct. 2594 (noting "a significant distinction" in analysis of what district performance " 'had been' " compared to "how it would operate today ... given the growing Latino political power in the district"). The District Court also found the expert's analysis lacking in other key respects. Namely, the District Court noted that one of the majority-HCVAP districts "provides opportunity, at least in presidential election years"; ***664** that "[m]ost of the elections in [the exogenous election] index did not involve a *Latino* Democrat candidate";

and that the expert "only looked at statewide races and no county races," even though it was "conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers." 267 F.Supp.3d, at 781 (emphasis in original).

Based on this review of the evidence, the District Court concluded "that Hispanics have equal opportunity in two districts drawn wholly within Nueces County (or at least [the challengers] failed to show that they do not)." *Id.,* at 782. It further explained that, whereas the "evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, ... the evidence does not show that the Legislature was required to break the County Line Rule to draw what [the challengers] consider to be 'effective' districts." *Id.,* at 783.

When read in the context of the full analysis just detailed, it is clear that the District Court was not "twist[ing] the burden of proof," *ante,* at 2333, when it observed that the challengers "failed to show that" the two HCVAP-majority districts drawn wholly within Nueces County would not perform. That statement plainly refers to the challengers' failure to rebut the finding that the two districts wholly within Nueces County provided equal electoral opportunity to Hispanics, as they needed to do to show that § 2 required breaking the County Line Rule. If anything is "twisted ... beyond recognition," *ibid.,* it is the majority opinion's description of the District Court's findings. For while relying on a reference to what the challengers' expert opined, the majority wholly ignores the District Court's lengthy discussion rejecting that opinion on the basis of other evidence in the record.[21]

***665** This Court has been clear that "the ultimate right of § 2 is equality of opportunity." *Johnson v. De Grandy,* 512 U.S. 997, 1014, n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The District Court found that ****2360** two HCVAP-majority districts drawn wholly within Nueces County provided such "equality of opportunity," and its findings of fact are not clearly erroneous. Only by selectively reading the factual record and ignoring the relevant analysis of those facts can the majority escape the § 2 results violation that flows from those findings.

IV

The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States' efforts to undermine the ability of minority voters to meaningfully exercise that right. For although we have made progress, "voting discrimination still exists; no one doubts that." *Shelby County,* 570 U.S., at 536, 133 S.Ct. 2612.

The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement. The Court intervenes when no intervention is authorized and blinds itself to the overwhelming factual record below. It does all of this to allow Texas to use electoral maps that, in design and effect, ***666** burden the rights of minority voters to exercise that most precious right that is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see *Husted v. A. Philip Randolph Institute,* 584 U.S. 756, 810, 138 S.Ct. 1833, 1865, —— L.Ed.2d —— (2018) (SOTOMAYOR, J., dissenting) ("Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote"). Because our duty is to safeguard that fundamental right, I dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 There are several appendixes in these cases. We use "App." to refer to the joint appendix filed at the merits stage. We use "C.J.S." and "H.J.S." to refer to the appendixes attached to Texas's jurisdictional statements in No. 17–586 and No.

17–626, respectively. We use "C.J.S. Findings" and "H.J.S. Findings" to refer to appellees' supplemental appendixes in No. 17–586 and No. 17–626.

2 See, *e.g.,* Tex. Const., Art. III, § 25 (Senate), § 26 (House).

3 The court found: "[I]t is difficult to differentiate an intent to affect Democrats from an intent to affect minority voters. Making minorities worse off will likely make Democrats worse off, and vice versa." C.J.S. Findings 467a (citation omitted). "This correlation is so strong that [an expert] assessed whether districts were minority opportunity districts by looking at Democratic results/wins (noting that in Texas, minority candidates of choice means Democrats)." *Ibid.*

4 See *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013).

5 Judge Smith dissented, arguing that the majority had produced a "runaway plan" that "award[ed] judgment on the pleadings in favor of one side—a slam-dunk victory for the plaintiffs." *Perez v. Perry,* 835 F.Supp.2d 209, 218 (W.D.Tex.2011).

6 The Texas court was given more leeway to make changes to districts challenged under § 5 because it would have been inappropriate for that court to address the "merits of § 5 challenges," a task committed by statute to the District Court for the District of Columbia. *Perez,* 565 U.S., at 394, 132 S.Ct. 934.

7 Notice of Appeal in *Texas v. United States,* Civ. No. 11–cv–1303, Doc. 234. (D DC, Aug. 31, 2012).

8 We express no view on the correctness of this holding.

9 Judge Smith again dissented, on both mootness and the merits. On mootness, Judge Smith explained that, "[s]ix years later, we are still enveloped in litigation over plans that have never been used and will never be implemented." C.J.S. 349a. On the merits, Judge Smith argued that the majority erroneously inferred a "complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive," when the intent was in fact partisan. H.J.S. 294a; C.J.S. 351a.

10 In relevant part, § 1253 applies to "an order granting ... an interlocutory ... injunction." Section 1292(a)(1) applies to "[i]nterlocutory orders ... granting ... injunctions." Although the similarity is obvious, the dissent perceives some unspecified substantive difference.

11 The dissent sees nothing strange about such a result because we held in *Mitchell v. Donovan,* 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) (*per curiam*), that we lacked jurisdiction under § 1253 to hear an appeal from a three-judge court order denying a declaratory judgment. The decision in *Donovan* was based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments. By contrast, § 1253 gives us jurisdiction to hear appeals from orders granting or denying injunctions.

The same goes for *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) (*per curiam*), also cited by the dissent. In that case, the District Court issued a declaratory judgment, not an injunction. Again, the text of § 1253 says nothing about declaratory judgments.

12 The inquiry required by the practical effects test is no more difficult when the question is whether an injunction was effectively granted than it is when the question is whether an injunction was effectively denied. Lower courts have had "no problem concluding that [certain orders have] the practical effect of granting an injunction." *I.A.M. Nat. Pension Fund Benefit Plan A v. Cooper Industries, Inc.,* 789 F.2d 21, 24 (C.A.D.C.1986); see also *Andrew v. American Import Center,* 110 A.3d 626, 634 (D.C.2015) ("[G]ranting a stay pending arbitration does have the 'practical effect' of enjoining the party opposing arbitration").

13 Section 3(c) provides that if "the court finds that violations of the fourteenth or fifteenth amendment justif[y] equitable relief," the court "shall retain jurisdiction for such period as it may deem appropriate and during such period no voting" practice shall go into effect unless first precleared by the court or the United States Attorney General. 52 U.S.C. § 10302(c).

14 The other authority cited by the dissent is a footnote in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), a case that came to us in an exceedingly complicated procedural posture. In *Whitcomb,* the District Court held in August 1969 that Indiana's legislative districting scheme was unconstitutional, but the court made it clear that it would take no further action for two months. See *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1392 (S.D.Ind.). The Governor nevertheless appealed to this Court, but by the time we ruled, the Governor had taken another appeal from a later order, entered in December 1969, prohibiting the use of Indiana's current plans and requiring the use of court-created plans in the 1970 elections. See 403 U.S., at 139, 91 S.Ct. 1858; Juris. Statement in *Whitcomb v. Chavis,* O.T.1970, No. 92, pp. 1–3. And to further complicate matters, by the time we reviewed the case, the Indiana Legislature had enacted new plans. *Whitcomb,* 403 U.S., at 140, 91 S.Ct. 1858.

This Court entertained the later appeal and reversed, but the Court dismissed the earlier—and by then, entirely superfluous—appeal, stating that, at the time when it was issued, "no judgment had been entered and no injunction had been granted or denied." *Id.,* at 138, n. 19, 91 S.Ct. 1858. But that cursory conclusion has little relevance here, where the District Court's orders were far more specific, immediate, and likely to demand compliance.

15 While we think it clear that the District Court effectively enjoined the use of these districts as currently configured for this year's elections, even if the court had not done so, that would not affect our jurisdiction to review the court's order with respect to all other districts.

16 The dissent cites exactly two cases (*Gunn* and *Whitcomb*) decided during the past half-century in which a party attempted to take an appeal to this Court from a three-judge court order holding a state statute unconstitutional but declining to issue an injunction.

17 The dissent argues that we give "short shrift" to the irreparable harm question, *post,* at 2343 – 2344, but the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State, see, *e.g., Maryland v. King,* 567 U.S. 1301, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (ROBERTS, C.J., in chambers).

18 The dissent attempts to rehabilitate this statement by focusing on the last part of this sentence, in which the District Court stated that the Legislature " ' "intended [the] taint to be maintained but safe from remedy." ' " *Post,* at 2353. In making this argument, the dissent, like the District Court, refuses to heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination. We do not dispute that the District Court purportedly found that the 2013 Legislature acted with discriminatory intent. The problem is that, in making that finding, it relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor.

19 The dissent is simply wrong in claiming over and over that we have not thoroughly examined the record. See *post,* at 2344 – 2345, 2349, 2349 – 2350, 2351, 2353 – 2354, 2357 – 2358, 2360. The dissent seems to think that the repetition of these charges somehow makes them true. It does not. On the contrary, it betrays the substantive weakness of the dissent's argument.

20 The dissent and the District Court attach much meaning to the attorney general's use of the term "insulate" when he advised the Legislature to adopt the District Court's plans to avoid further legal challenge. Setting aside that the word "insulate" is a common term used to describe minimizing legal concerns, the context of the letter makes clear that the attorney general was trying to make the point that adopting these plans was the best method of obtaining legal compliance, not the start of a grand conspiracy to trick the District Court. Indeed, if his plan was to dupe the District Court, shouting it to the world in a public letter was an odd way to go about it.

21 In any event, the Texas court was simply wrong that Texas believed its plans would be free from any legal challenge. 274 F.Supp.3d 624, 651 (2017). Texas consistently acknowledged that effects claims would continue to be available and responded in detail to those arguments in both the District Court and this Court. See Brief for Appellants 64; Defendants' Post–Trial Brief, Doc. 1526, p. 53. Moreover, Texas has not argued that intentional discrimination claims are unavailable; it has instead argued that intent must be assessed with respect to the *2013 Legislature,* the Legislature that actually enacted the plans at issue.

22 The 2013 Legislature had no reason to believe that the District Court would spend four years examining moot plans before reversing its own previous decisions by imputing the intent of the 2011 Legislature to the 2013 Legislature. At

the very least, the 2013 Legislature had good reason to believe that adopting the court-approved plans would lessen the time, expense, and complexity of further litigation (even if that belief turned out to be wrong).

23 Moreover, in criticizing the Legislature for moving too quickly, the dissent downplays the significant time and effort that went into consideration of the 2013 plans. Legislative committees held multiple field hearings in four cities, Tr. 1507 (July 14, 2017), and the legislative actors spent significant time considering the legislation, as well as accepting and rejecting amendments, see, *e.g.,* Joint Exh. 17.3, p. S29; Joint Exh. 24.4, p. 21.

24 The dissent tries to minimize the relevance of this amendment by arguing that it turned HD90 into a racial gerrymander. See *post,* at 2347, n. 12. But again this is misleading. The Legislature adopted changes to HD90 at the behest of *minority groups,* not out of a desire to discriminate. See Part IV–B, *infra*. That is, Darby was *too* solicitous of changes with respect to HD90.

25 In assessing the significance of the D.C. court's evaluation of intent, it is important not to forget that the burden of proof in a preclearance proceeding was on the State. *Texas v. United States,* 887 F.Supp.2d 133, 151 (D.C.Cir.2012). Particularly where race and partisanship can so often be confused, see *supra,* at 2314, and n. 3, the burden of proof may be crucial.

26 The District Court also purported to find a violation of the "one person, one vote" principle in Nueces County, 267 F.Supp.3d 750, 783 (2017); H.J.S. 254a–255a, but that finding was in actuality a restatement of its racial discrimination finding. The population deviations from the ideal are quite small (0.34% in HD32 and 3.29% in HD34, *id.,* at 254a), and the District Court relied solely on the "evidence of the use of race in drawing the lines in Nueces County" to find a one person, one vote violation. *Id.,* at 255a; see also *id.,* at 254a ("[T]he State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts"). Even assuming that a court could find a one person, one vote violation on the basis of such a small deviation, cf. *Brown v. Thomson,* 462 U.S. 835, 842–843, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (noting that deviations under 10% are generally insufficient to show invidious discrimination), the District Court erred in relying on its unsound finding regarding racial discrimination.

Moreover, plaintiffs rejected any separate one person, one vote claims before the District Court, Tr. 22 (July 10, 2017), and they have not mentioned such a claim as a separate theory in their briefing in this Court.

27 The District Court's belief that simple Latino majorities in Nueces County might be sufficient to create opportunity districts —and that Texas should have known as much—conflicts with other parts of its decision. With respect to numerous other districts, the District Court *chided* Texas for focusing on bare numbers and not considering real opportunity to elect. See, *e.g.,* C.J.S. 134a ("[T]he court rejects [the] bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack real electoral opportunity" (internal quotation marks omitted)); H.J.S. 121a (Texas "increase[d the Latino population] while simultaneously ensuring that election success rates remained minimally improved").

1 The Fourteenth Amendment and § 2 of the Voting Rights Act of 1965 prohibit intentional "vote dilution," *i.e.,* purposefully enacting "a particular voting scheme ... 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (citations omitted).

2 The § 2 "results" test focuses, as relevant here, on vote dilution accomplished through cracking or packing, *i.e.,* "the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority." *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

3 The Fourteenth Amendment "limits racial gerrymanders" and "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.' " *Cooper v. Harris,* 581 U.S. 285, 291, 137 S.Ct. 1455, 1463, 197 L.Ed.2d 837 (2017).

4 The various appendixes are abbreviated herein consistent with the majority opinion. See *ante,* at 2314, n. 1.

5 Contrary to what the majority contends, whether *Whitcomb* involved an "exceedingly complicated procedural posture" has no effect on whether, at the time the State first appealed, the District Court had granted or denied an injunction

for purposes of § 1253 jurisdiction. *Ante,* at 2323, n. 14. Nor was the order at issue in *Whitcomb* less "specific" or less "likely to demand compliance" than the orders at issue in these appeals. *Ibid.* The District Court in *Whitcomb,* like here, issued an order on the merits finding the State liable and unambiguously holding that a remedy was required. *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1391–1392 (S.D.Ind.1969). The District Court discussed how the Indiana Legislature might go about redistricting. *Ibid.* Also, the orders here were no more "immediate" than the order in *Whitcomb*. *Ante,* at 2323, n. 14. As in *Whitcomb,* the District Court here first attempted to defer to the State to redistrict, and nothing in the record suggests that the court would not have allowed the Texas Legislature a reasonable amount of time to redistrict had the State decided to take up the task, as the District Court did in *Whitcomb*. To the extent the majority relies on the 3–day deadline contained in the orders below, that deadline was solely for the Texas attorney general to inform the District Court whether the Legislature intended to take up redistricting; it was not a deadline to enact new maps. See *infra,* at 2344 – 2345. *Whitcomb* is thus not distinguishable in any relevant respect.

6 The majority opinion attempts to distinguish *Donovan* and *Rockefeller* by stating that the decisions there were "based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments." *Ante,* at 2320, n. 11. But of course, "the plain language of § 1253" also "says nothing about" noninjunctive orders, like the ones issued by the District Court below. Notably, the order at issue in *Rockefeller* looked similar to the orders on appeal here: There, the three-judge District Court declined to enter an injunction only because "the state ha[d] shown a desire to comply with applicable federal requirements," but its order nevertheless clearly resolved the merits against the State. See *Catholic Medical Center of Brooklyn & Queens, Inc. v. Rockefeller,* 305 F.Supp. 1268, 1271 (E.D.N.Y.1969).

7 "HCVAP" stands for Hispanic citizen voting age population.

8 The majority guarantees that there is "no reason to fear such a flood" of appeals from three-judge district court orders because "appeals from [orders expressly enjoining redistricting plans] have not overwhelmed our docket." *Ante,* at 2323. But of course, its jurisdictional ruling applies to all § 1253 cases, not just those involving redistricting. The majority also makes much of the fact that only "two cases (*Gunn* and *Whitcomb*) decided during the past half-century" have involved the scenario at issue here, *i.e.,* an effort to invoke our mandatory jurisdiction to review "a three-judge court order holding a state statute unconstitutional but declining to issue an injunction." *Ante,* at 2324, n. 16. The majority never stops to consider, however, that one reason so few cases have come to the Court in this posture may be that *Gunn* and *Whitcomb* drew clear jurisdictional lines that litigants easily understood—the same clear lines the majority erases today.

9 The majority believes these "long before" and "very close" limits guide district courts' determinations about whether to enter an injunction. *Ante,* at 2323 – 2324. Presumably the majority would resort to the same indeterminate limits in determining whether, in its view, a noninjunctive order had the "practical effect" of an injunction such that it would be justified to accept an appeal under § 1253.

10 Because the Court reaches the merits of these appeals despite lacking jurisdiction, this dissent addresses that portion of the majority opinion as well.

11 The majority is correct that our reference to these findings in the District Court orders below is "not just a single slip of the pen." *Ante,* at 2326. That is because these findings form part (though not the whole) of the comprehensive analysis that led the District Court to conclude that the 2013 Legislature acted with the specific intent to further the discrimination in its 2011 maps. Full consideration of that analysis, as I have endeavored to do here, requires review of those findings, and when read in the context of the full factual record and legal reasoning contained in the orders below, it is clear that these statements do not come close to suggesting what Texas and the majority read into them, *i.e.,* that the District Court somehow shifted the burden of proof to require Texas to show that it cured the taint from its past maps.

12 The majority again engages in its own factfinding, without reference to the fact that our review is for clear error only, when it decides that the District Court was wrong in concluding that Representative Darby willfully ignored the deficiencies in the 2013 maps. The legislative hearing that the District Court cited, see 274 F.Supp.3d, at 651, n. 45, shows, *inter alia,* that Representative Darby: told certain members of the Legislature that changes to district lines would not be considered; rejected proposed amendments where there was disagreement among the impacted members; rejected an amendment to the legislative findings that set out the history underlying the 2011 maps and related court rulings; acknowledged that the accepted amendments did not address concerns of retrogression or minority opportunity to elect their preferred candidates; and dismissed concerns regarding the packing and cracking of minority voters in, *inter alia,*

HD32, HD34, HD54, and HD55, stating simply that the 2012 court had already rejected the challengers' claims respecting those districts but without engaging in meaningful discussion of the other legislators' concerns. See Joint Exh. 17.3, pp. S7–S9, S11, S30–S35, S39–S43, S53. Instead of addressing what is evident from the 64–page hearing transcript, the majority fixates on the single fact that Representative Darby accepted an amendment for the redrawing of the new (racially gerrymandered) HD90, believing that this fact somehow erases or outweighs all the evidence in the record showing that Representative Darby was not interested in addressing concerns regarding the interim plans. *Ante,* at 2328 – 2330, and n. 24. Even if Representative Darby was in fact responsive to minority concerns regarding the composition of HD90—which the record contradicts, see 267 F.Supp.3d, at 791, 793—that does not undermine the weight of *all* of the evidence in the record regarding his intent with respect to the enactment of the 2013 maps as a whole.

13 The majority contends in passing that its analysis takes account of "all the relevant evidence in the record," *ante,* at 2327, and n. 19, apparently believing that stating it explicitly somehow makes it true. It does not. The District Court orders in these cases are part of the public record and readers can therefore judge for themselves.

14 The majority never explains why it believes it appropriate to engage in what amounts to *de novo* review of the factual record. Presumably, it justifies its *de novo* review with its claim of legal error as to the finding of invidious intent. See Part II–D, *infra*. But even if the majority were correct that the District Court improperly shifted the burden to the State to disprove invidious intent, the proper next step would have been to remand to the District Court for reconsideration of the facts in the first instance under the correct legal standard.

15 The majority is also just flat wrong on its characterization of the interim orders. With respect to all but two of the challenged State House districts, the discussion in the interim orders states only in general terms that the District Court "preliminarily [found] that any [§ 2] and constitutional challenges do not have a likelihood of success, and any [§ 5] challenges are insubstantial," emphasizing the "preliminarily nature of [its] order." H.J.S. 303a, 307a–309a. With respect to the congressional districts, the District Court opined that the "claims are not without merit" and were "a close call," but ultimately concluded that the challengers had not at that time demonstrated a likelihood of success on the merits. C.J.S. 409a, 419a. The District Court nevertheless emphasized that there remained "unsettled legal issues as well as numerous factual disputes" such that the interim map was "not a final ruling on the merits of any claims." *Id.,* at 367a. It is a stretch to characterize these interim orders as providing "a careful analysis of all the claims," *ante,* at 2328, and borderline disingenuous to state that, despite repeated and explicit warnings that its rulings were not final and subject to change, the District Court was somehow "reversing its own previous decisions" when it finally did render a final decision, *ante,* at 2328, n. 22.

16 The majority spends some time distinguishing *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), adamant that it does not support "shifting the burden" as it purports the District Court did below. *Ante,* at 2324 - 2325. But the District Court agreed that *Hunter* was distinguishable and did not rely on it to support any sort of burden shifting. As the majority explains, *Hunter* involved a state constitutional provision adopted with discriminatory intent that, despite pruning over the years, the State never repealed. *Ante,* at 2324 - 2325 (citing 471 U.S., at 229, 232–233, 105 S.Ct. 1916). The District Court discussed the differences between *Hunter* and these cases, namely, that *Hunter* "did not involve a later reenactment ... which is what [Texas] now claims cleanses the plans." 274 F.Supp.3d, at 647. It noted the important distinction that, " 'when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered.' " *Id.,* at 648. That the majority ignores that the District Court did not, as it suggests, rely on *Hunter* as controlling is another example of how it conveniently overlooks the District Court's express legal analysis.

17 Notably, the majority takes no issue with that first conclusion, *i.e.,* that the enactment of the interim plans does not, on its own, insulate the 2013 plans from challenge. It explicitly notes that the opinion does not hold that the ''2013 [plans] are unassailable because they were previously adopted on an interim basis by the Texas court," noting that such a factor is relevant insofar as it informs the inquiry into the intent of the 2013 Legislature. *Ante,* at 2326 – 2327.

18 The majority also believes that the interim orders gave the Legislature cover with respect to CD35, *ante,* at 2332, forgetting that the District Court explicitly and repeatedly warned the parties that its interim orders did not resolve all factual and legal disputes in the cases.

19 It is worth noting that Texas' efforts to suppress the voting strength of minority voters in Nueces County eerily mirror the actions this Court invalidated as a violation of § 2 in *LULAC,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609. Like in *LULAC,* "a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters." C.J.S. 182a; see also *LULAC,* 548 U.S., at 427–429, 126 S.Ct. 2594. And like in *LULAC,* Texas attempted to defend that curtailment of minority voters' rights by pointing to the creation of another supposed opportunity district. 274 F.Supp.3d, at 684–685; *LULAC,* 548 U.S., at 429, 126 S.Ct. 2594. In finding a § 2 results violation, the Court concluded that the "vote dilution of a group that was beginning to ... overcome prior electoral discrimination ... cannot be sustained." *Id.,* at 442, 126 S.Ct. 2594. The Court also rejected Texas' defense, holding that its "creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.,* at 430, 126 S.Ct. 2594. In line with *LULAC,* the Court should hold that Texas has once again contravened § 2 in its drawing of CD27.

20 The majority contends that the District Court did not engage in a sufficiently local analysis because it cited to the statewide history of discrimination against minority voters, the continuing disadvantage of Latino voters, and racially polarized voting. *Ante,* at 2333 – 2334. The majority not only misapprehends the importance of that statewide evidence to the local appraisal, but again ignores the many other factual findings and analysis that are specific to Nueces County and thus problematic for its conclusion. See infra at 2359 – 2360.

21 Contrary to what the majority suggests, the District Court did not believe that "simple Latino majorities in Nueces County might be sufficient to create opportunity districts" based only on "bare numbers." *Ante,* at 2333, n. 27. Consistent with its rebuke of Texas elsewhere in the opinion for advocating a "bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack 'real electoral opportunity,' " C.J.S. 134a, the District Court in its analysis of HD32 and HD34 was clear that the challengers "could assert that [the] HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination." 267 F.Supp.3d, at 781. Based on its review of that evidence, it concluded that the two majority-HCVAP districts drawn within Nueces County provided minority voters equal electoral opportunity. *Id.,* at 783.

115 S.Ct. 2097
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., Petitioner
v.
Federico PENA, Secretary of Transportation, et al.

No. 93–1841.
|
Argued Jan. 17, 1995.
|
Decided June 12, 1995.

Synopsis

Subcontractor that was not awarded guardrail portion of federal highway project brought action challenging constitutionality of federal program designed to provide highway contracts to disadvantaged business enterprises. The United States District Court for the District of Colorado, Jim R. Carrigan, J., granted summary judgment in favor of defendants, 790 F.Supp. 240, and subcontractor appealed. The Court of Appeals affirmed, 16 F.3d 1537, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) subcontractor had standing to seek forward-looking declaratory and injunctive relief; (2) all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny, overruling *Metro Broadcasting*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445; and (3) remand was required to determine whether challenged program satisfied strict scrutiny.

Vacated and remanded.

Justice O'Connor filed opinion joined by Justice Kennedy.

Justices Scalia and Thomas filed opinions concurring in part and concurring in judgment.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

Justice Souter filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Ginsburg filed dissenting opinion in which Justice Breyer joined.

West Headnotes (9)

[1] Declaratory Judgment Subjects of relief in general

Subcontractor that was not awarded guardrail portion of federal highway contract as result of contract's subcontractor compensation clause, offering financial incentives to prime contractor for hiring disadvantaged subcontractor, had standing to seek forward-looking declaratory and injunctive relief against future use of such compensation clauses on equal protection grounds; evidence indicated that government let contracts involving guardrail work that contained such clauses at least once per year in state, that subcontractor was likely to bid on each such contracts, and was required to compete for such contracts against small disadvantaged businesses. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

107 Cases that cite this headnote

[2] Action Persons entitled to sue

Federal Civil Procedure In general; injury or interest

Fact of past injury, while presumably affording plaintiff standing to claim damages, does nothing to establish real and immediate threat that plaintiff would again suffer similar injury in the future. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const. Art. 3, § 1 et seq.

110 Cases that cite this headnote

[3] **Constitutional Law** Government contracts

Subcontractor that challenged subcontractor compensation clause of government highway contract, offering financial incentives to prime contractor for hiring disadvantaged subcontractors was not required to demonstrate that it had been, or would be, low bidder on government contract to have standing to challenge clause on equal protection grounds. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

73 Cases that cite this headnote

[4] **Constitutional Law** Public contracts

To extent subcontractor compensation program, offering financial incentives to prime contractors on government projects for hiring disadvantaged subcontractors, was based on disadvantage, not race, it was subject to relaxed equal protection scrutiny. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

41 Cases that cite this headnote

[5] **Constitutional Law** Race, national origin, or ethnicity

All governmental action based on race should be subject to detailed judicial inquiry to ensure that personal right to equal protection of the laws has not been infringed. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

55 Cases that cite this headnote

[6] **Constitutional Law** Race, national origin, or ethnicity

All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest; overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

501 Cases that cite this headnote

[7] **Constitutional Law** Race, national origin, or ethnicity

Federal racial classifications, like those of a state, must serve compelling governmental interest and must be narrowly tailored to further that interest. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

295 Cases that cite this headnote

[8] **Constitutional Law** Race, national origin, or ethnicity

When race-based action is necessary to further compelling interest, such action is within constitutional constraints if it satisfies "narrow tailoring" test Supreme Court has set out in previous cases. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

114 Cases that cite this headnote

[9] **Federal Courts** Particular cases

Remand was required to determine whether subcontractor compensation clauses in federal highway contracts, offering financial incentives to prime contractor for hiring disadvantaged subcontractors, with presumption that minority-owned subcontractors were disadvantaged, served compelling governmental interest, as required by strict scrutiny equal protection test. (Per opinion of Justice O'Connor, with three

Justices concurring and one Justice concurring in part and concurring in judgment.) Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3); Surface Transportation and Uniform Relocation Assistance Act of 1987, § 106(c)(1), 23 U.S.C.A. § 101 note; 13 C.F.R. § 124.106(a), (b)(1); 48 C.F.R. § 19.703(a)(2); 49 C.F.R. § 23.62; 49 C.F.R. Part 23, Subpart D, App. C.

84 Cases that cite this headnote

**2099 *Syllabus*[*]

***200** Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: under one of two SBA programs—known as the 8(a) and 8(d) programs—or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents summary judgment. In affirming, the Court of Appeals assessed the constitutionality of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by ****2100** *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445.

Held: The judgment is vacated, and the case is remanded.

16 F.3d 1537 (CA10 1994), vacated and remanded.

Justice O'CONNOR delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, concluding that:

1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor ***201** for hiring disadvantaged subcontractors. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351. Pp. 2104–2105.

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 2105–2114; 2117–2118.

(a) In *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While *Croson* did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273–274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260. Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson, supra,* at 494, 109 S.Ct., at 722. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 2105–2111.

(b) However, a year after *Croson,* the Court, in *Metro Broadcasting,* upheld two federal race-based policies against

a Fifth Amendment challenge. The Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884, by holding that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. By adopting that standard, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court's earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 2111–2112.

(c) The propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental ***202** action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict scrutiny is the proper standard for analysis of all racial classifications, whether ****2101** imposed by a federal, state, or local actor. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled. Pp. 2112–2114.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases. Pp. 2117–2126.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." Nor did it address the question of narrow tailoring in terms of this Court's strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. P. 2118.

Justice SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. P. 2118.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of MCALIA, J., and an opinion with respect to Part III–C. Parts I, II, III–A, III–B, III–D, and IV of that opinion were joined by REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., and by ***203** SCALIA, J., to the extent heretofore indicated; and Part III–C was joined by KENNEDY, J. SCALIA, J., *post,* p. 2118, and THOMAS, J., *post,* p. 2119, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 2120. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 2131. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 2134.

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Opinion

***204** Justice O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice

SCALIA's concurrence, and an opinion with respect to Part III–C in which Justice KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under ****2102** a different standard of review than the one the Court of Appeals applied. We therefore ***205** vacate the Court of Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.,* at 28–31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of ***206** race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act (Act), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, ... shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).

In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," ***207** which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e.g.,* 13 CFR §§ 124.303–124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in ****2103** this case, 15 U.S.C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged ... pursuant

to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. 48 CFR §§ 19.001, ***208** 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§ 124.111(c)–(d), 124.601–124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100–17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i.e.,* eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

> ***209** "*Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals....
>
> "A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, ****2104** counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> . . . . .
>
> "The Contractor will be paid an amount computed as follows:
>
> "1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

"2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24–26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above—SBA's 8(a) or 8(d) program, or certification by a State ***210** under the DOT regulations—would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc. v. Skinner,* 790 F.Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F.3d 1537 (1994). It understood our decision in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F.3d, at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F.3d, at 1547. We granted certiorari. 512 U.S. 1288, 115 S.Ct. 41, 129 L.Ed.2d 936 (1994).

II

[1] **[2]** Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22–23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages ..., does ***211** nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.,* at 105, 103 S.Ct., at 1667.

[3] If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" ****2105** as to Adarand. We note that, contrary to respondents' suggestion, see Brief for Respondents 29–30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 667, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.,* at 666, 113 S.Ct., at 2303.

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.' " *Lujan, supra,* at 565, n. 2, 112 S.Ct., at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

***212** We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5–A. According to documents

produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90–C–1413, Exh. I, Attachment A (D.Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.;* see also *id.,* Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1 ½ contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.,* Exh. F, Attachments 1–3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

[4] Respondents urge that "[t]he Subcontracting Compensation Clause program is ... a program based on *disadvantage,* not on race," and thus that it is subject only to "the most ***213** relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.,* at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall ... be deprived ****2106** of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall ... deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940's, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank v. United States,* 317 U.S. 329, 337, 63 S.Ct. 297, 301, 87 L.Ed. 304 (1943); see also, *e.g., Helvering v. Lerner Stores Corp.,* 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 482 (1941); *LaBelle Iron Works v. United* ***214** *States,* 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment ...; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.,* at 100, 63 S.Ct., at 1385. But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," 320 U.S., at 100, 63 S.Ct., at 1385, and upheld the curfew because "circumstances within the knowledge

of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.,* at 102, 63 S.Ct., at 1386.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank,* that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and] courts must subject them to the most rigid scrutiny." 323 U.S., at 216, 65 S.Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications ***215** than are the States. Cf. *id.,* at 234–235, 65 S.Ct., at 202 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the *Hirabayashi* case," *id.,* at 217, 65 S.Ct., at 194, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," *id.,* at 218, 65 S.Ct., at 195, the racially discriminatory order was nonetheless within the Federal Government's power.*

****2107** In *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' " *id.,* at 499, 74 S.Ct., at 694. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.,* at 500, 74 S.Ct., at 695.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi, supra,* 320 U.S., at 100, 63 S.Ct., at 1385, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," ***216** *Korematsu, supra,* 323 U.S., at 216, 65 S.Ct., at 194, carry no less force in the context of federal action than in the context of action by the States—indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U.S., at 499, n. 3, 74 S.Ct., at 694, n. 3, and reiterated " 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the General Government, or by the States,* against any citizen because of his race,' " *id.,* at 499, 74 S.Ct., at 694 (quoting *Gibson v. Mississippi,* 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling v. Sharpe,* 347 U.S. 497, 499 [74 S.Ct. 693, 694]; and subject to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U.S. 214, 216 [65 S.Ct. 193, 194]; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100 [63 S.Ct. 1375, 1385]." *Id.,* at 191–192, 85 S.Ct., at 288.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation ***217** suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of

Equal Protection, 55 N.C.L.Rev. 541, 554 (1977). *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications ... be subjected to the 'most rigid scrutiny.' " 388 U.S., at 11, 87 S.Ct., at 1823. The various opinions in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case that invalidated sex discrimination by a State, without mentioning ****2108** any possibility of a difference between the standards applicable to state and federal action. *Frontiero,* 411 U.S. at 682–684, 93 S.Ct., at 1768–1769 (plurality opinion of Brennan, J.); *id.,* at 691, 93 S.Ct., at 1772 (Stewart, J., concurring in judgment); *id.,* at 692, 93 S.Ct., at 1773 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; see also *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *United States v. Paradise,* 480 U.S. 149, 166, n. 16, 107 S.Ct. 1053, 1064, n. 16, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to ***218** the political branches of the Federal Government to be appropriate, *e.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 101–102, n. 21, 96 S.Ct. 1895, 1903, 1904–1905, n. 21, 48 L.Ed.2d 495 (1976) (federal power over immigration), to detract from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.' " *Id.,* at 287–288, 98 S.Ct., at 2747 (opinion of Powell, J.) (citing *United States v. Carolene Products Co.,* 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S., at 289–290, 98 S.Ct., at 2748. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.,* at 291, 98 S.Ct., at 2748. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.,* at 359, 98 S.Ct., at 2783 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. *Id.,* at 411–412, 421, 98 S.Ct., at 2809–2810, 2815 (STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, ***219** JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke,* the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke,* there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S., at 491, 100 S.Ct., at 2781. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.,* at 492, 100 S.Ct., at 2781. It employed instead ****2109** a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.,* at 473, 100 S.Ct., at 2772. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial

review under either 'test' articulated in the several *Bakke* opinions." *Id.,* at 492, 100 S.Ct., at 2781. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his *Bakke* opinion—*i.e.,* it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest"—and had done so correctly. 448 U.S., at 496, 100 S.Ct., at 2783–2784 (concurring opinion). Justice Stewart (joined by then-Justice REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.,* at 523, and n. 1, 100 S.Ct., at 2797, and n. 1, and that the program before the Court failed that standard. Justice STEVENS also dissented, ***220** arguing that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *id.,* at 537, 100 S.Ct., at 2805, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." *Id.,* at 541, 100 S.Ct., at 2807. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"—*i.e.,* such action should be subjected only to what we now call "intermediate scrutiny." 448 U.S., at 518–519, 100 S.Ct., at 2795.

In *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.,* at 273, 106 S.Ct., at 1846, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.,* at 274, 106 S.Ct., at 1847. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.' " *Id.,* at 285, 106 S.Ct., at 1852 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.,* at 274, 106 S.Ct., at 1847, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.,* at 276, 106 S.Ct., at 1848, and insisted instead that "a public employer ... must ***221** ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.,* at 277, 106 S.Ct., at 1848–1849. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.,* at 295, 106 S.Ct., at 1858. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.,* at 301–302, 106 S.Ct., at 1861–1862 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke, Fullilove,* and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. See ****2110** *United States v. Paradise,* 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e.g., Kromnick v. School Dist. of Philadelphia,* 739 F.2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *Williams v. New Orleans,* 729 F.2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.,* 723 F.2d 846, 851 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), concerned a ***222** city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in

Croson held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.,* at 493–494, 109 S.Ct., at 722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree ... with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision ... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.,* at 491–492, 109 S.Ct., at 720–721, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,' " *id.,* at 500, 109 S.Ct., at 725 (majority opinion) (quoting *Wygant, supra,* at 277, 106 S.Ct., at 1849 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U.S., at 508, 109 S.Ct., at 729–730.

With *Croson,* the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment. *Id.,* at 491, 109 S.Ct., at 720 (plurality opinion); see also *id.,* at 522, 109 S.Ct., at 737 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* ..., I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action ***223** when it vacated a decision upholding such action and remanded for further consideration in light of *Croson. H.K. Porter Co. v. Metropolitan Dade County,* 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989); see also *Shurberg Broadcasting of Hartford, Inc. v. FCC,* 876 F.2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in *H.K. Porter Co.*), rev'd *sub nom. Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e.g., Mann v. Albany,* 883 F.2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg,* 876 F.2d, at 910 (noting the difficulty of extracting general principles ****2111** from the Court's fractured opinions); *id.,* at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc. v. FCC,* 873 F.2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting, supra.*

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant,* 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); *Fullilove,* 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger, C.J.); see also *id.,* at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin,* 379 U.S., at 192, 85 S.Ct., at 288 ("[R]acial classifications [are] 'constitutionally suspect' "); *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385 ("Distinctions ***224** between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also *Bakke,* 438 U.S., at 289–290, 98 S.Ct., at 2747–2748 (opinion of Powell, J.), *i.e.,* all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S., at 93, 96 S.Ct., at 670; see also *Weinberger v. Wiesenfeld,* 420 U.S., at 638, n. 2, 95 S.Ct., at 1228, n. 2; *Bolling v. Sharpe,* 347 U.S., at 500, 74 S.Ct., at 694. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal

treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [*Korematsu*], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling ***225** governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer,* 334 U.S. [1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948)]." *Bakke, supra,* 438 U.S., at 299, 98 S.Ct., at 2753 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC,* involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission (FCC). In *Metro Broadcasting,* the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, ****2112** *Bolling, supra,* at 500, 74 S.Ct., at 694. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said, "—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives." *Metro Broadcasting,* 497 U.S., at 564–565, 110 S.Ct., at 3008–3009 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Id.,* at 564, n. 12, 110 S.Ct., at 3009, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.,* at 566, 110 S.Ct., at 3009. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *id.,* at 566–567, 110 S.Ct., at 3009–3010, and that they were ***226** "substantially related" to that objective, *id.,* at 569, 110 S.Ct., at 3011. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra,* at 493, 109 S.Ct., at 721 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra,* at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L.J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial ***227** classifications and consistency of treatment irrespective of the race of the burdened or benefited group.

See *supra,* at 2110–2111. Under *Metro Broadcasting,* certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

[5] **[6]** The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons,* not *groups.* It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited," ****2113** *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.,* should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, Justice STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications," *post,* at 2120. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

***228** Justice STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Post,* at 2122. What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See *supra,* at 2112. And Justice STEVENS concedes that "some cases may be difficult to classify," *post,* at 2122, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," *post,* at 2121; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove,* 448 U.S., at 534, 100 S.Ct., at 2803 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

Justice STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." *Post,* at 2121. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And Justice STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain ***229** a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification,* the Court should not uphold this kind of statute." *Fullilove,* 448 U.S., at 545, 100 S.Ct., at 2809 (dissenting opinion) (emphasis added; footnote omitted); see also *id.,* at 537, 100 S.Ct., at 2805 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson,* 488 U.S., at 516–517, 109 S.Ct., at 734 (STEVENS, J., concurring in part and concurring in judgment) ****2114** ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination,

it actually imposes a greater stigma on its supposed beneficiaries"); *supra,* at 2112; but cf. *post,* at 2121–2122 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads Justice STEVENS to dissent. According to Justice STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," *post,* at 2122, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat," *post,* at 2120, 2121. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because ***230** of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson,* see 488 U.S., at 493–494, 109 S.Ct., at 721–722 (plurality opinion); *id.,* at 520–521, 109 S.Ct., at 735–736 (SCALIA, J., concurring in judgment); see also *Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 2824–2845, 125 L.Ed.2d 511 (1993); *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991). Justice STEVENS does not explain how his views square with *Croson,* or with the long line of cases understanding equal protection as a personal right.

Justice STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e.g., Metro Broadcasting,* 497 U.S., at 605–606, 110 S.Ct., at 3030–3031 (O'CONNOR, J., dissenting); *Croson,* 488 U.S., at 486–493, 109 S.Ct., at 717–722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White, J.); *id.,* at 518–519, 109 S.Ct., at 734–735 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 521–524, 109 S.Ct., at 736–738 (SCALIA, J., concurring in judgment); *Fullilove,* 448 U.S., at 472–473, 100 S.Ct., at 2771–2772 (opinion of Burger, ***231** C.J.); *id.,* at 500–502, and nn. 2–3, 515, and n. 14, 100 S.Ct., at 2786–2787, and nn. 2–3, 2793, and n. 14 (Powell, J., concurring); *id.,* at 526–527, 100 S.Ct., at 2799–2800 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that Justice STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post,* at 2123–2125, 2127, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, ****2115** when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years, see *supra,* at 2105–2112. Those principles together stood for an "embracing" and "intrinsically soun[d]"

understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect ***232** the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering:* We cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, *e.g.,* Fried, *Metro Broadcasting, Inc. v. FCC:* Two Concepts of Equality, 104 Harv.L.Rev. 107, 113–117 (1990) (arguing that *Metro Broadcasting*'s adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC:* Requiem for a Heavyweight, 69 Texas L.Rev. 125, 145–146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC:* The Solution Almost Nobody Wanted, 59 UMKC L.Rev. 293, 297, 316–317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission,* 17 T. Marshall L.Rev. 317, 319, 354–355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), we overruled the recent case of *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon, supra,* at 704, 712, 113 S.Ct., at 2860, 2864. In *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), we overruled *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." *Solorio,* ***233** *supra,* at 439–441, 450–451, 107 S.Ct., at 2926–2928, 2932–2933. And in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), we overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T.V., supra,* at 47–48, 58, 97 S.Ct., at 2556, 2561. See also, *e.g., Payne v. Tennessee,* 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) (overruling *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)); *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 695–701, 98 S.Ct. 2018, 2038–2041, 56 L.Ed.2d 611 (1978) (partially overruling *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), because *Monroe* was a "departure from prior practice" that had not ****2116** engendered substantial reliance); *Swift & Co. v. Wickham,* 382 U.S. 111, 128–129, 86 S.Ct. 258, 267–268, 15 L.Ed.2d 194 (1965) (overruling *Kesler v. Department of Public Safety of Utah,* 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view ... which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.,* at 854, 112 S.Ct., at 2808. In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.,* at 856, 112 S.Ct., at 2809 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow ***234** *Metro Broadcasting,* then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838–839, 130 L.Ed.2d 753 (1995) (declining to overrule *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the 10 years since *Southland* was decided).

Justice STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis.* But again, he misunderstands our position. We have acknowledged that, after *Croson,* "some uncertainty persisted with respect to the standard of review for federal racial classifications," *supra,* at 2110, and we therefore do not say that we "merely restor[e] the *status quo ante* " today, *post,* at 2127. But as we have described *supra,* at 2105–2113, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting,* and we therefore disagree with Justice STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," *post,* at 2127. We also disagree with Justice STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument, see *post,* at 2128, and n. 13. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " *Fullilove,* 448 U.S., at 523, and n. 1, 100 S.Ct., at 2798, and n. 1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is ***235** wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.,* at 524, 100 S.Ct., at 2798. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition, *post,* at 2128. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley, Loving, McLaughlin, Bolling, Hirabayashi,* and *Korematsu,* see *Fullilove, supra,* at 524–526, 100 S.Ct., at 2798–2800, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." *Helvering,* ****2117** 309 U.S., at 122, 60 S.Ct., at 453. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

[7] Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove,* 448 U.S., at 496, 100 S.Ct., at 2783–84 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt ... the formulas of analysis articulated in such cases as [*Bakke*]." *Id.,* at 492, 100 S.Ct., at 2781 (opinion of Burger, C.J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

***236** Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e.g., post,* at 2122 (STEVENS, J., dissenting); *Croson,* 488 U.S., at 514–515, and n. 5, 109 S.Ct., at 733, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting,* 497 U.S., at 610, 110 S.Ct., at 3033 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove, supra,* at 533–535, 537, 100 S.Ct., at 2803–2804, 2805 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu,* 323 U.S., at 223, 65 S.Ct., at 197 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub.L. 100–383, § 2(a), 102 Stat. 903–904 ("[T]hese actions [of relocating and interning civilians of

Japanese ancestry] were carried out without adequate security reasons ... and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

[8] ***237** Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove, supra,* at 519, 100 S.Ct., at 2795 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise,* 480 U.S., at 167, 107 S.Ct., at 1064 (plurality opinion of Brennan, J.); *id.,* at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); *id.,* at 196, 107 S.Ct., at 1079–1080 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

****2118** IV

[9] Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove,* analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F.3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of ***238** race-neutral means to increase minority business participation" in government contracting, *Croson, supra,* at 507, 109 S.Ct., at 729, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove, supra,* at 513, 100 S.Ct., at 2792–2793 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra.* We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged,*" 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question,should ***239** be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III–C, and except insofar as it may be inconsistent with the following: In my

view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520, 109 S.Ct. 706, 735–736, 102 L.Ed.2d 854 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State ... deny *to any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason ****2119** shall work Corruption of Blood"); Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

***240** Justice THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post,* at 2120 (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine ***241** of oppression," *post,* at 2120 (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid.* But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, Justice STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove v. Klutznick,* 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.[*] In each instance, it is racial discrimination, plain and simple.

**2120 *242 Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See *ante,* at 2110–2111. I shall comment on each of these propositions, then add a few words about *stare decisis,* and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." *Fullilove v. Klutznick,* 448 U.S. 448, 533–535, 100 S.Ct. 2758, 2804, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, *id.,* at 480, 100 S.Ct., at 2775–2776; in Justice Powell's concurrence, *id.,* at 496, 100 S.Ct., at 2783–2784; and in my dissent in *Fullilove, id.,* at 533–534, 100 S.Ct., at 2803–2804. I welcome its renewed endorsement by the Court today. But, as the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

*243 II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976), should ignore this distinction.[1]

**2121 *244 To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens—a curfew and exclusion from certain areas on the West Coast[2]—on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese–American veterans an extraordinary preference in Government employment. Cf. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834[3] *245 as comparable to the official discrimination against African-Americans that was prevalent for much of our history.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with

President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. *Ante,* at 2111–2112. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases ****2122** may be difficult to classify,[4] but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a ***246** disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. *Feeney,* 442 U.S., at 279, 99 S.Ct., at 2296.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see *id.,* at 253–254, 96 S.Ct., at 2054 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451–455, 105 S.Ct. 3249, 3260–3262, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 98–110, 93 S.Ct. 1278, 1329–1336, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

***247** Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See *Associated General Contractors of Cal., Inc. v. San Francisco,* 813 F.2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.[5] Indeed, ***248** as I have previously argued, the former is virtually always repugnant to ****2123** the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316–317, 106 S.Ct. 1842, 1869–70, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting).[6] ***249** By insisting on a doctrinaire notion of "consistency" in the standard applicable to all race-

based governmental actions, the Court obscures this essential dichotomy.

III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today's majority. Thus, in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which we upheld a federal program designed ****2124** to foster racial diversity in broadcasting, we identified the special "institutional ***250** competence" of our National Legislature. *Id.,* at 563, 110 S.Ct., at 3008. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." *Ibid.* We recalled the several opinions in *Fullilove* that admonished this Court to " 'approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the ... general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [*Fullilove,* 448 U.S., at 472 [100 S.Ct., at 2771]; see also *id.,* at 491 [100 S.Ct., at 2781]; *id.,* at 510, and 515–516, n. 14 [100 S.Ct., at 2791, 2794, n. 14] (Powell, J., concurring); *id.,* at 517–520 [100 S.Ct., at 2794–2796] (MARSHALL, J., concurring in judgment)." 497 U.S., at 563, 110 S.Ct., at 3008. We recalled that the opinions of Chief Justice Burger and Justice Powell in *Fullilove* had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." 497 U.S., at 563, 110 S.Ct., at 3008 (citations and footnote omitted).

The majority in *Metro Broadcasting* and the plurality in *Fullilove* were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520–524, 109 S.Ct. 706, 735–738, 102 L.Ed.2d 854 (1989), Justice SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1." *Id.,* at 521–522, 109 S.Ct., at 736. Continuing, Justice SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the ***251** Civil War Amendments, but upon social reality and governmental theory." *Id.,* at 522, 109 S.Ct., at 737.

> "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:
>
> " 'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961)." *Id.,* at 523 (opinion concurring in judgment).

In her plurality opinion in *Croson,* Justice O'CONNOR also emphasized the importance of this distinction when she responded to the city's argument that *Fullilove* was controlling. She wrote:

> ***252** "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define ****2125** situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U.S., at 490, 109 S.Ct., at 720 (joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 767–768, n. 2, 65 S.Ct. 1515, 1519–1520, n. 2, 89 L.Ed. 1915 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See *ante,* at 2114–2115. It provides not a word of direct explanation for its sudden and enormous departure from ***253** the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature.[7] The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.[8]

****2126** ***254** Our opinion in *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U.S., at 563, 110 S.Ct., at 3008. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in *Fullilove,* with respect to the States themselves.[9] When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment.[10] That section reads: ***255** "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.[11] This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though

it ***256** were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 and the second in 1990, ****2127** *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), *ante,* at 2112–2113, and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question, *ante,* at 2116–2117. By way of explanation, Justice O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." *Ante,* at 2116. A skeptical observer might ask whether this pronouncement is a faithful application of the doctrine of *stare decisis.*[12] A brief comment on each of the two ailing cases may provide the answer.

In the Court's view, our decision in *Metro Broadcasting* was inconsistent with the rule announced in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Ante,* at 2111–2112. But two decisive distinctions separate those two cases. First, *Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove,* which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today's majority trumpeted the importance of that distinction in *Croson,* they now reject it in the name of "congruence." It is therefore ***257** quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante,* for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

Second, *Metro Broadcasting* 's holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 311–319, 98 S.Ct. 2733, 2759–2763, 57 L.Ed.2d 750 (1978). Later, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.,* at 314–315, 98 S.Ct., at 2760–61 (STEVENS, J., dissenting); in response, Justice O'CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.,* at 288, n., 106 S.Ct., at 1854, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Thus, prior to *Metro Broadcasting,* the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting,* of course, answered that question in the ***258** affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. *Ante,* at 2112. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's ****2128** opinion to diminish that aspect of our decision in *Metro Broadcasting.*

The Court's suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, *ante,* at 2117, is even more disingenuous than its treatment of *Metro Broadcasting.* For the Court endorses the "strict scrutiny" standard that Justice Powell applied in *Bakke,* see *ante,* at 2111, and acknowledges that he applied that standard in *Fullilove* as well, *ante,* at 2108–2109. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke,* which of course included Justice Powell's. 448 U.S., at 492, 100 S.Ct., at 2781–82. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case's continued vitality and accuses

it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.,* at 532–554, 100 S.Ct., at 2802–2814 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, *id.,* at 522–532, 100 S.Ct., at 2797–2803, contained any suggestion that the issue the Court was resolving had been decided before.[13] As was true ***259** of *Metro Broadcasting,* the Court in *Fullilove* decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

V

The Court's holding in *Fullilove* surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in *Fullilove,* is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.,* STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE's significantly less objectionable than the 1977 categorical grant of $400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." *Fullilove,* 448 U.S., at 532, 100 S.Ct., at 2803 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,[14] gives rise to a second rebuttable presumption ***260** of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995); 48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., Apps. A and C (1994). Thus, the current ****2129** preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see *Fullilove,* 448 U.S., at 537–538, 540, 543–544, and n. 16, 546, 100 S.Ct., at 2805–2806, 2806–2807, 2808–2809, and n. 16, 2809–2810 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.[15] 13 CFR § 124.106(a)(1)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice—along with its lingering effects—still survives.[16] The presumption of economic disadvantage ***261** embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted. 13 CFR §§ 124.601–124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship. This program, then, if in part a remedy for past discrimination,

is most importantly a ***262** forward-looking response to practical problems faced by minority subcontractors.

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE's, 15 U.S.C. §§ 637(a)(1)(B)–(C) (1988 ed., Supp. V); 13 CFR § 124.602(a) (1995),[17] and DBE status can be challenged ****2130** by a competitor at any time under any of the routes to certification. 13 CFR § 124.603 (1995); 49 CFR § 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR § 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement—numerical or otherwise—that a general contractor must hire DBE subcontractors. The program we upheld in *Fullilove* required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, ***263** and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. *Bakke,* 438 U.S., at 319–320, 98 S.Ct., at 2763–2764 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see *Fullilove,* 448 U.S., at 549–550, 100 S.Ct., at 2811–2812 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.[18] However we might ***264** evaluate the benefits and costs—both fiscal and social—of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove.* If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution—a vision the Court expressly endorses today—it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

****2131** VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of ***265** discrimination, as under *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), sufficient to justify surpassing the congressional objective. See 16 F.3d 1537, 1544 (CA10 1994) ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); *Adarand Constructors, Inc. v. Skinner,* 790 F.Supp. 240, 242 (Colo.1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson* "); cf. Complaint ¶ 28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts,

without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is applied, and petitioner did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE's) on the basis of certain race-based presumptions. See generally *ante,* at 2102–2103. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing ***266** remedies for the continuing effects of past discrimination, see, *e.g., Fullilove, supra,* at 465–466, 100 S.Ct., at 2768 (citing legislative history describing SBA § 8(a) as remedial); S.Rep. No. 100–4, p. 11 (1987) U.S.Code Cong. & Admin.News 1987, pp. 66, 76 (Committee Report stating that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite. See, *e.g.,* 16 F.3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act ... satisfies the evidentiary requirements of *Fullilove* "); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90–C–1413 (D.Colo.), p. 12 (*Fullilove* is not applicable to the case at bar because "[f]irst and foremost, *Fullilove* stands for only one proposition relevant ****2132** here: the ability of the U.S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy").

In these circumstances, I agree with Justice STEVENS's conclusion that *stare decisis* compels the application of *Fullilove.* Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.[1] *Fullilove,* 448 U.S., at 477–478, 100 S.Ct., at 2774–2775 (opinion of Burger, ***267** C.J.); *id.,* at 503, 100 S.Ct., at 2787 (Powell, J., concurring); *id.,* at 520–521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). Once *Fullilove* is applied, as Justice STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in *Fullilove,* see *ante,* at 2128–2130 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

The Court today, however, does not reach the application of *Fullilove* to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the *Fullilove* plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered *Fullilove* 's conclusion obsolete as judged under the *Fullilove* plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what *Fullilove* would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in *Fullilove* was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, *Metro Broadcasting, Inc. v.* ***268** *FCC,* 497 U.S. 547, 564, 110 S.Ct. 2997, 3008, 111 L.Ed.2d 445 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. *Fullilove, supra,* at 495–496, 100 S.Ct., at 2783 (concurring opinion) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate

judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451, 105 S.Ct. 3249, 3260, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring, joined by Burger, C.J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante,* at 2117 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, ****2133** but fatal in fact.' *Fullilove, supra,* at 519 [100 S.Ct., at 2795–2796] (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact' ").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. The Court simply notes the observation in *Croson* "that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson* 's facts did not implicate Congress's broad power under § 5 of the Fourteenth Amendment," *ante,* at 2110, and explains that there is disagreement ***269** among today's majority about the extent of the § 5 power, *ante,* at 2114–2115. There is therefore no reason to treat the opinion as affecting one way or another the views of § 5 power, described as "broad," *ante,* at 2110, "unique," *Fullilove,* 448 U.S., at 500, 100 S.Ct., at 2786 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (opinion of O'CONNOR, J.). See also *Jenkins, post,* at 113, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("Congress ... enjoys ' "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," ' *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (quoting *Katzenbach v. Morgan,* 384 U.S., at 651 [86 S.Ct., at 1723])"). Thus, today's decision should leave § 5 exactly where it is as the source of an interest of the National Government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily have any effect on the resolution of an issue that was just as pertinent under *Fullilove* 's unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future' "), quoting *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). This is so whether the remedial authority is exercised by a court, see *ibid.; Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437, 88 S.Ct. 1689, 1693–1694, 20 L.Ed.2d 716 (1968), the Congress, see *Fullilove, supra,* 448 U.S., at 502, 100 S.Ct., at 2787 (Powell, J., concurring), or some other legislature, see *Croson, supra,* 488 U.S., at 491–492, 109 S.Ct., at 720–721 (opinionof ***270** O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, *e.g., ante,* at 2113–2114, 2117–2118 (opinion of O'CONNOR, J.); *ante,* at 2120 (STEVENS, J., with whom GINSBURG, J., joins, dissenting); *post,* at 2135, 2136 (GINSBURG, J., with whom BREYER, J. joins, dissenting); *Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this ****2134** price is considered reasonable, it is in part because it is a price to be

paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in *Fullilove* that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S., at 513, 100 S.Ct., at 2792–2793; *ante,* at 2117–2118 (opinion of the Court).

Surely the transition from the *Fullilove* plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand ***271** had chosen to press a challenge to the reasonableness of the burden of these statutes,[2] more than a decade after *Fullilove* had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

For the reasons stated by Justice SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with Justice STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." *Ante,* at 2125 (STEVENS, J., dissenting); see *ante,* at 2126.[1] I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.

***272** I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Ante,* at 2117 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," *ante,* at 2119 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional ****2135** liberty." *Id.,* at 559, 16 S.Ct., at 1146 (dissenting opinion).

Not until *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.,* at 11, 87 S.Ct., at 1823.[2]

***273** The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. *Ante,* at 2117 (lead opinion); see also *ante,* at 2133 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race.[3] White and African–American consumers still encounter different deals.[4] People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.[5] ***274** Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

****2136** Given this history and its practical consequences, Congress surely can conclude that a carefully designed

affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[8]

***275** II

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. *Ante,* at 2117–2118. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); for in that case, scrutiny the Court described as "most rigid," *id.,* at 216, 65 S.Ct., at 194, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante,* at 2106 (lead opinion). A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," *ante,* at 2119 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is " 'fatal in fact.' " *Ante,* at 2117 (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 519, 100 S.Ct. 2758, 2795–2796, 65 L.Ed.2d 902 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante,* at 2113–2114 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e.g., Hoyt v. Florida,* 368 U.S. 57, 60, 82 S.Ct. 159, 161–162, 7 L.Ed.2d 118 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from ***276** illegitimate uses of race in governmental decisionmaking," *ante,* at 2113 (lead opinion), "to 'differentiate between' permissible and impermissible governmental use of race," *ibid.,* to distinguish " 'between a "No Trespassing" sign and a welcome mat,' " *ante,* at 2114.

Close review also is in order for this further reason. As Justice SOUTER points out, *ante,* at 2133–2134 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n,* 482 F.2d 1333, 1341 (CA2 1973).

* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." *Korematsu,* 323 U.S., at 233, 65 S.Ct., at 202. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub.L. 100–383, § 2(a), 102 Stat. 903 ("The Congress

recognizes that ... a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

* It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," *post,* at 2136 (GINSBURG, J., dissenting); see also, *post,* at 2122 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on " 'whose ox is gored,' " *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 295, n. 35, 98 S.Ct. 2733, 2751, n. 35, 57 L.Ed.2d 750 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

1 As Justice GINSBURG observes, *post,* at 2136, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate " 'relevant differences,' " *ante,* at 2113; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See *Missouri v. Jenkins,* 515 U.S. 70, 112, 115 S.Ct. 2038, 2060–2061, 132 L.Ed.2d 63 (1995) (O'CONNOR, J., concurring) ("[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice.... It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

2 These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in *Hirabayashi* and *Korematsu.* See *Korematsu,* 323 U.S., at 223, 65 S.Ct., at 197 ("Regardless of the true nature of the assembly and relocation centers ... we are dealing specifically with nothing but an exclusion order").

3 See *Morton v. Mancari,* 417 U.S. 535, 541, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). To be eligible for the preference in 1974, an individual had to " 'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' " *Id.,* at 553, n. 24, 94 S.Ct., at 2484, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U.S., at 553–554, 94 S.Ct., at 2484–2485. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.,* at 551–552, 94 S.Ct., at 2483–2484. In this case Respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

4 For example, in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

5 In his concurrence, Justice THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. *Ante,* at 2119. Although I agree that this cost may be more significant than many people realize, see *Fullilove v. Klutznick,* 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find Justice THOMAS' extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, *ante,* at 2119—at all persuasive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-

based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots.

Finally, although Justice THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but not without a strong element of common sense, see *id.,* at 252–256, 96 S.Ct., at 2053–2055 (STEVENS, J., concurring); *id.,* at 256–270, 96 S.Ct., at 2055–2062 (BRENNAN, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See *Fullilove,* 448 U.S., at 521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism," *ante,* at 2119 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

6 As I noted in *Wygant:*

"There is ... a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

"The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality." 476 U.S., at 316–317, 106 S.Ct., at 1869 (dissenting opinion).

7 Despite the majority's reliance on *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *ante,* at 2106, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." 323 U.S., at 216, 65 S.Ct., at 194, quoted *ante,* at 2106 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority.

8 We have rejected this proposition outside of the affirmative-action context as well. In *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 96 S.Ct. 1895, 1903–1904, 48 L.Ed.2d 495 (1976), we held:

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

9 The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA § 106(c)(4), 101 Stat. 146.

In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' § 5 authority even if the federal contracts are not. See *Metro Broadcasting,* 497 U.S., at 603–604, 110 S.Ct., at 3029–3030 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

10 Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's application to pure federal regulation of individuals.

11 We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In *Katzenbach,* this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. *Id.,* at 648–651, 86 S.Ct., at 1722–1724. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

12 Our skeptical observer might also notice that Justice O'CONNOR's explanation for departing from settled precedent is joined only by Justice KENNEDY. *Ante,* at 2100. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis.*

13 Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See *ante,* at 2116, citing 448 U.S., at 523–526, 100 S.Ct., at 2797–2799. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before *Fullilove.* The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

14 STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR § 124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, *id.,* § 124.106. Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See 15 U.S.C. § 637(d)(3) (1988 ed. and Supp. V); 13 CFR § 124.601 (1995).

15 The Government apparently takes this exclusion seriously. See *Autek Systems Corp. v. United States,* 835 F.Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under § 8(a) program), aff'd, 43 F.3d 712 (CADC 1994).

16 "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Ante,* at 2117.

"Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong.Rec. 34097 (1978)

17 The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of § 8(d) certification, although such review may be derivative for those businesses that receive § 8(d) certification as a result of § 8(a) or STURAA certification.

18 Respondents point us to the following legislative history: H.R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H.R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U.S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women–Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs—Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set–Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9–10, n. 9.

1 If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as Justice STEVENS has noted, see *ante,* at 2122–2123, n. 5, 2123, n. 6, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

2 I say "press a challenge" because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

1 On congressional authority to enforce the equal protection principle, see, *e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 286, 85 S.Ct. 348, 373, 13 L.Ed.2d 258 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under § 5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person —whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.,* at 291, 293, 85 S.Ct., at 375, 377 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 ... is the vindication of human dignity"; "Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147–151 (12th ed. 1991).

2 The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in *Loving.* See *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749, vacated and remanded, 350 U.S. 891, 76 S.Ct. 151, 100 L.Ed. 784 (1955), reinstated and aff'd, 197 Va. 734, 90 S.E.2d 849, appeal dism'd, 350 U.S. 985, 76 S.Ct. 472, 100 L.Ed. 852 (1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S.E.2d, at 756.

3 See, *e.g.,* H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90–4, 1990) (*e.g.,* Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91–9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

4 See, *e.g.,* Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv.L.Rev. 817, 821–822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

5 See, *e.g.,* A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds. 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, R. Struyk, & J. Yinger, U.S. Dept. of Housing and Urban Development, Housing Discrimination Study: Synthesis i-vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African–American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am.J.Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

6 See, *e.g., Associated General Contractors v. Coalition for Economic Equity,* 950 F.2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

7 Cf. *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 318, 106 S.Ct. 1842, 1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); *Califano v. Goldfarb,* 430 U.S. 199, 222–223, 97 S.Ct. 1021, 1034–1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

8 On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, *e.g.,* Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

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143 S.Ct. 1487
Supreme Court of the United States.

Wes ALLEN, Alabama Secretary of State, et al., Appellants
v.
Evan MILLIGAN, et al.
Wes Allen, Alabama Secretary of State, et al., Petitioners
v.
Marcus Caster, et al.

Nos. 21-1086 and 21-1087
|
Argued October 4, 2022
|
Decided June 8, 2023*

Synopsis

Background: Black registered voters and civil rights organizations brought actions against Alabama Secretary of State and others, challenging Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, as violating equal protection and diluting votes in violation of § 2 of Voting Rights Act (VRA). Two actions were consolidated for preliminary injunction proceedings, and a three-judge panel of the United States District Court for the Northern District of Alabama, 582 F.Supp.3d 924, granted preliminary injunctions, with clarification, 2022 WL 272637, and denied a stay pending appeal, 2022 WL 272636. In third action, which involved vote dilution claim under VRA, the United States District Court for the Northern District of Alabama, Anna M. Manasco, J., 2022 WL 264819, granted preliminary injunction. The Supreme Court, 142 S.Ct. 879, noted its probable jurisdiction in first two actions, granted certiorari before judgment in third action, and stayed the preliminary injunctions.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] challengers were likely to succeed, as element for obtaining preliminary injunction, in showing precondition, under Supreme Court's *Gingles* framework for proving vote dilution claim under § 2 of VRA, that group of Black voters was sufficiently large and geographically compact to constitute a majority in second, reasonably configured district;

[2] challengers were likely to succeed in showing *Gingles* preconditions that group of Black voters was politically cohesive, and that the white majority voted sufficiently as a bloc to enable it to defeat Black voters' preferred candidate;

[3] challengers were likely to succeed at totality of circumstances stage of *Gingles* framework; and

[4] single-minded view that focuses on race-neutral benchmark is not a permissible approach to determining vote dilution claim under § 2 of VRA.

Affirmed.

Justices Sotomayor, Kagan, and Jackson joined, and Justice Kavanaugh joined in part.

Justice Kavanaugh filed an opinion concurring in part.

Justice Thomas filed a dissenting opinion, in which Justice Gorsuch joined, and Justices Alito and Barrett joined in part.

Justice Alito filed a dissenting opinion, in which Justice Gorsuch joined.

West Headnotes (25)

[1] Constitutional Law Fifteenth Amendment

The Fifteenth Amendment, under which the right of United States citizens to vote cannot be denied or abridged on account of race, color, or previous condition of servitude, prohibits States from acting with a racially discriminatory motivation or an invidious purpose to discriminate, but it does not prohibit laws that are discriminatory only in effect. U.S. Const. Amend. 15.

1 Case that cites this headnote

[2] **Election Law** Dilution of voting power in general

The essence of a vote dilution claim under § 2 of the VRA is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and white voters, which occurs where an electoral structure operates to minimize or cancel out minority voters' ability to elect their preferred candidates, and the risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

5 Cases that cite this headnote

[3] **Election Law** Vote Dilution

To succeed in proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, a plaintiff must satisfy three preconditions under the Supreme Court's *Gingles* framework: first, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district, second, the minority group must be able to show that it is politically cohesive, and third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority group's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

19 Cases that cite this headnote

[4] **Election Law** Compactness and cohesiveness of minority group

For purposes of the precondition, under the Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, that the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district, a district will be reasonably configured if it comports with traditional districting criteria, such as being contiguous and reasonably compact. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

16 Cases that cite this headnote

[5] **Election Law** Dilution of voting power in general

A plaintiff who demonstrates, under the Supreme Court's *Gingles* framework, the three preconditions for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, must also show, under the totality of circumstances, that the political process is not equally open to minority voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

6 Cases that cite this headnote

[6] **Election Law** Compactness and cohesiveness of minority group

The precondition, under the Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, that the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district, is needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

14 Cases that cite this headnote

[7] **Election Law** Compactness and cohesiveness of minority group

The precondition, under the Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, that the minority group must be able to show that it is politically cohesive, shows that a representative of the minority group's choice would in fact be elected. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[8] **Election Law** Racially polarized or bloc voting

The precondition, under the Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, that the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority group's preferred candidate, establishes that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

10 Cases that cite this headnote

[9] **Election Law** Dilution of voting power in general

The totality of circumstances inquiry, for proving a vote dilution claim under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, recognizes that application of the Supreme Court's *Gingles* preconditions is peculiarly dependent upon the facts of each case. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[10] **Election Law** Discriminatory practices proscribed in general

Before courts can find a violation of § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, they must conduct an intensely local appraisal of the electoral mechanism at issue, as well as a searching practical evaluation of the past and present reality. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[11] **Injunction** Redistricting and reapportionment

Challengers to Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, were likely to succeed, as element for obtaining preliminary injunction, in showing precondition, under Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, that group of Black voters was sufficiently large and geographically compact to constitute a majority in a second, reasonably configured district; challengers' 11 illustrative maps strongly made that suggestion, and even if Gulf Coast region was a community of interest that was separated into two different districts, challengers offered evidence that their maps were still reasonably configured because they joined together another community of interest. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

11 Cases that cite this headnote

[12] **Election Law** Vote Dilution

Section 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, does not permit a

State, based on core retention, which involves the proportion of districts that remain when a State transitions from one districting plan to another, to provide some voters less opportunity to participate in the political process just because the State has done it before. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

2 Cases that cite this headnote

[13] **Injunction** Redistricting and reapportionment

Challengers to Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, were likely to succeed, as element for obtaining preliminary injunction, in showing preconditions, under Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA, that group of Black voters was politically cohesive, and that the white majority voted sufficiently as a bloc to enable it to defeat Black voters' preferred candidate; challengers offered evidence that, on average, Black voters supported their candidates of choice with 92.3% of the vote while white voters supported Black-preferred candidates with 15.4% of the vote, and challengers' experts described evidence of racially polarized voting in Alabama as intense, very strong, and very clear. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

5 Cases that cite this headnote

[14] **Injunction** Redistricting and reapportionment

Challengers to Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, were likely to succeed, as element for obtaining preliminary injunction, at the totality of circumstances stage of Supreme Court's *Gingles* framework for proving a vote dilution claim under § 2 of the VRA; challengers offered evidence that elections in Alabama were racially polarized, that Black Alabamians enjoyed virtually zero success in statewide elections, that political campaigns in Alabama had been characterized by overt or subtle racial appeals, and that Alabama's extensive history of repugnant racial and voting-related discrimination was undeniable and well documented. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

5 Cases that cite this headnote

[15] **Election Law** Discriminatory practices proscribed in general

Section 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, turns on the presence of discriminatory effects, not discriminatory intent. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

6 Cases that cite this headnote

[16] **Election Law** Discriminatory practices proscribed in general

Congress used the words "on account of race or color" in § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, to mean "with respect to" race or color, and not to connote any required purpose of racial discrimination. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[17] **Election Law** Dilution of voting power in general

Individuals lack an equal opportunity to participate in the political process, in violation of § 2 of the VRA, when a State's electoral structure operates in a manner that minimizes or cancels out their voting strength, and that occurs where an individual is disabled from entering into the political process in a reliable and meaningful manner in the light of past and present reality, political and otherwise. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

[18] **Election Law** Racially polarized or bloc voting

An electoral district is not "equally open," within meaning of § 2 of VRA, which prohibits political processes that are not equally open to participation by members of a class of citizens, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

[19] **Election Law** Vote Dilution

A State's liability under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, must be determined based on the totality of circumstances, as embodied in the Supreme Court's *Gingles* framework, not based on a single-minded view that focuses on a race-neutral benchmark that uses modern computer technology to design maps to comply with traditional districting criteria without considering race, because such a view cannot be squared with VRA's demand that courts employ a more refined approach. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[20] **Election Law** Reapportionment in general

Legislative reapportionment is primarily the duty and responsibility of the States, not the federal courts.

[21] **Election Law** Vote Dilution

Section 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, never requires adoption of districts that violate traditional redistricting principles, and its exacting requirements, instead, limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate. Voting Rights Act of 1965 §§ 2, 14, 52 U.S.C.A. §§ 10301, 10310(c)(1).

2 Cases that cite this headnote

[22] **Election Law** Vote Dilution

While algorithmic mapmaking is not categorically irrelevant in cases under § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, courts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim, in light of the difficulties imposed by algorithmic mapmaking, e.g., districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality, yet quantifying, measuring, prioritizing, and reconciling these criteria requires map drawers to make difficult, contestable choices. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[23] **Election Law** Discriminatory practices proscribed in general

Election Law Vote Dilution

The meaning of "standard, practice, or procedure" in § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, is not limited to methods for conducting a part of the voting process that might be used to interfere with a citizen's ability to cast his vote, and also encompasses a single-member districting system or the selection of one

set of districting lines over another. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[24] **Constitutional Law** Fifteenth Amendment

Election Law Apportionment and Reapportionment

As applied to redistricting, § 2 of the VRA, which prohibits States from imposing any standard, practice, or procedure in a manner which results in denial or abridgement of any citizen's right to vote on account of race or color, is not unconstitutional under the Fifteenth Amendment, which provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. U.S. Const. Amend. 15; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

2 Cases that cite this headnote

[25] **Constitutional Law** Fifteenth Amendment

Even if § 1 of the Fifteenth Amendment, which provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude, prohibits only purposeful discrimination, Congress may outlaw voting practices that are discriminatory in effect, pursuant to its enforcement power under § 2 of the Fifteenth Amendment. U.S. Const. Amend. 15.

1 Case that cites this headnote

****1492** *Syllabus*[*]

The issue presented is whether the districting plan adopted by the State of Alabama for its 2022 congressional elections likely violated § 2 of the Voting Rights Act, 52 U.S.C. § 10301. As originally enacted in 1965, § 2 of the Act tracked the language of the Fifteenth Amendment, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47, this Court held that the Fifteenth Amendment—and thus § 2—prohibits States from acting with a "racially discriminatory motivation" or an "invidious purpose" to discriminate, but it does not prohibit laws that are discriminatory only in effect. *Id.*, at 61–65, 100 S.Ct. 1519 (plurality opinion). Criticism followed, with many viewing *Mobile*'s intent test as not sufficiently protective of voting rights. But others believed that adoption of an effects test would inevitably require a focus on proportionality, calling voting laws into question whenever a minority group won fewer seats in the legislature than its share of the population. Congress ultimately resolved this debate in 1982, reaching a bipartisan compromise that amended § 2 to incorporate both an effects test and a robust disclaimer that "nothing" in § 2 "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." § 10301(b).

In 1992, § 2 litigation challenging the State of Alabama's then-existing districting map resulted in the State's first majority-black district and, subsequently, the State's first black Representative since 1877. Alabama's congressional map has remained remarkably similar since that litigation. Following the 2020 decennial census, a group of plaintiffs led by Alabama legislator Bobby Singleton sued the State, arguing that the State's population growth rendered the existing congressional map malapportioned and racially gerrymandered in violation of the Equal Protection Clause. While litigation was proceeding, the Alabama Legislature's Committee on Reapportionment drew a new districting map that would reflect the distribution of the prior decade's population growth across the State. The resulting map largely resembled the 2011 map on which it was based and similarly produced only one district in which black voters constituted a majority. That new map was signed into law as HB1.

Three groups of Alabama citizens brought suit seeking to stop Alabama's Secretary of State from conducting congressional elections under HB1. One group (*Caster* plaintiffs) challenged HB1 as invalid under § 2. Another group (*Milligan* plaintiffs) brought claims under § 2 and the Equal Protection Clause of the Fourteenth Amendment. And a third group (the *Singleton* plaintiffs) amended the complaint in their ongoing litigation to challenge HB1 as a racial gerrymander under the Equal Protection Clause. A three-judge District Court was convened, and the *Singleton* and *Milligan* actions were consolidated before that District Court for purposes of preliminary injunction proceedings, while *Caster* proceeded before one of the judges on a parallel

track. After an extensive hearing, the District Court concluded in a 227-page opinion that the question whether HB1 likely violated § 2 was not "close." The Court preliminarily enjoined Alabama from using HB1 in forthcoming elections. The same relief was ordered in *Caster*.

Held: The Court affirms the District Court's determination that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2. Pp. 1502 – 1510, 1511 – 1517.

(a) The District Court faithfully applied this Court's precedents in concluding that HB1 likely violates § 2. Pp. 1502 – 1506.

(1) This Court first addressed the 1982 amendments to § 2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, and has for the last 37 years evaluated § 2 claims using the *Gingles* framework. *Gingles* described the "essence of a § 2 claim" as when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an "electoral structure operates to minimize or cancel out" minority voters' "ability to elect their preferred candidates." *Id.*, at 48, 106 S.Ct. 2752. Such a risk is greatest "where minority and majority voters consistently prefer different candidates" and where minority voters are submerged in a majority voting population that "regularly defeat[s]" their choices. *Ibid.*

To prove a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (*per curiam*). "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Ibid.* A plaintiff who demonstrates the three preconditions must then show, under the "totality of circumstances," that the challenged political process is not "equally open" to minority voters. *Id.*, at 45–46, 106 S.Ct. 2752. The totality of circumstances inquiry recognizes that application of the *Gingles* factors is fact dependent and requires courts to conduct "an intensely local appraisal" of the electoral mechanism at issue, as well as a "searching practical evaluation of the past and present reality." *Id.*, at 79, 106 S.Ct. 2752. Congress has not disturbed the Court's understanding of § 2 as *Gingles* construed it nearly 40 years ago. Pp. 1502 – 1504.

(2) The extensive record in these cases supports the District Court's conclusion that plaintiffs' § 2 claim was likely to succeed under *Gingles*. As to the first *Gingles* precondition, the District Court correctly found that black voters could constitute a majority in a second district that was "reasonably configured." The plaintiffs adduced eleven illustrative districting maps that Alabama could enact, at least one of which contained two majority-black districts that comported with traditional districting criteria. With respect to the compactness criteria, for example, the District Court explained that the maps submitted by one expert "perform[ed] generally better on average than" did HB1, and contained no "bizarre shapes, or any other obvious irregularities." Plaintiffs' maps contained equal populations, were contiguous, and respected existing political subdivisions. Indeed, some of plaintiffs' proposed maps split the same (or even fewer) county lines than the State's.

The Court finds unpersuasive the State's argument that plaintiffs' maps were not reasonably configured because they failed to keep together the Gulf Coast region. Even if that region is a traditional community of interest, the District Court found the evidence insufficient to sustain Alabama's argument that no legitimate reason could exist to split it. Moreover, the District Court found that plaintiffs' maps were reasonably configured because they joined together a different community of interest called the Black Belt—a community with a high proportion of similarly situated black voters who share a lineal connection to "the many enslaved people brought there to work in the antebellum period."

As to the second and third *Gingles* preconditions, the District Court determined that there was "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." The court noted that, "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." Finally, the District Court concluded that plaintiffs had carried their burden at the

totality of circumstances stage given the racial polarization of elections in Alabama, where "Black Alabamians enjoy virtually zero success in statewide elections" and where "Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." The Court sees no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Pp. 1503 – 1506.

(b) The Court declines to remake its § 2 jurisprudence in line with Alabama's "race-neutral benchmark" theory.

(1) The Court rejects the State's contention that adopting the race-neutral benchmark as the point of comparison in § 2 cases would best match the text of the VRA. Section 2 requires political processes in a State to be "equally open" such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b). Under the Court's precedents, a district is not equally open when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter. Alabama would ignore this precedent in favor of a rationale that a State's map cannot "abridge[ ]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. But this Court's cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State.

The Court declines to adopt Alabama's interpretation of § 2, which would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of [the Court's] § 2 jurisprudence" for decades. *Bartlett v. Strickland*, 556 U.S. 1, 16, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion). Pp. 1506 – 1508.

(2) Alabama argues that absent a benchmark, the *Gingles* framework ends up requiring the racial proportionality in districting that § 2(b) forbids. The Court's decisions implementing § 2 demonstrate, however, that when properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality. See *Shaw v. Reno*, 509 U.S. 630, 633–634, 113 S.Ct. 2816, 125 L.Ed.2d 511; *Miller v. Johnson*, 515 U.S. 900, 906, 115 S.Ct. 2475, 132 L.Ed.2d 762; *Bush v. Vera*, 517 U.S. 952, 957, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plurality opinion). In *Shaw* v. *Reno*, for example, the Court considered the permissibility of a second majority-minority district in North Carolina, which at the time had 12 seats in the U. S. House of Representatives and a 20% black voting age population. 509 U.S. at 633–634, 113 S.Ct. 2816. Though North Carolina believed § 2 required a second majority-minority district, the Court found North Carolina's approach an impermissible racial gerrymander because the State had "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.*, at 647, 113 S.Ct. 2816. The Court's decisions in *Bush* and *Shaw* similarly declined to require additional majority-minority districts under § 2 where those districts did not satisfy traditional districting principles.

The Court recognizes that reapportionment remains primarily the duty and responsibility of the States, not the federal courts. Section 2 thus never requires adoption of districts that violate traditional redistricting principles and instead limits judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process ... den[ies] minority voters equal opportunity to participate." S. Rep. No. 97–417, pp. 33–34. Pp. 1507 – 1510.

(c) To apply its race-neutral benchmark in practice, Alabama would require plaintiffs to make at least three showings. First, Alabama would require § 2 plaintiffs to show that the illustrative maps adduced for the first *Gingles* precondition are not based on race. Alabama would next graft onto § 2 a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than what an "average" race-neutral plan would contain. And finally, Alabama would have plaintiffs prove that any deviation between the State's plan and a race-neutral plan is explainable "only" by race. The Court declines to adopt any of these novel requirements.

Here, Alabama contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by the State's experts—all of which lack two majority-black districts—HB1 does not violate § 2. Alabama's reliance on the maps created by its experts Dr. Duchin and Dr. Imai is misplaced because those maps do not accurately represent the districting

process in Alabama. Regardless, the map-comparison test that Alabama proposes is flawed in its fundamentals. Neither the text of § 2 nor the fraught debate that produced it suggests that "equal access" to the fundamental right of voting turns on technically complicated computer simulations. Further, while Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district, that (albeit very big) number is close to irrelevant in practice, where experts estimate the possible number of Alabama districting maps numbers is at least in the trillion trillions.

Alabama would also require plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral alternatives "can be explained *only* by racial discrimination." Brief for Alabama 44 (emphasis added). But the Court's precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. Pp. 1510, 1511 – 1515.

(d) The Court disagrees with Alabama's assertions that the Court should stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. Alabama's understanding of § 2 would require abandoning four decades of the Court's § 2 precedents. The Court has unanimously held that § 2 and the *Gingles* framework apply to claims challenging single-member districts. *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388. As Congress is undoubtedly aware of the Court's construction of § 2 to apply to districting challenges, statutory *stare decisis* counsels staying the course until and unless Congress acts. In any event, the statutory text supports the conclusion that § 2 applies to single-member districts. Indeed, the contentious debates in Congress about proportionality would have made little sense if § 2's coverage was as limited as Alabama contends.

The Court similarly rejects Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. The Court held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination," *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 64 L.Ed.2d 119, the VRA's "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment," *id.*, at 177, 100 S.Ct. 1548. Alabama's contention that the Fifteenth Amendment does not authorize race-based redistricting as a remedy for § 2 violations similarly fails. The Court is not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The Court's opinion does not diminish or disregard the concern that § 2 may impermissibly elevate race in the allocation of political power within the States. Instead, the Court simply holds that a faithful application of precedent and a fair reading of the record do not bear those concerns out here. Pp. 1514 – 1517.

Nos. 21–1086, 582 F. Supp. 3d 924, and 21–1087, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part III–B–1. SOTOMAYOR, KAGAN, and JACKSON, JJ., joined that opinion in full, and KAVANAUGH, J., joined except for Part III–B–1. KAVANAUGH, J., filed an opinion concurring in all but Part III–B–1. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined, in which BARRETT, J., joined as to Parts II and III, and in which ALITO, J., joined as to Parts II–A and II–B. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined.

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Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part III–B–1.*

***9** ****1498** In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional ***10** elections, finding that the plan likely violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. This Court stayed the District Court's order pending further review. 595 U. S. —— (2022). After conducting that review, we now affirm.

I

A

Shortly after the Civil War, Congress passed and the States ratified the Fifteenth Amendment, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1. In the century that followed, however, the Amendment proved little more than a parchment promise. Jim Crow laws like literacy tests, poll taxes, and "good-morals" requirements abounded, *South Carolina v. Katzenbach*, 383 U.S. 301, 312–313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), "render[ing] the right to vote illusory for blacks," ****1499** *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 220–221, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part). Congress stood up to little of it; "[t]he first century of congressional enforcement of the [Fifteenth] Amendment ... can only be regarded as a failure." *Id.*, at 197, 129 S.Ct. 2504 (majority opinion).

That changed in 1965. Spurred by the Civil Rights movement, Congress enacted and President Johnson signed into law the Voting Rights Act. 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* The Act "create[d] stringent new remedies for voting discrimination," attempting to forever "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308, 86 S.Ct. 803. By 1981, in only sixteen years' time, many considered the VRA "the most successful civil rights statute in the history of the Nation." S. Rep. No. 97–417, p. 111 (1982) (Senate Report).

These cases concern Section 2 of that Act. In its original form, "§ 2 closely tracked the language of the [Fifteenth] ***11** Amendment" and, as a result, had little independent force. *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2331, 210 L.Ed.2d 753 (2021).[1] Our leading case on § 2 at the time was *City of Mobile* v. *Bolden*, which involved a claim by black voters that the City's at-large election system effectively excluded them from participating in the election of city commissioners. 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980). The commission had three seats, black voters comprised one-third of the City's population, but no black-preferred candidate had ever won election.

[1] The Court ruled against the plaintiffs. The Fifteenth Amendment—and thus § 2—prohibits States from acting with a "racially discriminatory motivation" or an "invidious purpose" to discriminate. *Id.*, at 61–65, 100 S.Ct. 1519 (plurality opinion). But it does not prohibit laws that are discriminatory only in effect. *Ibid.* The *Mobile* plaintiffs could "register and vote without hindrance"—"their freedom to vote ha[d] not been denied or abridged by anyone." *Id.*, at 65, 100 S.Ct. 1519. The fact that they happened to lose frequently was beside the point. Nothing the City had done "purposeful[ly] exclu[ded]" them "from participati[ng] in the election process." *Id.*, at 64, 100 S.Ct. 1519.

Almost immediately after it was decided, *Mobile* "produced an avalanche of criticism, both in the media and within the civil rights community." T. Boyd & S. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1355 (1983) (Boyd & Markman). The New York Times wrote that the decision represented "the biggest step backwards in civil rights to come from the Nixon Court." N. Y. Times, Apr. 23, 1980, p. A22. And the Washington Post described *Mobile* as a "major defeat for blacks and other minorities fighting electoral schemes that exclude them from office." Washington ***12** Post, Apr. 23, 1980, p. A5. By focusing on discriminatory intent and ignoring disparate effect, critics argued, the Court had abrogated "the standard used by the courts to determine whether [racial] discrimination existed ...: Whether such discrimination existed." It's Results That Count, Philadelphia Inquirer, Mar. 3, 1982, p. 8–A.

****1500** But *Mobile* had its defenders, too. In their view, abandoning the intent test in favor of an effects test would inevitably require a focus on *proportionality*—wherever a minority group won fewer seats in the legislature than its share of the population, the charge could be made that the State law had a discriminatory effect. That, after all, was the type of claim brought in *Mobile*. But mandating racial proportionality in elections was regarded by many as intolerable. Doing so, wrote Senator Orrin Hatch in the Washington Star, would be "strongly resented by the American public." Washington Star, Sept. 30, 1980, p. A–9. The Wall Street Journal offered similar criticism. An effects test would generate "more, not less, racial and ethnic polarization." Wall Street Journal, Jan. 19, 1982, p. 28.

This sharp debate arrived at Congress's doorstep in 1981. The question whether to broaden § 2 or keep it as is, said Hatch—by then Chairman of the Senate Subcommittee before which § 2 would be debated—"involve[d] one of the most substantial constitutional issues ever to come before this body." 2 Hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., pt. 1, p. 1 (1982).

Proceedings in Congress mirrored the disagreement that had developed around the country. In April 1981, Congressman Peter W. Rodino, Jr.—longtime chairman of the House Judiciary Committee—introduced a bill to amend the VRA, proposing that the words "to deny or abridge" in § 2 be replaced with the phrase "*in a manner which results* in a denial or abridgement." H. R. 3112, 97th Cong., 1st Sess., 2 ***13** (as introduced) (emphasis added). This was the effects test that *Mobile*'s detractors sought.

But those wary of proportionality were not far behind. Senator Hatch argued that the effects test "was intelligible only to the extent that it approximated a standard of proportional representation by race." Boyd & Markman 1392. The Attorney General had the same concern. The effects test "would be triggered whenever election results did not mirror the population mix of a particular community," he wrote, producing "essentially a quota system for electoral politics." N. Y. Times, Mar. 27, 1982, p. 23.

The impasse was not resolved until late April 1982, when Senator Bob Dole proposed a compromise. Boyd & Markman 1414. Section 2 would include the effects test that many desired but also a robust disclaimer against proportionality. Seeking to navigate any tension between the two, the Dole Amendment borrowed language from a Fourteenth Amendment case of ours, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), which many in Congress believed would allow courts to consider effects but avoid proportionality. The standard for liability in voting cases, *White* explained, was whether "the political processes leading to nomination and election were not equally open to participation by the group in question—[in] that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 766, 93 S.Ct. 2332.

The Dole compromise won bipartisan support and, on June 18, the Senate passed the 1982 amendments by an overwhelming margin, 85–8. Eleven days later, President Reagan signed the Act into law. The amended § 2 reads as follows:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner ***14** which results in a denial or abridgement of the right of any citizen ****1501** of the United States to vote on account of race or color ... as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301.

B

For the first 115 years following Reconstruction, the State of Alabama elected no black Representatives to Congress. See *Singleton v. Merrill*, 582 F.Supp.3d 924, 947 (ND Ala. 2022) (*per curiam*). In 1992, several plaintiffs sued the State, alleging that it had been impermissibly diluting the votes of black Alabamians in violation of § 2. See *Wesch v. Hunt*, 785 F.Supp. 1491, 1493 (SD Ala.). The lawsuit produced a majority-black district in Alabama for the first time in decades. *Id.*, at 1499. And that fall, Birmingham lawyer Earl Hillard became the first black Representative from Alabama since 1877. 582 F.Supp.3d at 947.

Alabama's congressional map has "remained remarkably similar" after *Wesch*. Brief for Appellants in No. 21–1086 etc., p. 9 (Brief for Alabama). The map contains seven congressional districts, each with a single representative. See Supp. App. 205–211; 582 F.Supp.3d at 951. District 1 encompasses the Gulf Coast region in the southwest; District ***15** 2—known as the Wiregrass region—occupies the southeast; District 3 covers the eastern-central part of the State; Districts 4 and 5 stretch width-wise across the north, with the latter layered atop the former; District 6 is right in the State's middle; and District 7 spans the central west. *Id.*, at 951.

In 2020, the decennial census revealed that Alabama's population had grown by 5.1%. See 1 App. 86. A group of plaintiffs led by Alabama legislator Bobby Singleton sued the State, arguing that the existing congressional map was malapportioned and racially gerrymandered in violation of the Equal Protection Clause. 582 F.Supp.3d at 938–939. While litigation was proceeding, the Alabama Legislature's Committee on Reapportionment began creating a new districting map. *Ibid.* Although the prior decade's population growth did not change the number of seats that Alabama would receive in the House, the growth had been unevenly distributed across the State, and the existing map was thus out of date.

To solve the problem, the State turned to experienced mapmaker Randy Hinaman, who had created several districting maps that Alabama used over the past 30 years. *Id.*, at 947–948. The starting point for Hinaman was the then-existing 2011 congressional map, itself a product of the 2001 map that Hinaman had also created. Civ. No. 21–1530 (ND Ala.), ECF Doc. 70–2, pp. 40, 93–94; see also 582 F.Supp.3d at 950. Hinaman worked to adjust the 2011 map in accordance with the redistricting guidelines set by the legislature's Reapportionment Committee. *Id.*, at 948–950; 1 App. 275. Those guidelines prioritized population equality, contiguity, compactness, and avoiding dilution of minority voting strength. 582 F.Supp.3d at 1035–1036. ****1502** They also encouraged, as a secondary matter, avoiding incumbent pairings, respecting communities of interest, minimizing the number of counties in each district, and preserving cores of existing districts. *Id.*, at 1036–1037.

***16** The resulting map Hinaman drew largely resembled the 2011 map, again producing only one district in which black voters constituted a majority of the voting age population. Supp. App. 205–211. The Alabama Legislature enacted Hinaman's map under the name HB1. 582 F.Supp.3d at 935, 950–951. Governor Ivey signed HB1 into law on November 4, 2021. *Id.*, at 950.

C

Three groups of plaintiffs brought suit seeking to stop Alabama's Secretary of State from conducting congressional elections under HB1. The first group was led by Dr. Marcus Caster, a resident of Washington County, who challenged HB1 as invalid under § 2. *Id.*, at 934–935, 980. The second

group, led by Montgomery County resident Evan Milligan, brought claims under § 2 and the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 939–940, 966. Finally, the *Singleton* plaintiffs, who had previously sued to enjoin Alabama's 2011 congressional map, amended their complaint to challenge HB1 as an impermissible racial gerrymander under the Equal Protection Clause. *Id.*, at 938–939.

A three-judge District Court was convened, comprised of Circuit Judge Marcus and District Judges Manasco and Moorer. The *Singleton* and *Milligan* actions were consolidated before the three-judge Court for purposes of preliminary injunction proceedings, while *Caster* proceeded before Judge Manasco on a parallel track. 582 F.Supp.3d at 934–935. A preliminary injunction hearing began on January 4, 2022, and concluded on January 12. *Id.*, at 943. In that time, the three-judge District Court received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation. *Id.*, at 935–936. After reviewing that extensive record, the Court concluded in a 227-page opinion that the question whether HB1 likely violated § 2 was not "a close one." It did. *Id.*, at 1026. The Court thus preliminarily enjoined ***17** Alabama from using HB1 in forthcoming elections. *Id.*, at 936.[2]

Four days later, on January 28, Alabama moved in this Court for a stay of the District Court's injunction. This Court granted a stay and scheduled the cases for argument, noting probable jurisdiction in *Milligan* and granting certiorari before judgment in *Caster*. 595 U. S. ——, 142 S.Ct. 879, —— L.Ed.2d —— (2022).

II

The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2. We affirm that determination.

A

For the past forty years, we have evaluated claims brought under § 2 using the three-part framework developed in our decision ****1503** *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *Gingles* concerned a challenge to North Carolina's multimember districting scheme, which allegedly diluted the vote of its black citizens. *Id.*, at 34–36, 106 S.Ct. 2752. The case presented the first opportunity since the 1982 amendments to address how the new § 2 would operate.

[2] *Gingles* began by describing what § 2 guards against. "The essence of a § 2 claim," the Court explained, "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an "electoral structure operates to ***18** minimize or cancel out" minority voters' "ability to elect their preferred candidates." *Id.*, at 48, 106 S.Ct. 2752. Such a risk is greatest "where minority and majority voters consistently prefer different candidates" and where minority voters are submerged in a majority voting population that "regularly defeat[s]" their choices. *Ibid.*

[3] **[4]** **[5]** To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*) (citing *Gingles*, 478 U.S. at 46–51, 106 S.Ct. 2752). A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact. See *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Ibid.* Finally, a plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters. *Id.*, at 45–46, 106 S.Ct. 2752; see also *id.*, at 36–38, 106 S.Ct. 2752 (identifying several factors relevant to the totality of circumstances inquiry, including "the extent of any history of official discrimination in the state ... that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process").

[6] **[7]** **[8]** **[9]** **[10]** Each *Gingles* precondition serves a different purpose. The first, focused on geographical compactness and numerosity, is "needed to establish that the minority has the potential to elect a representative of its own

choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). The second, concerning the political cohesiveness of the minority ***19** group, shows that a representative of its choice would in fact be elected. See *ibid.* The third precondition, focused on racially polarized voting, "establish[es] that the challenged districting thwarts a distinctive minority vote" at least plausibly on account of race. *Ibid.* And finally, the totality of circumstances inquiry recognizes that application of the *Gingles* factors is "peculiarly dependent upon the facts of each case." 478 U.S. at 79, 106 S.Ct. 2752. Before courts can find a violation of § 2, therefore, they must conduct "an intensely local appraisal" of the electoral mechanism at issue, as well as a "searching practical evaluation of the 'past and present reality.' " *Ibid.*

****1504** *Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago. Congress has never disturbed our understanding of § 2 as *Gingles* construed it. And we have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country. See *Voinovich v. Quilter*, 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (Ohio); *Growe*, 507 U.S. at 25, 113 S.Ct. 1075 (Minnesota); *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (Florida); *Holder v. Hall*, 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Georgia); *Abrams v. Johnson*, 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) (Georgia); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 423, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (Texas); *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion) (North Carolina); *Cooper v. Harris*, 581 U.S. 285, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (North Carolina); *Abbott* v. *Perez*, 585 U. S. ——, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (Texas); *Wisconsin Legislature*, 595 U. S. ——, 142 S.Ct. 1245, 212 L.Ed.2d 251 (Wisconsin).

B

As noted, the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*. 582 F.Supp.3d at 1026. Based on our review of the record, we agree.

[11] With respect to the first *Gingles* precondition, the District Court correctly found that black voters could constitute a majority in a second district that was "reasonably configured." 1 App. to Emergency Application for Stay in ***20** No. 21–1086 etc., p. 253 (MSA). The plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria. With respect to compactness, for example, the District Court explained that the maps submitted by one of plaintiffs' experts, Dr. Moon Duchin, "perform[ed] generally better on average than" did HB1. 582 F.Supp.3d at 1009. A map offered by another of plaintiffs' experts, Bill Cooper, produced districts roughly as compact as the existing plan. *Ibid.* And none of plaintiffs' maps contained any "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find" them sufficiently compact. *Id.*, at 1011. Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns. *Id.*, at 1011, 1016. Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map. *Id.*, at 1011–1012. We agree with the District Court, therefore, that plaintiffs' illustrative maps "strongly suggest[ed] that Black voters in Alabama" could constitute a majority in a second, reasonably configured, district. *Id.*, at 1010.

The State nevertheless argues that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama. See, *e.g.*, *id.*, at 1012. A "community of interest," according to Alabama's districting guidelines, is an "area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities." *Ibid.* Alabama argues that the Gulf Coast region in the southwest of the State is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts. *Ibid.*

***21** ****1505** We do not find the State's argument persuasive. Only two witnesses testified that the Gulf Coast was a community of interest. *Id.*, at 1015. The testimony provided by one of those witnesses was "partial, selectively informed, and poorly supported." *Ibid.* The other witness, meanwhile, justified keeping the Gulf Coast together "simply" to preserve "political advantage[ ]": "You start splitting counties," he testified, "and that county loses its influence. That's why I don't want Mobile County to be split." *Id.*, at 990, 1015. The District Court understandably found this testimony insufficient to sustain Alabama's "overdrawn

argument that there can be no legitimate reason to split" the Gulf Coast region. *Id.*, at 1015.

Even if the Gulf Coast did constitute a community of interest, moreover, the District Court found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt. *Id.*, at 1012–1014. Named for its fertile soil, the Black Belt contains a high proportion of black voters, who "share a rural geography, concentrated poverty, unequal access to government services, ... lack of adequate healthcare," and a lineal connection to "the many enslaved people brought there to work in the antebellum period." *Id.*, at 1012–1013; see also 1 App. 299–304. The District Court concluded—correctly, under our precedent—that it did not have to conduct a "beauty contest[ ]" between plaintiffs' maps and the State's. There would be a split community of interest in both. 582 F.Supp.3d at 1012 (quoting *Bush v. Vera*, 517 U.S. 952, 977–978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion)).

[12] The State also makes a related argument based on "core retention"—a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another. See, *e.g.*, Brief for Alabama 25, 61. Here, by largely mirroring Alabama's 2011 districting plan, HB1 performs well on the core retention metric. Plaintiffs' illustrative ***22** plans, by contrast, naturally fare worse because they change where the 2011 district lines were drawn. See *e.g.*, Supp. App. 164–173. But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan. That is not the law: § 2 does not permit a State to provide some voters "less opportunity ... to participate in the political process" just because the State has done it before. 52 U.S.C. § 10301(b).

[13] As to the second and third *Gingles* preconditions, the District Court determined that there was "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." 582 F.Supp.3d at 1016 (internal quotation marks omitted). The Court noted that, "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." *Id.*, at 1017 (internal quotation marks omitted). Plaintiffs' experts described the evidence of racially polarized voting in Alabama as "intens[e]," "very strong," and "very clear." *Ibid.* Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." *Id.*, at 1018.

[14] Finally, the District Court concluded that plaintiffs had carried their burden ****1506** at the totality of circumstances stage. The Court observed that elections in Alabama were racially polarized; that "Black Alabamians enjoy virtually zero success in statewide elections"; that political campaigns in Alabama had been "characterized by overt or subtle racial appeals"; and that "Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Id.*, at 1018–1024.

***23** We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. See *Cooper*, 581 U.S. at 309, 137 S.Ct. 1455. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, HB1 violated § 2.

III

The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our § 2 jurisprudence anew.

The centerpiece of the State's effort is what it calls the "race-neutral benchmark." The theory behind it is this: Using modern computer technology, mapmakers can now generate millions of possible districting maps for a given State. The maps can be designed to comply with traditional districting criteria but to not consider race. The mapmaker can determine how many majority-minority districts exist in each map, and can then calculate the median or average number of majority-minority districts in the entire multimillion-map set. That number is called the race-neutral benchmark.

The State contends that this benchmark should serve as the point of comparison in § 2 cases. The benchmark, the State says, was derived from maps that were "race-blind"—maps that cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race" because they never took race into "account" in the first place. 52 U.S.C. § 10301(a). Courts in § 2 cases should therefore compare the number of majority-

minority districts in the State's plan to the benchmark. If those numbers are similar—if the State's map "resembles" the benchmark in this way—then, Alabama argues, the State's map also cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race." *Ibid.*

Alabama contends that its approach should be adopted for two reasons. First, the State argues that a race-neutral ***24** benchmark best matches the text of the Voting Rights Act. Section 2 requires that the political processes be "equally open." § 10301(b). What that means, the State asserts, is that the State's map cannot impose "obstacles or burdens that block or seriously hinder voting on account of race." Brief for Alabama 43. These obstacles do not exist, in the State's view, where its map resembles a map that never took race into "account." *Ibid.* Second, Alabama argues that the *Gingles* framework ends up requiring racial proportionality in districting. According to the State, *Gingles* demands that where "another majority-black district could be drawn, it must be drawn." Brief for Alabama 71 (emphasis deleted). And that sort of proportionality, Alabama continues, is inconsistent with the compromise that Congress struck, with the text of § 2, and with the Constitution's prohibition on racial discrimination in voting.

To apply the race-neutral benchmark in practice, Alabama would require § 2 plaintiffs to make at least three showings. First, the illustrative plan that plaintiffs adduce for the first *Gingles* precondition cannot have been "based" on race. Brief for Alabama 56. Second, plaintiffs must show at ****1507** the totality of circumstances stage that the State's enacted plan diverges from the average plan that would be drawn without taking race into account. And finally, plaintiffs must ultimately prove that any deviation between the State's plan and a race-neutral plan is explainable "only" by race—not, for example, by "the State's naturally occurring geography and demography." *Id.*, at 46.

As we explain below, we find Alabama's new approach to § 2 compelling neither in theory nor in practice. We accordingly decline to recast our § 2 case law as Alabama requests.

A

1

Section 2 prohibits States from imposing any "standard, practice, or procedure ... in a manner which results in a ***25** denial or abridgement of the right of any citizen ... to vote on account of race or color." 52 U.S.C. § 10301(a). What that means, § 2 goes on to explain, is that the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b).

[15] [16] [17] [18] We have understood the language of § 2 against the background of the hard-fought compromise that Congress struck. To that end, we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent. See, *e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 403–404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). And we have explained that "[i]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (some alterations omitted). Individuals thus lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that "minimize[s] or cancel[s] out the[ir] voting strength." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an individual is disabled from "enter[ing] into the political process in a reliable and meaningful manner" "in the light of past and present reality, political and otherwise." *White*, 412 U.S. at 767, 770, 93 S.Ct. 2332. A district is not equally open, in other words, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.

The State's reading of § 2, by contrast, runs headlong into our precedent. Alabama asserts that a State's map does not "abridge[ ]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. See Brief for Alabama 54–56. But our cases have consistently focused, for purposes of litigation, on the specific ***26** illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State, past and present.

[19] A State's liability under § 2, moreover, must be determined "based on the totality of circumstances." 52 U.S.C. § 10301(b). Yet Alabama suggests there is only one "circumstance[ ]" that matters—how the State's map stacks up relative to the benchmark. That single-minded view of § 2 cannot be squared with the VRA's ****1508** demand that courts employ a more refined approach. And we decline to adopt an interpretation of § 2 that would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence" for nearly forty years. *Bartlett*, 556 U.S. at 16, 129 S.Ct. 1231 (plurality opinion); see also *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1250 (faulting lower court for "improperly reduc[ing] *Gingles*' totality-of-circumstances analysis to a single factor"); *De Grandy*, 512 U.S. at 1018, 114 S.Ct. 2647 ("An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' ").[3]

2

Alabama also argues that the race-neutral benchmark is required because our existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to the last sentence of § 2(b). But properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated.

***27** In *Shaw* v. *Reno*, for example, we considered the permissibility of a second majority-minority district in North Carolina, which at the time had 12 seats in the U. S. House of Representatives and a 20% black voting age population. 509 U.S. 630, 633–634, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). The second majority-minority district North Carolina drew was "160 miles long and, for much of its length, no wider than the [interstate] corridor." *Id.*, at 635, 113 S.Ct. 2816. The district wound "in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough enclaves of black neighborhoods." *Id.*, at 635–636, 113 S.Ct. 2816. Indeed, the district was drawn so imaginatively that one state legislator remarked: "[I]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Id.*, at 636, 113 S.Ct. 2816.

Though North Carolina believed the additional district was required by § 2, we rejected that conclusion, finding instead that those challenging the map stated a claim of impermissible racial gerrymandering under the Equal Protection Clause. *Id.*, at 655, 658, 113 S.Ct. 2816. In so holding, we relied on the fact that the proposed district was not reasonably compact. *Id.*, at 647, 113 S.Ct. 2816. North Carolina had "concentrated a *dispersed* minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Ibid.* (emphasis added). And "[a] reapportionment plan that includes in one district individuals who belong to the same race, *but who are otherwise separated by geographical and political boundaries*," we said, raised serious constitutional concerns. *Ibid.* (emphasis added).

The same theme emerged in our 1995 decision *Miller* v. *Johnson*, where we upheld a district court's finding that one of Georgia's ten congressional districts was the product of an impermissible racial gerrymander. 515 U.S. 900, 906, 910–911, 115 S.Ct. 2475, 132 L.Ed.2d 762. At the time, Georgia's black voting age population was 27%, but there was only one majority-minority district. *Id.*, at 906, 115 S.Ct. 2475. To comply with the VRA, Georgia thought it necessary ***28** to create two more ****1509** majority-minority districts—achieving proportionality. *Id.*, at 920–921, 115 S.Ct. 2475. But like North Carolina in *Shaw*, Georgia could not create the districts without flouting traditional criteria. One district "centered around four discrete, widely spaced urban centers that ha[d] absolutely nothing to do with each other, and stretch[ed] the district hundreds of miles across rural counties and narrow swamp corridors." 515 U.S. at 908, 115 S.Ct. 2475. "Geographically," we said of the map, "it is a monstrosity." *Id.*, at 909, 115 S.Ct. 2475.

In *Bush* v. *Vera*, a plurality of the Court again explained how traditional districting criteria limited any tendency of the VRA to compel proportionality. The case concerned Texas's creation of three additional majority-minority districts. 517 U.S. at 957, 116 S.Ct. 1941. Though the districts brought the State closer to proportional representation, we nevertheless held that they constituted racial gerrymanders in violation of the Fourteenth Amendment. That was because the districts had "no integrity in terms of traditional, neutral redistricting criteria." *Id.*, at 960, 116 S.Ct. 1941. One of the majority-black districts consisted "of narrow and bizarrely shaped tentacles." *Id.*, at 965, 116 S.Ct. 1941. The proposed majority-Hispanic district resembled "a sacred Mayan bird" with "[s]pindly legs reach[ing] south" and a "plumed head ris[ing] northward." *Id.*, at 974, 116 S.Ct. 1941.

The point of all this is a simple one. Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2. The numbers bear the point out well. At the congressional level, the fraction of districts in which black-preferred candidates are likely to win "is currently below the Black share of the eligible voter population in every state but three." Brief for Professors Jowei Chen et al. as *Amici Curiae* 3 (Chen Brief). Only one State in the country, meanwhile, "has attained a proportional share" of districts in which Hispanic-preferred candidates are likely to prevail. *Id.*, at 3–4. That is because as residential segregation decreases—as it has "sharply" done since the ***29** 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult." T. Crum, Reconstructing Racially Polarized Voting, 70 Duke L. J. 261, 279, and n. 105 (2020).

Indeed, as *amici* supporting the appellees emphasize, § 2 litigation in recent years has rarely been successful for just that reason. See Chen Brief 3–4. Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. *Id.*, at 7. And "the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston." *Id.*, at 7–8. By contrast, "[n]umerous lower courts" have upheld districting maps "where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district" or satisfy the compactness requirement. *Id.*, at 15–16 (collecting cases). The same has been true of recent litigation in this Court. See *Abbott*, 585 U. S., at ——– ——, 138 S.Ct., at 2331 (finding a Texas district did not violate § 2 because "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino ... districts that exist under the current plan").[4]

****1510** **[20]** **[21]** Reapportionment, we have repeatedly observed, "is primarily the duty and responsibility of the State[s]," not the federal courts. *Id.*, at ——, 138 S.Ct., at 2324. Properly applied, the *Gingles* factors help ensure that remains the case. As respondents ***30** themselves emphasize, § 2 "never require[s] adoption of districts that violate traditional redistricting principles." Brief for Respondents in No. 21–1087, p. 3. Its exacting requirements, instead, limit judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process ... den[ies] minority voters equal opportunity to participate." Senate Report 33–34.

B

Although we are content to reject Alabama's invitation to change existing law on the ground that the State misunderstands § 2 and our decisions implementing it, we also address how the race-neutral benchmark would operate in practice. Alabama's approach fares poorly on that score, which further counsels against our adopting it.

1

The first change to existing law that Alabama would require is prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being "based" on race. Brief for Alabama 36. Although Alabama is not entirely clear whether, under its view, plaintiffs' illustrative plans must not take race into account at all or whether they must just not "prioritize" race, *ibid.*, we see no reason to impose such a new rule.

When it comes to considering race in the context of districting, we have made clear that there is a difference "between being aware of racial considerations and being motivated by them." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475; see also *North Carolina* v. *Covington*, 585 U. S. ——, ——, 138 S.Ct. 2548, 2553, 201 L.Ed.2d 993 (2018) (*per curiam*). The former is permissible; the latter is usually not. That is because "[r]edistricting legislatures will ... almost always be aware of racial demographics," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, but such "race consciousness does not lead inevitably to impermissible race discrimination," *Shaw*, 509 U.S. at 646, 113 S.Ct. 2816. Section 2 itself "demands consideration of race." ***31** *Abbott*, 581 U. S., at ——, 138 S.Ct., at 2315. The question whether additional majority-*minority* districts can be drawn, after all, involves a "quintessentially race-conscious calculus." *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647.

At the same time, however, race may not be "the predominant factor in drawing district lines unless [there is] a compelling reason." *Cooper*, 581 U.S. at 291, 137 S.Ct. 1455. Race predominates in the drawing of district lines, our cases explain, when "race-neutral considerations [come] into play only after the race-based decision had been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 189, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017) (internal quotation marks omitted). That may occur where "race for its own sake is the

overriding reason for choosing one map over others." *Id.*, at 190, 137 S.Ct. 788.

While the line between racial predominance and racial consciousness can be difficult **1511 to discern, see *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, it was not breached here. The *Caster* plaintiffs relied on illustrative maps produced by expert Bill Cooper. See 2 App. 591–592. Cooper testified that while it was necessary for him to *consider* race, he also took several other factors into account, such as compactness, contiguity, and population equality. *Ibid.* Cooper testified that he gave all these factors "equal weighting." *Id.*, at 594. And when asked squarely whether race predominated in his development of the illustrative plans, Cooper responded: "No. It was a consideration. This is a Section 2 lawsuit, after all. But it did not predominate or dominate." *Id.*, at 595.

The District Court agreed. It found "Cooper's testimony highly credible" and commended Cooper for "work[ing] hard to give 'equal weight[ ]' to all traditional redistricting criteria." 582 F.Supp.3d at 1005–1006; see also *id.*, at 978–979. The court also explained that Alabama's evidence of racial predominance in Cooper's maps was exceedingly thin. Alabama's expert, Thomas Bryan, "testified that he never reviewed the exhibits to Mr. Cooper's report" and "that he never reviewed" one of the illustrative plans that Cooper *32 submitted. *Id.*, at 1006. Bryan further testified that he could offer no "conclusions or opinions as to the apparent basis of any individual line drawing decisions in Cooper's illustrative plans." 2 App. 740. By his own admission, Bryan's analysis of any race predominance in Cooper's maps "was pretty light." *Id.*, at 739. The District Court did not err in finding that race did not predominate in Cooper's maps in light of the evidence before it.[5]

The dissent contends that race nevertheless predominated in both Cooper's and Duchin's maps because they were designed to hit " 'express racial target[s]' "—namely, two "50%-plus majority-black districts." *Post*, at 1527 (opinion of THOMAS, J.) (quoting *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788). This argument fails in multiple ways. First, the dissent's reliance on *Bethune-Hill* is mistaken. In that case, this Court was unwilling to conclude that a State's maps were produced in a racially predominant manner. Instead, we remanded for the lower court to conduct the predominance analysis itself, explaining that "the use of an express racial target" was just one factor among others that the court would have to consider as part of "[a] holistic analysis." *Id.*, at 192, 137 S.Ct. 788. Justice *33 THOMAS dissented in relevant part, contending that because "the legislature sought to achieve a [black voting-age population] of at least 55%," race necessarily predominated in its decisionmaking. *Id.*, at 198, 137 S.Ct. 788 (opinion concurring in part and dissenting in part). But the Court did not join in that view, and Justice THOMAS again dissents along the same lines today.

**1512 The second flaw in the dissent's proposed approach is its inescapable consequence: *Gingles* must be overruled. According to the dissent, racial predominance plagues *every single illustrative map ever adduced* at the first step of *Gingles*. For all those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise. The upshot of the approach the dissent urges is not to change how *Gingles* is applied, but to reject its framework outright.

The contention that mapmakers must be entirely "blind" to race has no footing in our § 2 case law. The line that we have long drawn is between consciousness and predominance. Plaintiffs adduced at least one illustrative map that comported with our precedents. They were required to do no more to satisfy the first step of *Gingles*.

2

The next condition Alabama would graft onto § 2 is a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than the race-neutral benchmark. Brief for Alabama 43. If it does not, then § 2 should drop out of the picture. *Id.*, at 44.

Alabama argues that is what should have happened here. It notes that one of plaintiffs' experts, Dr. Duchin, used an algorithm to create "2 million districting plans for Alabama ... without taking race into account in any way in the generation process." 2 App. 710. Of these two million "race-blind" *34 plans, none contained two majority-black districts while many plans did not contain any. *Ibid.* Alabama also points to a "race-neutral" computer simulation conducted by another one of plaintiffs' experts, Dr. Kosuke Imai, which produced 30,000 potential maps. Brief for Alabama 55. As with Dr. Duchin's maps, none of the maps that Dr. Imai created contained two majority-black districts. See 2 App. 571–572. Alabama thus contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by Dr. Duchin

and Dr. Imai—all of the maps lack two majority-black districts—HB1 does not violate § 2. Brief for Alabama 54.

Alabama's reliance on the maps created by Dr. Duchin and Dr. Imai is misplaced. For one, neither Duchin's nor Imai's maps accurately represented the districting process in Alabama. Dr. Duchin's maps were based on old census data—from 2010 instead of 2020—and ignored certain traditional districting criteria, such as keeping together communities of interest, political subdivisions, or municipalities.[6] And Dr. Imai's 30,000 maps failed to incorporate Alabama's own districting guidelines, including keeping together communities of interest and preserving municipal boundaries. See Supp. App. 58–59.[7]

***35** ****1513** But even if the maps created by Dr. Duchin and Dr. Imai were adequate comparators, we could not adopt the map-comparison test that Alabama proposes. The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Yet "[q]uantifying, measuring, prioritizing, and reconciling these criteria" requires map drawers to "make difficult, contestable choices." Brief for Computational Redistricting Experts as *Amici Curiae* 8 (Redistricting Brief). And "[i]t is easy to imagine how different criteria could move the median map toward different ... distributions," meaning that "the same map could be [lawful] or not depending solely on what the mapmakers said they set out to do." *Rucho* v. *Common Cause*, 588 U. S. ——, ——, 139 S.Ct. 2484, 2505, 204 L.Ed.2d 931 (2019). For example, "the scientific literature contains dozens of competing metrics" on the issue of compactness. Redistricting Brief 8. Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?

[22] Alabama does not say; it offers no rule or standard for determining which of these choices are better than others. Nothing in § 2 provides an answer either. In 1982, the computerized mapmaking software that Alabama contends plaintiffs ***36** must use to demonstrate an (unspecified) level of deviation did not even exist. See, *e.g.*, J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 881–882 (2021) (Chen & Stephanopoulos). And neither the text of § 2 nor the fraught debate that produced it suggests that "equal access" to the fundamental right of voting turns on computer simulations that are technically complicated, expensive to produce, and available to "[o]nly a small cadre of university researchers [that] have the resources and expertise to run" them. Brief for United States as *Amicus Curiae* 28 (citing Chen & Stephanopoulos 882–884).[8]

One final point bears mentioning. Throughout these cases, Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district. See, *e.g.*, Brief for Alabama 1, 23, 30, 31, 54–56, 70, 79. The point is that two million is a very big number and that sheer volume matters. But as elsewhere, Alabama misconceives ****1514** the math project that it expects courts to oversee. A brief submitted by three computational redistricting experts explains that the number of possible districting maps in Alabama is at least in the "trillion trillions." Redistricting Brief 6, n. 7. Another publication reports that the number of potential maps may be orders of magnitude higher: "the universe of all possible connected, population-balanced districting plans that satisfy the state's requirements," it explains, "is likely in the range of googols." Duchin & Spencer 768. Two million maps, in other words, is not many maps at all. And Alabama's insistent reliance on that number, ***37** however powerful it may sound in the abstract, is thus close to irrelevant in practice. What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all. See, *e.g.*, Redistricting Brief 2 ("[I]t is computationally intractable, and thus effectively impossible, to generate a complete enumeration of all potential districting plans. [Even] algorithms that attempt to create a manageable sample of that astronomically large universe do not consistently identify an average or median map."); Duchin & Spencer 768 ("[A] comprehensive survey of [all districting plans within a State] is impossible.").

Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.

3

Alabama's final contention with respect to the race-neutral benchmark is that it requires plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral

alternatives "can be explained *only* by racial discrimination." Brief for Alabama 44 (emphasis added).

We again find little merit in Alabama's proposal. As we have already explained, our precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. See, *e.g.*, *Chisom*, 501 U.S. at 403–404, 111 S.Ct. 2354; *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816; *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). Yet Alabama's proposal is even *more* demanding than the intent test Congress jettisoned. Demonstrating discriminatory intent, we have long held, "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose[ ]." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added); see also *Reno*, 520 U.S. at 488, 117 S.Ct. 1491. Alabama's proposed approach stands in sharp contrast to all this, injecting into the effects test of § 2 an ***38** evidentiary standard that even our purposeful discrimination cases eschew.

C

Alabama finally asserts that the Court should outright stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. We disagree on both counts.

[23] Alabama first argues that § 2 does not apply to single-member redistricting. Echoing Justice THOMAS's concurrence in *Holder* v. *Hall*, Alabama reads § 2's reference to "standard, practice, or procedure" to mean only the "methods for conducting a part of the voting process that might ... be used to interfere with a citizen's ability to cast his vote." 512 U.S. at 917–918, 114 S.Ct. 2581 (opinion concurring ****1515** in judgment). Examples of covered activities would include "registration requirements, ... the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process." *Id.*, at 922, 114 S.Ct. 2581. But not "a single-member districting system or the selection of one set of districting lines over another." *Id.*, at 923, 114 S.Ct. 2581.

This understanding of § 2 cannot be reconciled with our precedent. As recounted above, we have applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades. See *supra*, at 1503 – 1504; see also *Brnovich*, 594 U. S., at ——, n. 5, 141 S.Ct., at 2333, n. 5) (collecting cases). In doing so, we have unanimously held that § 2 and *Gingles* "[c]ertainly ... apply" to claims challenging single-member districts. *Growe*, 507 U.S. at 40, 113 S.Ct. 1075. And we have even invalidated portions of a State's single-district map under § 2. See *LULAC*, 548 U.S. at 427–429, 126 S.Ct. 2594.[9] Alabama's approach would require ***39** "abandoning" this precedent, "overruling the interpretation of § 2" as set out in nearly a dozen of our cases. *Holder*, 512 U.S. at 944, 114 S.Ct. 2581 (opinion of THOMAS, J.).

We decline to take that step. Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course. See, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015).[10]

The statutory text in any event supports the conclusion that § 2 applies to single-member districts. Alabama's own proffered definition of a "procedure is the manner or method of proceeding in a process or course of action." Brief for Alabama 51 (internal quotation marks omitted). But the manner of proceeding in the act of voting entails determining in which districts voters will vote. The fact that the term "procedure" is preceded by the phrase "qualification or prerequisite to voting," 52 U.S.C. § 10301(a), does not change its meaning. It is hard to imagine many more fundamental "prerequisites" to voting than determining where to cast your ballot or who you are eligible to vote for. Perhaps for ***40** that reason, even Alabama ****1516** does not bear the courage of its conviction on this point. It refuses to argue that § 2 is inapplicable to multimember districting, though its textual arguments apply with equal force in that context.

The dissent, by contrast, goes where even Alabama does not dare, arguing that § 2 is wholly inapplicable to districting because it "focuses on ballot access and counting" only. *Post*, at 1520 (opinion of THOMAS, J.). But the statutory text upon which the dissent relies supports the exact opposite conclusion. The relevant section provides that "[t]he terms 'vote' or 'voting' shall include *all action necessary to make a vote effective*." *Ibid.* (quoting 52 U.S.C. § 10310(c)(1); emphasis added). Those actions "includ[e], but [are] not limited to, ... action[s] required by law prerequisite to voting,

casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." § 10310(c)(1). It would be anomalous to read the broad language of the statute—"all action necessary," "including but not limited to"—to have the crabbed reach that Justice THOMAS posits. And we have already discussed why determining where to cast a ballot constitutes a "prerequisite" to voting, as the statute requires.

The dissent also contends that "applying § 2 to districting rests on systematic neglect of ... the ballot-access focus of the 1960s' voting-rights struggles." *Post*, at 1520 (opinion of THOMAS, J.). But history did not stop in 1960. As we have explained, Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile*, a case about *districting*. And—as the dissent itself acknowledges—"Congress drew § 2(b)'s current operative language" from the 1973 decision *White* v. *Regester*, *post*, at 1521, n. 3 (opinion of THOMAS, J.), a case that was also about districting (in fact, a case that invalidated two multimember districts in Texas and ordered them redrawn into single-member districts, 412 U.S. at 765, 93 S.Ct. 2332). This was not lost on anyone when § 2 was amended. Indeed, it was the precise reason that the contentious debates over ***41** proportionality raged—debates that would have made little sense if § 2 covered only poll taxes and the like, as the dissent contends.

[24] **[25]** We also reject Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. See Brief for Alabama 73. But we held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." *Id.*, at 177, 100 S.Ct. 1548. As *City of Rome* recognized, we had reached the very same conclusion in *South Carolina* v. *Katzenbach*, a decision issued right after the VRA was first enacted. 383 U.S. at 308–309, 329–337, 86 S.Ct. 803; see also *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2330–2331.

Alabama further argues that, even if the Fifteenth Amendment authorizes the effects test of § 2, that Amendment does not authorize race-based redistricting as a remedy for § 2 violations. But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as ****1517** a remedy for state districting maps that violate § 2. See, *e.g.*, *supra,* at 1503 – 1504; cf. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984). In light of that precedent, including *City of Rome*, we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The concern that § 2 may impermissibly elevate race in the allocation of political power within the States is, of course, ***42** not new. See, *e.g.*, *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."). Our opinion today does not diminish or disregard these concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out here.

* * *

The judgments of the District Court for the Northern District of Alabama in the *Caster* case, and of the three-judge District Court in the *Milligan* case, are affirmed.

It is so ordered.

Justice KAVANAUGH, concurring in all but Part III–B–1.
I agree with the Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). I write separately to emphasize four points.

First, the upshot of Alabama's argument is that the Court should overrule *Gingles*. But the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*. In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made

other changes to the Voting Rights Act. Although statutory *stare decisis* is not absolute, "the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process." *Ramos* v. *Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390, 1413, 206 L.Ed.2d 583 (2020) (KAVANAUGH, J., concurring in part); see also, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015); ***43** *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Flood v. Kuhn*, 407 U.S. 258, 283–284, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).[1]

Second, Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer in § 2(b) of the Voting Rights Act. 52 U.S.C. § 10301(b). But Alabama's ****1518** premise is wrong. As the Court's precedents make clear, *Gingles* does not mandate a proportional number of majority-minority districts. *Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and "geographically compact" minority population and (ii) a plaintiff 's proposed alternative map and proposed majority-minority district are "reasonably configured" – namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines. See, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Voinovich v. Quilter*, 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *ante*, at 1503 – 1505, 1507 – 1510.

If *Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach. See, *e.g.*, *Abbott* v. *Perez*, 585 U. S. ——, —— – ——, 138 S.Ct. 2305, 2331–2332, 201 L.Ed.2d 714 (2018); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); ***44** *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752; see also *Miller v. Johnson*, 515 U.S. 900, 917–920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 644–649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *ante*, at 1507 – 1510, 113 S.Ct. 2816.[2]

Third, Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race. It is true that computer simulations might help detect the presence or absence of *intentional* discrimination. For example, if all of the computer simulations generated only one majority-minority district, it might be difficult to say that a State had intentionally discriminated on the basis of race by failing to draw a second majority-minority district.

But as this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test. See *ante*, at 1507; *post*, at 1522 – 1523 (THOMAS, J., dissenting); *post*, at 1556 – 1557 (ALITO, J., dissenting). And the effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations. See *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2314–2315; *Johnson v. De Grandy*, 512 U.S. 997, 1006–1007, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Voinovich*, 507 U.S. at 153–154, 113 S.Ct. 1149; see generally *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2341, 210 L.Ed.2d 753 (2021) ("§ 2 does not demand proof of discriminatory purpose"); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (Congress "clearly expressed its desire that § 2 *not* have an intent component"); ****1519** *Holder v. Hall*, 512 U.S. 874, 923–924, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment) (§ 2 adopts a ***45** " 'results' test, rather than an 'intent' test"); *Chisom v. Roemer*, 501 U.S. 380, 394, 404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) ("proof of intent is no longer required to prove a § 2 violation" as "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"); *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (§ 2 does not require " 'purpose of racial discrimination' ").

Fourth, Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority under the Fourteenth and Fifteenth Amendments. As the Court explains, the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents. See *ante*, at 1516 – 1517; see also *City of Rome v. United States*, 446 U.S. 156, 177–178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Justice THOMAS notes, however, that even if Congress in

1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. See *post*, at 1543 – 1544 (dissenting opinion). But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time.

For those reasons, I vote to affirm, and I concur in all but Part III–B–1 of the Court's opinion.

Justice THOMAS, with whom Justice GORSUCH joins, with whom Justice BARRETT joins as to Parts II and III, and with whom Justice ALITO joins as to Parts II–A and II–B, dissenting.

These cases "are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting) (quoting *Holder v. Hall*, 512 U.S. 874, 893, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment)). What distinguishes them is the uncommon clarity with which they lay bare the gulf between our "color-blind" ***46** Constitution, *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), and "the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder*, 512 U.S. at 907, 114 S.Ct. 2581 (opinion of THOMAS, J.). The question presented is whether § 2 of the Act, as amended, requires the State of Alabama to intentionally redraw its longstanding congressional districts so that black voters can control a number of seats roughly proportional to the black share of the State's population. Section 2 demands no such thing, and, if it did, the Constitution would not permit it.

I

At the outset, I would resolve these cases in a way that would not require the Federal Judiciary to decide the correct racial apportionment of Alabama's congressional seats. Under the statutory text, a § 2 challenge must target a "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). I have long been convinced that those words reach only "enactments that regulate citizens' access to the ballot or the processes for counting a ballot"; they "do not include a State's ... choice of one districting scheme over another." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). "Thus, § 2 cannot provide a basis for invalidating any district." ****1520** *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2335, 201 L.Ed.2d 714 (2018) (THOMAS, J., concurring).

While I will not repeat all the arguments that led me to this conclusion nearly three decades ago, see *Holder*, 512 U.S. at 914–930, 114 S.Ct. 2581 (opinion concurring in judgment), the Court's belated appeal to the statutory text is not persuasive. See *ante*, at 1515 – 1516. Whatever words like "practice" and "procedure" are capable of meaning in a vacuum, the prohibitions *of § 2* apply to practices and procedures that affect "voting" and "the right ... to vote." § 10301(a). "Vote" and "voting" are defined terms under the Act, and the Act's definition plainly focuses on ballot access and counting:

> ***47** "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." § 10310(c)(1).

In enacting the original Voting Rights Act in 1965, Congress copied this definition almost verbatim from Title VI of the Civil Rights Act of 1960—a law designed to protect access to the ballot in jurisdictions with patterns or practices of denying such access based on race, and which cannot be construed to authorize so-called vote-dilution claims. See 74 Stat. 91–92 (codified in relevant part at 52 U.S.C. § 10101(e)). Title I of the Civil Rights Act of 1964, which cross-referenced the 1960 Act's definition of "vote," likewise protects ballot access alone and cannot be read to address vote dilution. See 78 Stat. 241 (codified in relevant part at 52 U.S.C. § 10101(a)). Tellingly, the 1964 Act also used the words "standard, practice, or procedure" to refer specifically to voting qualifications for individuals and the actions of state and local officials in administering such requirements.[1] Our entire enterprise of applying § 2 to districting rests on systematic neglect of these statutory antecedents and, more broadly, of the ballot-access focus of the 1960s' voting-rights struggles. See, *e.g.*, ***48** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2330, 210 L.Ed.2d 753 (2021) (describing the "notorious methods" by which, prior to the Voting Rights Act, States and localities deprived black Americans of the ballot: "poll

taxes, literacy tests, property qualifications, white primaries, and grandfather clauses" (alterations and internal quotation marks omitted)).[2]

Moreover, the majority drastically overstates the *stare decisis* support for applying § 2 to single-member districting plans **1521 like the one at issue here.[3] As the majority implicitly acknowledges, this Court has only applied § 2 to invalidate one single-member district in one case. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.). And no party in *49 that case argued that the plaintiffs' vote-dilution claim was not cognizable. As for *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), it held only that the threshold preconditions for challenging multimember and at-large plans must limit challenges to single-member districts with *at least* the same force, as "[i]t would be peculiar [if] a vote-dilution challenge to the (more dangerous) multimember district require[d] a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Id.*, at 40, 113 S.Ct. 1075. *Growe* did not consider (or, thus, reject) an argument that § 2 does not apply to single-member districts.

In any event, *stare decisis* should be no barrier to reconsidering a line of cases that "was based on a flawed method of statutory construction from its inception," has proved incapable of principled application after nearly four decades of experience, and puts federal courts in the business of "methodically carving the country into racially designated electoral districts." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). This Court has "never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes," and it should not do so here. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Stare decisis* did not save "separate but equal," despite its repeated reaffirmation in this Court and the pervasive reliance States had placed upon it for decades. See, *e.g.*, Brief for Appellees in *Brown* v. *Board of Education*, O. T. 1953, No. 1, pp. 18–30. It should not rescue modern-day forms of *de jure* racial balkanization—which, as these cases show, is exactly where our § 2 vote-dilution jurisprudence has led.[4]

*50 **1522 II

Even if § 2 applies here, however, Alabama should prevail. The District Court found that Alabama's congressional districting map "dilutes" black residents' votes because, while it is *possible* to draw two majority-black districts, Alabama's map only has one.[5] But the critical question in all vote-dilution cases is: "Diluted relative to what benchmark?" *Gonzalez v. Aurora*, 535 F.3d 594, 598 (CA7 2008) (Easterbrook, C. J.). Neither the District Court nor the majority has any defensible answer. The text of § 2 and the logic of vote-dilution claims require a meaningfully race-neutral benchmark, and no race-neutral benchmark can justify the District Court's finding of vote dilution in these cases. The *51 only benchmark that can justify it—and the one that the District Court demonstrably applied—is the decidedly nonneutral benchmark of proportional allocation of political power based on race.

A

As we have long recognized, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). In a challenge to a districting plan, a court must be able to compare a State's enacted plan with "a hypothetical, undiluted plan," *ibid.*, ascertained by an "objective and workable standard." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion); see also *id.*, at 887, 114 S.Ct. 2581 (opinion of O'Connor, J.) (noting the "general agreement" on this point).

To be sure, it is no easy task to identify an objective, "undiluted" benchmark against which to judge a districting plan. As we recently held in the analogous context of partisan gerrymandering, "federal courts are not equipped to apportion political power as a matter of fairness." *Rucho* v. *Common Cause*, 588 U. S. ——, ——, 139 S.Ct. 2484, 2499, 204 L.Ed.2d 931 (2019). Yet § 2 vote-dilution cases require nothing less. If § 2 prohibited only intentional racial discrimination, there would be no difficulty in finding a clear and workable rule of decision. But the "results test" that Congress wrote into § 2 to supersede *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), eschews intent as the criterion of liability. See *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Accordingly, a § 2 vote-dilution **1523 claim does not simply "as[k] ... for the elimination of a racial classification." *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2502. It asks, instead, "for a fair share of political power and

influence, with all the justiciability conundrums that entails." *Ibid.* Nevertheless, if § 2 applies to single-member districts, we must accept that some "objective and workable standard for choosing a reasonable benchmark" exists; otherwise, single-member districts "cannot be challenged as dilutive under § 2." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion).

***52** Given the diverse circumstances of different jurisdictions, it would be fanciful to expect a one-size-fits-all definition of the appropriate benchmark. Cf. *Thornburg v. Gingles*, 478 U.S. 30, 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (explaining that the vote-dilution inquiry "is peculiarly dependent upon the facts of each case and requires an intensely local appraisal" (citation and internal quotation marks omitted)). One overriding principle, however, should be obvious. A proper districting benchmark must be *race neutral*: It must not assume, *a priori*, that an acceptable plan should include any particular number or proportion of minority-controlled districts.

I begin with § 2's text. As relevant here, § 2(a) prohibits a State from "impos[ing] or appl[ying]" any electoral rule "in a manner which results in a denial or abridgement of the right ... to vote on account of race or color." § 10301(a). Section 2(b) then provides that § 2(a) is violated

> "if, based on the totality of circumstances, ... the political processes leading to nomination or election in the State ... are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State ... is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." § 10301(b).

As we held two Terms ago in *Brnovich*, the "equal openness" requirement is "the core" and "touchstone" of § 2(b),

with "equal opportunity" serving an ancillary function.[6] ***53** 594 U. S., at ——, 141 S.Ct., at 2338. Relying significantly on § 2(b)'s disclaimer of a right to proportional representation, we also held that § 2 does not enact a "freewheeling disparate-impact regime." *Id.*, at ——, and n. 14, 141 S.Ct., at 2341, and n. 14. *Brnovich* further stressed the value of "benchmarks with which ... challenged [electoral] rule[s] can be compared," *id.*, at ——, 141 S.Ct., at 2338, and that "a meaningful comparison is essential" in judging the significance of any challenged scheme's racially disparate impact. *Id.*, at ——, 141 S.Ct., at 2339. To the extent § 2 applies to districting plans, then, it requires that they be "equally open to participation" by voters of all races, but it is not a pure disparate-impact statute and does not guarantee proportional representation.

In its main argument here, Alabama simply carries these principles to their logical conclusion: Any vote-dilution benchmark must be race neutral. See Brief for Appellants 32–46. Whatever "equal openness" means in the context of single-member ****1524** districting, no "meaningful comparison" is possible using a benchmark that builds in a presumption in favor of minority-controlled districts. Indeed, any benchmark other than a race-neutral one would render the vote-dilution inquiry fundamentally circular, allowing courts to conclude that a districting plan "dilutes" a minority's voting strength "on account of race" merely because it does not measure up to an ideal already defined in racial terms. Such a question-begging standard would not answer our precedents' demand for an "*objective*," "reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion) (emphasis added). Nor could any nonneutral benchmark be reconciled with *Brnovich*'s rejection of a disparate-impact regime or the text's disclaimer of a right to proportional representation. 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14).

There is yet another compelling reason to insist on a race-neutral benchmark. "The Constitution abhors classifications based on race." *Grutter v. Bollinger*, 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). Redistricting is no exception. "Just as the State ***54** may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," the State also "may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (citations omitted). "[D]istricting maps that sort voters on the basis of race ' "are by their very nature odious." ' " *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*) (quoting *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*)). Accordingly, our precedents apply strict scrutiny whenever race was "the predominant factor motivating [the

placement of] a significant number of voters within or without a particular district," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, or, put another way, whenever "[r]ace was the criterion that ... could not be compromised" in a district's formation. *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

Because "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and undermine "the goal of a political system in which race no longer matters," *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816, our cases have long recognized the need to interpret § 2 to avoid "unnecessarily infus[ing] race into virtually every redistricting" plan. *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.); accord, *Bartlett v. Strickland*, 556 U.S. 1, 21, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). Plainly, however, that "infusion" is the inevitable result of any race-based benchmark. Any interpretation of § 2 that permits courts to condemn enacted districting plans as dilutive relative to a nonneutral benchmark "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision,' " thus " 'raising serious constitutional questions.' " *Id.*, at 21–22, 129 S.Ct. 1231 (first quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, then quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594). To avoid setting § 2 on a collision course with the Constitution, courts must apply a race-neutral benchmark in assessing any ***55** claim that a districting plan unlawfully dilutes a racial minority's voting strength.

B

The plaintiffs in these cases seek a "proportional allocation of political power according ****1525** to race." *Holder*, 512 U.S. at 936, 114 S.Ct. 2581 (opinion of THOMAS, J.). According to the 2020 census, black Alabamians account for 27.16% of the State's total population and 25.9% of its voting-age population, both figures slightly less than two-sevenths. Of Alabama's seven existing congressional districts, one, District 7, is majority-black.[7] ***56** These cases were brought to compel "the creation of *two* majority-minority congressional districts"—roughly proportional control. 1 App. 135 (emphasis added); see also *id.*, at 314 ("Plaintiffs seek an order ... ordering a congressional redistricting plan that includes two majority-Black congressional districts").

Remarkably, the majority fails to acknowledge that two minority-controlled districts would mean proportionality, or even that black Alabamians are about two-sevenths of the State. Yet that context is critical to the issues before us, not least because it explains the extent of the racial sorting the plaintiffs' goal would require. "[A]s a matter of mathematics," single-member districting "tends to deal out representation far short of proportionality to virtually *all* minorities, from environmentalists in Alaska to Republicans in Massachusetts." M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 752 (2021) (Duchin & Spencer). As such, creating two majority-black districts would require Alabama to aggressively "sort voters on the basis of race." *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248.

The plaintiffs' 11 illustrative maps make that clear. All 11 maps refashion existing District 2 into a majority-black district while preserving the current black majority in District 7. They all follow the same approach: Starting with majority-black areas of populous Montgomery County, they expand District 2 east and west to encompass predominantly majority-black areas throughout the rural "Black Belt." In the process, the plans are careful to leave enough of the Black Belt for District 7 to maintain its black majority. Then—and critically—the plans have District 2 extend a southwestern tendril into Mobile County to capture a dense, high-population majority-black ****1526** cluster in urban Mobile.[8] ***57** See Supp. App. 184, 186, 188, 190, 193, 195, 197, 199, 201, 203; see also *id.*, at 149.

Those black Mobilians currently reside in the urban heart of District 1. For 50 years, District 1 has occupied the southwestern pocket of Alabama, consisting of the State's two populous Gulf Coast counties (Mobile and Baldwin) as well as some less populous areas to the immediate north and east. See *id.*, at 205–211. It is indisputable that the Gulf Coast region is the sort of community of interest that the Alabama Legislature might reasonably think a congressional district should be built around. It contains Alabama's only coastline, its fourth largest city, and the Port of Mobile. Its physical geography runs north along the Alabama and Mobile Rivers, whose paths District 1 follows. Its economy is tied to the Gulf —to shipping, shipbuilding, tourism, and commercial fishing. See Brief for Coastal Alabama Partnership as *Amicus Curiae* 13–15.

But, for the plaintiffs to secure their majority-black District 2, this longstanding, compact, and eminently sensible district

must be radically transformed. In the Gulf Coast region, the newly drawn District 1 would retain only the majority-white areas that District 2 did not absorb on its path to Mobile's large majority-black population. To make up the lost population, District 1 would have to extend eastward through largely majority-white rural counties along the length of Alabama's border with the Florida panhandle. The plaintiffs do not assert that white residents on the Gulf Coast have anything special in common with white residents in those communities, and the District Court made no such finding. The plaintiffs' maps would thus reduce District 1 to the leftover white communities of the southern fringe of the State, its shape and constituents defined almost entirely ***58** by the need to make District 2 majority-black while also retaining a majority-black District 7.

The plaintiffs' mapmaking experts left little doubt that their plans prioritized race over neutral districting criteria. Dr. Moon Duchin, who devised four of the plans, testified that achieving "two majority-black districts" was a "nonnegotiable principl[e]" in her eyes, a status shared only by our precedents' "population balance" requirement. 2 App. 634; see also *id.*, at 665, 678. Only "after" those two "nonnegotiable[s]" were satisfied did Dr. Duchin then give lower priority to "contiguity" and "compactness." *Id.*, at 634. The architect of the other seven maps, William Cooper, considered "minority voting strengt[h]" a "traditional redistricting principl[e]" in its own right, *id.*, at 591, and treated "the minority population in and of itself" as the paramount community of interest in his plans. *Id.*, at 601.

Statistical evidence also underscored the illustrative maps' extreme racial sorting. Another of the plaintiffs' experts, Dr. Kosuke Imai, computer generated 10,000 districting plans using a race-blind algorithm programmed to observe several objective districting criteria. Supp. App. 58–59. None of those plans contained even one majority-black district. *Id.*, at 61. Dr. Imai generated another 20,000 plans using the same algorithm, but with the additional constraint that they must contain at least one majority-black district; none of those plans contained a second majority-black ****1527** district, or even a second district with a black voting-age population above 40%. *Id.*, at 54, 67, 71–72. In a similar vein, Dr. Duchin testified about an academic study in which she had randomly "generated 2 million districting plans for Alabama" using a race-neutral algorithm that gave priority to compactness and contiguity. 2 App. 710; see Duchin & Spencer 765. She "found some [plans] with one majority-black district, but never found a second ... majority-black district in 2 million attempts." 2 App. 710. "[T]hat it is hard to draw two majority-black districts by accident," ***59** Dr. Duchin explained, "show[ed] the importance of doing so on purpose." *Id.*, at 714.[9]

The plurality of Justices who join Part III–B–I of THE CHIEF JUSTICE's opinion appear to agree that the plaintiffs could not prove the first precondition of their statewide vote-dilution claim—that black Alabamians could constitute a majority in two "reasonably configured" districts, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct. at 1248—by drawing an illustrative map in which race was predominant. See *ante*, at 1511 – 1512. That should be the end of these cases, as the illustrative maps here are palpable racial gerrymanders. The plaintiffs' experts clearly applied "express racial target[s]" by setting out to create 50%-plus majority-black districts in both Districts 2 and 7. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). And it is impossible to conceive of *the State* adopting the illustrative maps without pursuing the same racially motivated goals. Again, the maps' key design features are: (1) making District 2 majority-black by connecting black residents in one metropolitan area (Montgomery) with parts of the rural Black Belt and black residents in another metropolitan area (Mobile); (2) leaving enough of the Black Belt's majority-black rural areas for District 7 to maintain its majority-black status; and (3) reducing District 1 to the white remainder of the southern third of the State.

If the State did this, we would call it a racial gerrymander, and rightly so. We would have no difficulty recognizing race as "the predominant factor motivating [the placement of] significant number[s] of voters within or without" Districts 1, 2, ***60** and 7. *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The "stark splits in the racial composition of populations moved into and out of " Districts 1 and 2 would make that obvious. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788. So would the manifest absence of any nonracial justification for the new District 1. And so would the State's clear intent to ensure that *both* Districts 2 and 7 hit their preordained racial targets. See *ibid.* (noting that "pursu[it of] a common redistricting policy toward multiple districts" may show predominance). That the plan delivered proportional control for a particular minority—a statistical anomaly that over 2 million race-blind simulations did not yield and 20,000 *race-conscious* simulations did not even approximate—would be still further confirmation.

The State could not justify such a plan simply by arguing that it was less bizarre to the naked eye than other, more elaborate racial gerrymanders we have encountered. See *ante*, at 1508 – 1509 (discussing **1528 cases). As we held in *Miller*, visual "bizarreness" is not "a necessary element of the constitutional wrong," only "persuasive circumstantial evidence." 515 U.S. at 912–913, 115 S.Ct. 2475.[10]

*61 Nor could such a plan be explained by supposed respect for the Black Belt. For present purposes, I accept the District Court's finding that the Black Belt is a significant community of interest. But the entire black population of the Black Belt—some 300,000 black residents, see Supp. App. 33—is too small to provide a majority in a *single* congressional district, let alone two.[11] The black residents needed to populate majority-black versions of Districts 2 and 7 are overwhelmingly concentrated in the urban counties of Jefferson (*i.e.*, the Birmingham metropolitan area, with about 290,000 black residents), Mobile (about 152,000 black residents), and Montgomery (about 134,000 black residents). *Id.*, at 83. Of the three, only Montgomery County is in the Black Belt. The plaintiffs' maps, therefore, cannot and do not achieve their goal of two majority-black districts by "join[ing] together" the Black Belt, as the majority seems wrongly to believe. *Ante*, at 1505. Rather, their majority-black districts are anchored by three separate high-density clusters of black residents in three separate metropolitan areas, two of them outside the Black Belt. The Black Belt's largely rural remainder is then *divided* between the two districts to the extent needed to fill out their population numbers with black majorities in both. Respect for the Black Belt as a community of interest cannot explain this approach. The only *62 explanation is the plaintiffs' express racial target: two majority-black districts and statewide proportionality.

The District Court nonetheless found that race did not predominate in the plaintiffs' illustrative maps because Dr. Duchin and Mr. Cooper "prioritized race only as necessary ... to draw two reasonably compact majority-Black congressional districts," as opposed to "maximiz[ing] the **1529 number of majority-Black districts, or the BVAP [black voting-age population] in any particular majority-Black district." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1029–1030 (ND Ala. 2022) (*per curiam*). This reasoning shows a profound misunderstanding of our racial-gerrymandering precedents. As explained above, what triggers strict scrutiny is the intentional use of a racial classification in placing "a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Thus, *any* plan whose predominant purpose is to achieve a nonnegotiable, predetermined racial target in a nonnegotiable, predetermined number of districts is a racial gerrymander subject to strict scrutiny. The precise fraction used as the racial target, and the number of districts it is applied to, are irrelevant.

In affirming the District Court's nonpredominance finding, the plurality glosses over these plain legal errors,[12] and it *63 entirely ignores Dr. Duchin's plans—presumably because her own explanation of her method sounds too much like textbook racial predominance. Compare 2 App. 634 ("[A]fter ... what I took to be *nonnegotiable* principles of population balance *and seeking two majority-black districts*, *after that*, I took contiguity as a requirement and compactness as paramount" (emphasis added)) and *id.*, at 635 ("I took ... county integrity to take precedence over the level of [black voting-age population] *once that level was past 50 percent*" (emphasis added)), with *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788 (explaining that race predominates when it " 'was the criterion that ... could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made' " (quoting *Shaw II*, 517 U.S. at 907, 116 S.Ct. 1894)), and *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (explaining that race predominates when "the [mapmaker] subordinated traditional race-neutral districting principles ... to racial considerations"). The plurality thus affirms the District Court's finding only in part and with regard to Mr. Cooper's plans alone.

In doing so, the plurality acts as if the only relevant evidence were Mr. Cooper's testimony about his own mental state and the State's expert's analysis of Mr. Cooper's maps. See *ante*, at 1510 – 1511. Such a blinkered view of the issue is unjustifiable. All 11 illustrative maps follow the same approach to creating two majority-black districts. The essential design features of Mr. Cooper's maps are indistinguishable from Dr. Duchin's, and it is those very design features that would require race to predominate. None of the **1530 plaintiffs' maps could possibly be drawn by a mapmaker who was merely "aware of," rather than motivated by, "racial demographics." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. They could only ever be drawn by a mapmaker whose predominant motive was *64 hitting the "express racial target" of two majority-black districts. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788.[13]

The plurality endeavors in vain to blunt the force of this obvious fact. See *ante*, at 1511 – 1512. Contrary to the

plurality's apparent understanding, nothing in *Bethune-Hill* suggests that "an express racial target" is not highly probative evidence of racial predominance. 580 U.S. at 192, 137 S.Ct. 788 (placing "express racial target[s]" alongside "stark splits in the racial composition of [redistricted] populations" as "relevant districtwide evidence"). That the *Bethune-Hill* majority "decline[d]" to act as a " 'court of ... first view,' " instead leaving the ultimate issue of predominance for remand, cannot be transmuted into such an implausible holding or, in truth, any holding at all. *Id.*, at 193, 137 S.Ct. 788.

The plurality is also mistaken that my predominance analysis would doom every illustrative map a § 2 plaintiff "ever adduced." *Ante*, at 1511 – 1512 (emphasis deleted). Rather, it would mean only that—because § 2 requires a race-neutral benchmark—plaintiffs cannot satisfy their threshold burden of showing a reasonably configured alternative plan with a proposal that could only be viewed as a racial gerrymander if ***65** enacted by the State. This rule would not bar a showing, in an appropriate case, that a State could create an additional majority-minority district through a reasonable redistricting process in which race did not predominate. It would, on the other hand, screen out efforts to use § 2 to push racially proportional districting to the limits of what a State's geography and demography make possible—the approach taken by the illustrative maps here.

C

The foregoing analysis should be enough to resolve these cases: If the plaintiffs have not shown that Alabama could create two majority-black districts without resorting to a racial gerrymander, they cannot have shown that Alabama's one-majority-black-district map "dilutes" black Alabamians' voting strength relative to any meaningfully race-neutral benchmark. The inverse, however, is not true: Even if it were possible to regard the illustrative maps as not requiring racial predominance, it would not necessarily follow that a two-majority-black-district map was an appropriate benchmark. All that might follow is that the illustrative maps were reasonably configured—in other words, that they were consistent with some reasonable application ****1531** of traditional districting criteria in which race did not predominate. See *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594. But, in virtually all jurisdictions, there are countless possible districting schemes that could be considered reasonable in that sense. The mere fact that a plaintiff 's illustrative map is *one* of them cannot justify making it the benchmark against which other plans should be judged. Cf. *Rucho*, 588 U. S., at —— – ——, 139 S.Ct., at 2500–2501 (explaining the lack of judicially manageable standards for evaluating the relative fairness of different applications of traditional districting criteria).

That conceptual gap—between "reasonable" and "benchmark"—is highly relevant here. Suppose, for argument's sake, that Alabama *reasonably* could decide to create two majority-black districts by (1) connecting Montgomery's ***66** black residents with Mobile's black residents, (2) dividing up the rural parts of the Black Belt between that district and another district with its population core in the majority-black parts of the Birmingham area, and (3) accepting the extreme disruption to District 1 and the Gulf Coast that this approach would require. The plaintiffs prefer that approach because it allows the creation of two majority-black districts, which they think Alabama should have. But even if that approach were reasonable, there is hardly any compelling race-neutral reason to elevate such a plan to a *benchmark* against which all other plans must be measured. Nothing in Alabama's geography or demography makes it clearly the best way, or even a particularly attractive way, to draw three of seven equally populous districts. The State has obvious legitimate, race-neutral reasons to prefer its own map—most notably, its interest in "preserving the cores of prior districts" and the Gulf Coast community of interest in District 1. *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). And even *discounting* those interests would not yield a race-neutral case for treating the plaintiffs' approach as a suitable benchmark: Absent core retention, there is no apparent race-neutral reason to insist that District 7 remain a majority-black district uniting Birmingham's majority-black neighborhoods with majority-black rural areas in the Black Belt.

Finally, it is surely probative that over 2 million race-neutral simulations did not yield a single plan with two majority-black districts, and even 20,000 simulations with a one-majority-black-district floor did not yield a second district with a black voting-age population over 40%. If any plan with two majority-black districts would be an "out-out-out-outlier" within the likely universe of race-neutral districting plans, *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2518 (KAGAN, J., dissenting), it is hard to see how the mere possibility of drawing two majority-black districts could show that a one-district ***67** map diluted black Alabamians' votes relative to any appropriate benchmark.[14]

****1532** D

Given all this, by what benchmark did the District Court find that Alabama's enacted plan was dilutive? The answer is as simple as it is unlawful: The District Court applied a benchmark of proportional control based on race. To be sure, that benchmark was camouflaged by the elaborate vote-dilution framework we have inherited from *Gingles*. But nothing else in that framework or in the District Court's reasoning supplies an alternative benchmark capable of explaining the District Court's bottom line: that Alabama's one-majority-black-district ***68** map dilutes black voters' fair share of political power.

Under *Gingles*, the majority explains, there are three "preconditions" to a vote-dilution claim: (1) the relevant "minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district"; (2) the minority group must be "politically cohesive"; and (3) the majority group must "vot[e] sufficiently as a bloc to enable it to defeat the minority's preferred candidate[s]." *Ante*, at 1503 (alterations and internal quotation marks omitted). If these preconditions are satisfied, *Gingles* instructs courts to "consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752 (citation and internal quotation marks omitted).

The majority gives the impression that, in applying this framework, the District Court merely followed a set of well-settled, determinate legal principles. But it is widely acknowledged that "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim," with commentators "noting the lack of any 'authoritative resolution of the basic questions one would need to answer to make sense of [§ 2's] results test.' " *Merrill* v. *Milligan*, 595 U. S. ——, —— – ——, 142 S.Ct. 879, 883, —— L.Ed.2d —— (2022) (ROBERTS, C. J., dissenting from grant of applications for stays) (quoting C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 389 (2012)). If there is any "area of law notorious for its many unsolved puzzles," this is it. J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 871 (2021); see also Duchin & Spencer 758 ("Vote dilution on the basis of group membership is a crucial instance of the lack of a prescribed ideal").

***69** The source of this confusion is fundamental: Quite simply, we have never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark. The second and third preconditions are all but irrelevant to the task. They essentially collapse into one question: Is voting racially polarized such that minority-preferred candidates consistently lose ****1533** to majority-preferred ones? See *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Even if the answer is yes, that tells a court nothing about "how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Id.*, at 88, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment). Perhaps an acceptable system is one in which the minority simply cannot elect its preferred candidates; it is, after all, a minority. Rejecting that outcome as "dilutive" requires a value judgment relative to a benchmark that polarization alone cannot provide.

The first *Gingles* precondition is only marginally more useful. True, the benchmark in a redistricting challenge must be "a hypothetical, undiluted plan," *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491, and the first precondition at least requires plaintiffs to identify *some* hypothetical alternative plan. Yet that alternative plan need only be "reasonably configured," and—as explained above—to say that a plan is *reasonable* is a far cry from establishing an objective standard of fairness.

That leaves only the *Gingles* framework's final stage: the totality-of-circumstances determination whether a State's "political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752. But this formulation is mere verbiage unless one knows what an "equally open" system should look like—in other words, what the benchmark is. And, our cases offer no substantive guidance on how to identify the undiluted benchmark at the totality stage. The best they have to offer is a grab bag of amorphous "factors"—widely known as the Senate factors, after the Senate Judiciary Committee Report ***70** accompanying the 1982 amendments to § 2—that *Gingles* said "typically may be relevant to a § 2 claim." See *id.*, at 44–45, 106 S.Ct. 2752. Those factors, however, amount to no more than "a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction." *Holder*, 512 U.S. at 938, 114 S.Ct.

2581 (opinion of THOMAS, J.). Such a *gestalt* view is far removed from the necessary benchmark of a hypothetical, undiluted districting plan.

To see this, one need only consider the District Court's use of the Senate factors here. See 582 F.Supp.3d at 1018–1024. The court began its totality-stage analysis by reiterating what nobody disputes: that voting in Alabama is racially polarized, with black voters overwhelmingly preferring Democrats and white voters largely preferring Republicans. To rebut the State's argument that this pattern is attributable to politics, not race *per se*, the court noted that Donald Trump (who is white) prevailed over Ben Carson (who is black) in the 2016 Republican Presidential primary. Next, the court observed that black candidates rarely win statewide elections in Alabama and that black state legislators overwhelmingly come from majority-minority districts. The court then reviewed Alabama's history of racial discrimination, noted other voting-rights cases in which the State was found liable, and cataloged socioeconomic disparities between black and white Alabamians in everything from car ownership to health insurance coverage. The court attributed these disparities "at least in part" to the State's history of discrimination and found that they hinder black residents from participating in politics today, notwithstanding the fact that black and white Alabamians register and turn out to vote at similar rates. *Id.*, at 1021–1022. Last, the court interpreted a handful of comments by three white politicians as "racial campaign appeals." *Id.*, at 1023–1024.

***71** ****1534** In reviewing this march through the Senate factors, it is impossible to discern any overarching standard or central question, only what might be called an impressionistic moral audit of Alabama's racial past and present. Nor is it possible to determine any logical nexus between this audit and the remedy ordered: a congressional districting plan in which black Alabamians can control more than one seat. Given the District Court's finding that two reasonably configured majority-black districts could be drawn, would Alabama's one-district map have been acceptable if Ben Carson had won the 2016 primary, or if a greater number of black Alabamians owned cars?

The idea that such factors could explain the District Court's judgment line is absurd. The plaintiffs' claims pose one simple question: What is the "right" number of Alabama's congressional seats that black voters who support Democrats "should" control? Neither the Senate factors nor the *Gingles* framework as a whole offers any principled answer.

In reality, the limits of the *Gingles* preconditions and the aimlessness of the totality-of-circumstances inquiry left the District Court only one obvious and readily administrable option: a benchmark of "allocation of seats in direct proportion to the minority group's percentage in the population." *Holder*, 512 U.S. at 937, 114 S.Ct. 2581 (opinion of THOMAS, J.). True, as discussed above, that benchmark is impossible to square with what the majority calls § 2(b)'s "robust disclaimer against proportionality," *ante*, at 1500 – 1501, and it runs headlong into grave constitutional problems. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 730, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality opinion). Nonetheless, the intuitive pull of proportionality is undeniable. "Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim" "is inherently based on ratios between the numbers of the minority ***72** in the population and the numbers of seats controlled," and there is no more logical ratio than direct proportionality. *Holder*, 512 U.S. at 902, 114 S.Ct. 2581 (opinion of THOMAS, J.). Combine that intuitive appeal with the "lack of any better alternative" identified in our case law to date, *id.*, at 937, 114 S.Ct. 2581, and we should not be surprised to learn that proportionality generally explains the results of § 2 cases after the *Gingles* preconditions are satisfied. See E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 730–732 (2006) (surveying lower court cases and finding a near-perfect correlation between proportionality findings and liability results).

Thus, in the absence of an alternative benchmark, the vote-dilution inquiry has a strong and demonstrated tendency to collapse into a rough two-part test: (1) Does the challenged districting plan give the relevant minority group control of a proportional share of seats? (2) If not, has the plaintiff shown that some reasonably configured districting plan could better approximate proportional control? In this approach, proportionality is the ultimate benchmark, and the first *Gingles* precondition becomes a proxy for whether that benchmark is reasonably attainable in practice.

Beneath all the trappings of the *Gingles* framework, that two-part test describes how the District Court applied § 2 here. The gravitational force of proportionality is obvious throughout its opinion. At the front end, the District Court even built

proportionality into its understanding of **1535 *Gingles*' first precondition, finding the plaintiffs' illustrative maps to be reasonably configured in part *because* they "provide[d] a number of majority-Black districts ... roughly proportional to the Black percentage of the population." 582 F.Supp.3d at 1016. At the back end, the District Court concluded its "totality" analysis by revisiting proportionality and finding that it "weigh[ed] decidedly in favor of the plaintiffs." *73 *Id.*, at 1025. While the District Court disclaimed giving overriding significance to proportionality, the fact remains that nothing else in its reasoning provides a logical nexus to its finding of a districting wrong and a need for a districting remedy. Finally, as if to leave no doubt about its implicit benchmark, the court admonished the State that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close." *Id.*, at 1033. In sum, the District Court's thinly disguised benchmark was proportionality: Black Alabamians are about two-sevenths of the State's population, so they should control two of the State's seven congressional seats.

That was error—perhaps an understandable error given the limitations of the *Gingles* framework, but error nonetheless. As explained earlier, any principled application of § 2 to cases such as these requires a meaningfully race-neutral benchmark. The benchmark cannot be an *a priori* thumb on the scale for racially proportional control.

E

The majority opinion does not acknowledge the District Court's express proportionality-based reasoning. That omission is of a piece with its earlier noted failures to acknowledge the well-known indeterminacy of the *Gingles* framework, that black Alabamians are about two-sevenths of the State's population, and that the plaintiffs here are thus seeking statewide proportionality. Through this pattern of omissions, the majority obscures the burning question in these cases. The District Court's vote-dilution finding can be justified only by a racially loaded benchmark—specifically, a benchmark of proportional control based on race. Is that the benchmark the statute demands? The majority fails to confront this question head on, and it studiously avoids mentioning anything that would require it to do so.

The same nonresponsiveness infects the majority's analysis, which is largely devoted to rebutting an argument nobody *74 makes. Contrary to the majority's telling, Alabama does not equate the "race-neutral benchmark" with "the median or average number of majority-minority districts" in a large computer-generated set of race-blind districting plans. *Ante*, at 1506. The State's argument for a race-neutral benchmark is rooted in the text of § 2, the logic of vote-dilution claims, and the constitutional problems with any nonneutral benchmark. See Brief for Appellants 32–46. It then relies on the computer evidence in these cases, among other facts, to argue that the plaintiffs have not shown dilution relative to any race-neutral benchmark. See *id.*, at 54–56. But the idea that "race-neutral benchmark" *means* the composite average of many computer-generated plans is the majority's alone.

After thus straw-manning Alabama's arguments at the outset, the majority muddles its own response. In a perfunctory footnote, it disclaims any holding that "algorithmic map making" evidence "is categorically irrelevant" in § 2 cases. *Ante*, at 1513, n. 8. That conclusion, however, is the obvious implication of the majority's reasoning and rhetoric. See *ante*, at 1513 (decrying a "map-comparison test" as "flawed in its fundamentals" even if it involves **1536 concededly "adequate comparators"); see also *ante*, at 1507 (stating that the "focu[s]" of § 2 analysis is "on the specific illustrative maps that a plaintiff adduces," leaving unstated the implication that other algorithmically generated maps are irrelevant). The majority in effect, if not in word, thus forecloses any meaningful use of computer evidence to help locate the undiluted benchmark.

There are two critical problems with this fiat. The first, which the majority seems to recognize yet fails to resolve, is that excluding such computer evidence from view cannot be reconciled with § 2's command to consider "the totality of circumstances."[15] Second—and more fundamentally—the *75 reasons that the majority gives for downplaying the relevance of computer evidence would more logically support a holding that there is no judicially manageable way of applying § 2's results test to single-member districts. The majority waxes about the "myriad considerations" that go into districting, the "difficult, contestable choices" those considerations require, and how "[n]othing in § 2 provides an answer" to the question of how well any given algorithm approximates the correct benchmark. *Ante*, at 1513 – 1514 (internal quotation marks omitted). In the end, it concludes, "Section 2 cannot require courts to judge a contest of computers" in which "there is no reliable way to determine who wins, or even where the finish line is." *Ante*, at 1514.

The majority fails to recognize that *whether* vote-dilution claims require an undiluted benchmark is not up for debate. If § 2 applies to single-member districting plans, courts cannot dispense with an undiluted benchmark for comparison, ascertained by an objective and workable method. *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491; *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Of course, I would be the last person to deny that defining the undiluted benchmark is difficult. See *id.*, at 892, 114 S.Ct. 2581 (opinion of THOMAS, J.) (arguing that it "immerse[s] the federal courts in a hopeless project of weighing questions of political theory"). But the "myriad considerations" and "[a]nswerless questions" the majority frets about, *ante*, at 1513, 1514, are inherent in the very enterprise of applying § 2 to single-member districts. Everything the majority says ***76** about the difficulty of defining the undiluted benchmark *with* computer evidence applies with equal or greater force to the task of defining it *without* such evidence. At their core, the majority's workability concerns are an isolated demand for rigor against the backdrop of a legal regime that has long been " 'inherently standardless,' " and must remain so until the Court either discovers a principled and objective method of identifying the undiluted benchmark, *Holder*, 512 U.S. at 885, 114 S.Ct. 2581 (plurality opinion), or abandons this enterprise altogether, see *id.*, at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.).

****1537** Ultimately, the majority has very little to say about the appropriate benchmark. What little it does say suggests that the majority sees no real alternative to the District Court's proportional-control benchmark, though it appears unwilling to say so outright. For example, in a nod to the statutory text and its "equal openness" requirement, the majority asserts that "[a] district is not equally open ... when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Ante*, at 1507. But again, we have held that dilution cannot be shown without an objective, undiluted benchmark, and this verbiage offers no guidance for how to determine it.[16] Later, the majority asserts that "the *Gingles* framework itself imposes meaningful constraints on proportionality." *Ante*, at 1508. But the only constraint on proportionality the majority articulates is that it is often *difficult to* ***77** *achieve*—which, quite obviously, is no principled limitation at all. *Ante*, at 1508 – 1510.

Thus, the end result of the majority's reasoning is no different from the District Court's: The ultimate benchmark is a racially proportional allocation of seats, and the main question on which liability turns is whether a closer approximation to proportionality is possible under any reasonable application of traditional districting criteria.[17] This approach, moreover, is consistent with how the majority describes the role of plaintiffs' illustrative maps, as well as an unjustified practical asymmetry to which its rejection of computer evidence gives rise. Courts are to "focu[s] ... on the specific illustrative maps that a plaintiff adduces," *ante*, at 1507 – 1508, by which the majority means that courts should *not* "focu[s]" on statistical evidence showing those maps to be outliers. Thus, plaintiffs may use an algorithm to generate any number of maps that meet specified districting criteria and a preferred racial target; then, they need only produce one of those maps to "sho[w] it is *possible* that the State's map" is dilutive. *Ante*, at 1507 (emphasis in original). But the State may not use algorithmic evidence to suggest that the plaintiffs' map is an unsuitable benchmark for comparison —not even, apparently, if it can prove that the illustrative map ***78** is an outlier among "billion[s]" or "trillion[s]" of concededly "adequate comparators." *Ante*, at 1513, 1514; see also ****1538** *ante*, at 1514 (rejecting sampling algorithms). This arbitrary restriction amounts to a thumb on the scale for § 2 plaintiffs—an unearned presumption that any "reasonable" map they put forward constitutes a benchmark against which the State's map can be deemed dilutive. And, once the comparison is framed in that way, the only workable rule of decision is proportionality. See *Holder*, 512 U.S. at 941–943, 114 S.Ct. 2581 (opinion of THOMAS, J.).

By affirming the District Court, the majority thus approves its benchmark of proportional control limited only by feasibility, and it entrenches the most perverse tendencies of our vote-dilution jurisprudence. It guarantees that courts will continue to approach vote-dilution claims just as the District Court here did: with no principled way of determining how many seats a minority "should" control and with a strong temptation to bless every incremental step toward a racially proportional allocation that plaintiffs can pass off as consistent with any reasonable map.

III

As noted earlier, the Court has long recognized the need to avoid interpretations of § 2 that " 'would unnecessarily infuse race into virtually every redistricting, raising serious

constitutional questions.' " *Bartlett*, 556 U.S. at 21, 129 S.Ct. 1231 (plurality opinion) (quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.)). Today, however, by approving the plaintiffs' racially gerrymandered maps as reasonably configured, refusing to ground § 2 vote-dilution claims in a race-neutral benchmark, and affirming a vote-dilution finding that can only be justified by a benchmark of proportional control, the majority holds, in substance, that race belongs in virtually every redistricting. It thus drives headlong into the very constitutional problems that the Court has long sought to avoid. The result of this collision is unmistakable: If the ***79** District Court's application of § 2 was correct as a statutory matter, § 2 is unconstitutional as applied here.

Because the Constitution "restricts consideration of race and the [Voting Rights Act] demands consideration of race," *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315, strict scrutiny is implicated wherever, as here, § 2 is applied to require a State to adopt or reject any districting plan on the basis of race. See *Bartlett*, 556 U.S. at 21–22, 129 S.Ct. 1231 (plurality opinion). At this point, it is necessary to confront directly one of the more confused notions inhabiting our redistricting jurisprudence. In several cases, we have "assumed" that compliance with § 2 of the Voting Rights Act could be a compelling state interest, before proceeding to *reject* race-predominant plans or districts as insufficiently tailored to that asserted interest. See, *e.g.*, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; *Cooper v. Harris*, 581 U.S. 285, 292, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894; *Miller*, 515 U.S. at 921, 115 S.Ct. 2475. But we have never applied this assumption to *uphold* a districting plan that would otherwise violate the Constitution, and the slightest reflection on first principles should make clear why it would be problematic to do so.[18] The Constitution ****1539** is supreme over statutes, not vice versa. *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803). Therefore, if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid.

If Congress has any power at all to require States to sort voters into congressional districts based on race, that power must flow from its authority to "enforce" the Fourteenth and ***80** Fifteenth Amendments "by appropriate legislation." Amdt. 14, § 5; Amdt. 15, § 2. Since Congress in 1982 replaced intent with effects as the criterion of liability, however, "a violation of § 2 is no longer *a fortiori* a violation of " either Amendment. *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Thus, § 2 can be justified only under Congress' power to "enact reasonably prophylactic legislation to deter constitutional harm." *Allen* v. *Cooper*, 589 U. S. ——, ——, 140 S.Ct. 994, 1004, 206 L.Ed.2d 291 (2020) (alteration and internal quotation marks omitted); see *City of Boerne v. Flores*, 521 U.S. 507, 517–529, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Because Congress' prophylactic-enforcement authority is "remedial, rather than substantive," "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] *Id.*, at 520, 117 S.Ct. 2157. Congress' chosen means, moreover, must " 'consist with the letter and spirit of the constitution.' " *Shelby County v. Holder*, 570 U.S. 529, 555, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)); accord, *Miller*, 515 U.S. at 927, 115 S.Ct. 2475.

Here, as with everything else in our vote-dilution jurisprudence, the task of sound analysis is encumbered by the lack of clear principles defining § 2 liability in districting. It is awkward to examine the "congruence" and "proportionality" of a statutory rule whose very meaning exists in a perpetual state of uncertainty. The majority makes clear, however, that the primary factual predicate of a vote-dilution claim is "bloc voting along racial lines" that results in majority-preferred candidates defeating minority-preferred ones. *Ante*, at 1507; accord, *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752 ("The theoretical basis for [vote-dilution claims] is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly ***81** defeat the choices of minority voters"). And, as I have shown, the remedial logic with which the District Court's construction of § 2 addresses that "wrong" rests on a proportional-control benchmark limited only by feasibility. Thus, the relevant statutory rule may be approximately stated as follows: If voting is racially polarized in a jurisdiction, and if there exists any more or less reasonably configured districting plan that would enable the minority group to constitute a majority in a number of districts roughly proportional to its share of the population, then the jurisdiction must ensure that its districting plan includes that number of majority-minority districts "or something quite close."[20] 582 F.Supp.3d at 1033. Thus construed ****1540** and applied, § 2 is not congruent and proportional to any provisions of the Reconstruction Amendments.

To determine the congruence and proportionality of a measure, we must begin by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Reconstruction Amendments "forbi[d], so far as civil and political rights are concerned, discrimination ... against any citizen because of his race," ensuring that "[a]ll citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J.). They dictate "that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). These principles are why the Constitution presumptively forbids race-predominant districting, "even for remedial purposes." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816.

These same principles foreclose a construction of the Amendments that would entitle members of racial minorities, ***82** *qua* racial minorities, to have their preferred candidates win elections. Nor do the Amendments limit the rights of members of a racial majority to support *their* preferred candidates—regardless of whether minorities prefer different candidates and of whether "the majority, by virtue of its numerical superiority," regularly prevails. *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752. Nor, finally, do the Amendments establish a norm of proportional control of elected offices on the basis of race. See *Parents Involved*, 551 U.S. at 730–731, 127 S.Ct. 2738 (plurality opinion); *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. And these notions are not merely *foreign to* the Amendments. Rather, they are *radically inconsistent* with the Amendments' command that government treat citizens as individuals and their "goal of a political system in which race no longer matters." *Ibid.*

Those notions are, however, the values at the heart of § 2 as construed by the District Court and the majority. As applied here, the statute effectively considers it a legal wrong by the State if white Alabamians vote for candidates from one political party at high enough rates, provided that black Alabamians vote for candidates from the other party at a still higher rate. And the statute remedies that wrong by requiring the State to engage in race-based redistricting in the direction of proportional control.

I am not certain that Congress' enforcement power could *ever* justify a statute so at odds " 'with the letter and spirit of the constitution.' " *Shelby County*, 570 U.S. at 555, 133 S.Ct. 2612. If it could, it must be because Congress "identified a history and pattern" of actual constitutional violations that, for some reason, required extraordinary prophylactic remedies. *Garrett*, 531 U.S. at 368, 121 S.Ct. 955. But the legislative record of the 1982 amendments is devoid of any showing that might justify § 2's blunt approximation of a "racial register for allocating representation on the basis of race." *Holder*, 512 U.S. at 908, 114 S.Ct. 2581 (opinion of THOMAS, J.). To be sure, the Senate Judiciary Committee Report that accompanied the 1982 amendment to the Voting Rights Act "listed many examples of what ***83** the Committee *took to be* unconstitutional vote dilution." ****1541** *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2333 (emphasis added). But the Report also showed the Committee's fundamental lack of "concern with whether" those examples reflected the "intentional" discrimination required "to raise a constitutional issue." *Allen*, 589 U. S., at ——, 140 S.Ct., at 1006. The Committee's "principal reason" for rejecting discriminatory purpose was simply that it preferred an alternative legal standard; it thought *Mobile*'s intent test was "the wrong question," and that courts should instead ask whether a State's election laws offered minorities "a fair opportunity to participate" in the political process. S. Rep. No. 97–417, p. 36.

As applied here, the amended § 2 thus falls on the wrong side of "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157. It replaces the constitutional right against intentionally discriminatory districting with an amorphous race-based right to a "fair" distribution of political power, a "right" that cannot be implemented without requiring the very evils the Constitution forbids.

If that alone were not fatal, § 2's "reach and scope" further belie any congruence and proportionality between its districting-related commands, on the one hand, and actionable constitutional wrongs, on the other. *Id.*, at 532, 117 S.Ct. 2157. Its "[s]weeping coverage ensures its intrusion at every level of government" and in every electoral system. *Ibid.* It "has no termination date or termination mechanism." *Ibid.* Thus, the amended § 2 is not spatially or temporally "limited to those cases in which constitutional violations [are] most likely." *Id.*, at 533, 117 S.Ct. 2157. Nor does the statute limit its reach to "attac[k] a particular type" of electoral mechanism "with a long history as a 'notorious means to deny and abridge voting rights on racial grounds.' " *Ibid.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (Black, J., concurring and dissenting)). In view of this "indiscriminate ***84** scope," "it simply cannot be

said that 'many of [the districting plans] affected by the congressional enactment have a significant likelihood of being unconstitutional.' " *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (quoting *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157).

Of course, under the logically unbounded totality-of-circumstances inquiry, a court applying § 2 can always embroider its vote-dilution determination with findings about past or present unconstitutional discrimination. But this possibility does nothing to heal either the fundamental contradictions between § 2 and the Constitution or its extreme overbreadth relative to actual constitutional wrongs. "A generalized assertion of past discrimination" cannot justify race-based redistricting, "because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw II*, 517 U.S. at 909, 116 S.Ct. 1894 (internal quotation marks omitted). To justify a statute tending toward the proportional allocation of political power by race throughout the Nation, it cannot be enough that a court can recite some indefinite quantum of discrimination in the relevant jurisdiction. If it were, courts "could uphold [race-based] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). That logic "would effectively assure that race will always be relevant in [redistricting], and that the ultimate goal of eliminating entirely from governmental decisionmaking **1542 such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730, 127 S.Ct. 2738 (plurality opinion) (alteration and internal quotation marks omitted).

For an example of these baleful results, we need look no further than the congressional districts at issue here. In 1992, Alabama and a group of § 2 plaintiffs, whom a federal court chose to regard as the representatives "of all African-American *85 citizens of the State of Alabama," stipulated that the State's black population was " 'sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district,' " and that, " '[c]onsequently,' " such a " 'district should be created.' " *Wesch v. Hunt*, 785 F.Supp. 1491, 1493, 1498 (SD Ala.). Accepting that stipulation, the court reworked District 7 into an irregularly shaped supermajority-black district—one that scooped up populous clusters of black voters in the disparate urban centers of Birmingham and Montgomery to connect them across a swath of largely majority-black rural areas—without even "decid[ing] whether the creation of a majority African-American district [was] mandated by either § 2 or the Constitution." *Id.*, at 1499; see n. 7, *supra*. It did not occur to the court that the Constitution might *forbid* such an extreme racial gerrymander, as it quite obviously did. But, once District 7 had come into being as a racial gerrymander thought necessary to satisfy § 2, it became an all-but-immovable fixture of Alabama's districting scheme.

Now, 30 years later, the plaintiffs here demand that Alabama carve up not two but three of its main urban centers on the basis of race, and that it configure those urban centers' black neighborhoods with the outlying majority-black rural areas so that black voters can control not one but two of the State's seven districts. The Federal Judiciary now upholds their demand—overriding the State's undoubted interest in preserving the core of its existing districts, its plainly reasonable desire to maintain the Gulf Coast region as a cohesive political unit, and its persuasive arguments that a race-neutral districting process would not produce anything like the districts the plaintiffs seek. Our reasons for doing so boil down to these: that the plaintiffs' proposed districts are more or less within the vast universe of reasonable districting outcomes; that Alabama's white voters do not support the black minority's preferred candidates; that Alabama's racial climate, taken as a rarefied whole, crosses some indefinable *86 line justifying our interference; and, last but certainly not least, that black Alabamians are about two-sevenths of the State's overall population.

By applying § 2 in this way to claims of this kind, we encourage a conception of politics as a struggle for power between "competing racial factions." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. We indulge the pernicious tendency of assigning Americans to "creditor" and "debtor race[s]," even to the point of redistributing political power on that basis. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Scalia, J., concurring in part and concurring in judgment). We ensure that the race-based redistricting we impose on Alabama now will bear divisive consequences long into the future, just as the initial creation of District 7 segregated Jefferson County for decades and minted the template for crafting black "political homelands" in Alabama. *Holder*, 512 U.S. at 905, 114 S.Ct. 2581 (opinion of THOMAS, J.). We place States in the impossible position of having to weigh just how much racial sorting is necessary to avoid the "competing hazards" of

violating § 2 and violating the Constitution. *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315 (internal quotation **1543 marks omitted). We have even put ourselves in the ridiculous position of "assuming" that compliance with a statute can excuse disobedience to the Constitution. Worst of all, by making it clear that there are political dividends to be gained in the discovery of new ways to sort voters along racial lines, we prolong immeasurably the day when the "sordid business" of "divvying us up by race" is no more. *LULAC*, 548 U.S. at 511, 126 S.Ct. 2594 (ROBERTS, C. J., concurring in part, concurring in judgment in part, and dissenting in part). To the extent § 2 requires any of this, it is unconstitutional.

The majority deflects this conclusion by appealing to two of our older Voting Rights Act cases, *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), and *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, that did not address § 2 at all and, indeed, predate Congress' adoption of the results test. *Ante*, at 1516 – 1517. That maneuver is untenable. *Katzenbach* upheld § 5's preclearance *87 requirements, § 4(b)'s original coverage formula, and other related provisions aimed at "a small number of States and political subdivisions" where "systematic resistance to the Fifteenth Amendment" had long been flagrant. 383 U.S. at 328, 86 S.Ct. 803; see also *id.*, at 315–317, 86 S.Ct. 803 (describing the limited issues presented). Fourteen years later, *City of Rome* upheld the 1975 Act extending § 5's preclearance provisions for another seven years. See 446 U.S. at 172–173, 100 S.Ct. 1548. The majority's reliance on these cases to validate a statutory rule not there at issue could make sense only if we assessed the congruence and proportionality of the Voting Rights Act's rules wholesale, without considering their individual features, or if *Katzenbach* and *City of Rome* meant that Congress has plenary power to enact whatever rules it chooses to characterize as combating "discriminatory ... effect[s]." *Ante*, at 1516 (internal quotation marks omitted). Neither proposition makes any conceptual sense or is consistent with our cases. See, *e.g.*, *Shelby County*, 570 U.S. at 550–557, 133 S.Ct. 2612 (holding the 2006 preclearance coverage formula unconstitutional); *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (emphasizing the distinctness of §§ 2 and 5); *City of Boerne*, 521 U.S. at 533, 117 S.Ct. 2157 (discussing *City of Rome* as a paradigm case of congruence-and-proportionality review of remedial legislation); *Miller*, 515 U.S. at 927, 115 S.Ct. 2475 (stressing that construing § 5 to require "that States engage in presumptively unconstitutional race-based districting" would raise "troubling and difficult constitutional questions," notwithstanding *City of Rome*).

In fact, the majority's cases confirm the very limits on Congress' enforcement powers that are fatal to the District Court's construction of § 2. *City of Rome*, for example, immediately after one of the sentences quoted by the majority, explained the remedial rationale for its approval of the 1975 preclearance extension: "Congress could rationally have concluded that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* *88 *in voting create the risk of purposeful discrimination*, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177, 100 S.Ct. 1548 (emphasis added; footnote omitted). The next section of *City of Rome* then separately examined and upheld the reasonableness of the extension's 7-year time period. See *id.*, at 181–182, 100 S.Ct. 1548. *City of Rome* thus stands for precisely the propositions for which *City of Boerne* cited it: Congress may adopt "[p]reventive measures ... when there is reason to believe that many of the laws **1544 affected by the congressional enactment have a significant likelihood of being unconstitutional," 521 U.S. at 532, 117 S.Ct. 2157, particularly when it employs "termination dates, geographic restrictions, or egregious predicates" that "tend to ensure Congress' means are proportionate to ends legitimate," *id.*, at 533, 117 S.Ct. 2157; see also *id.*, at 532–533, 117 S.Ct. 2157 (analyzing *Katzenbach* in similar terms); *Shelby County*, 570 U.S. at 535, 545–546, 133 S.Ct. 2612 (same). Again, however, the amended § 2 lacks any such salutary limiting principles; it is unbounded in time, place, and subject matter, and its districting-related commands have no nexus to any likely constitutional wrongs.

In short, as construed by the District Court, § 2 does not remedy or deter unconstitutional discrimination in districting in any way, shape, or form. On the contrary, it *requires* it, hijacking the districting process to pursue a goal that has no legitimate claim under our constitutional system: the proportional allocation of political power on the basis of race. Such a statute "cannot be considered remedial, preventive legislation," and the race-based redistricting it would command cannot be upheld under the Constitution. *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157.[21]

*89 IV

These cases are not close. The plaintiffs did not prove that Alabama's districting plan "impose[s] or applie[s]" any "voting qualification or prerequisite to voting or standard, practice, or procedure" that effects "a denial or abridgement of the[ir] right ... to vote on account of race or color." § 10301(a). Nor did they prove that Alabama's congressional districts "are not equally open to participation" by black Alabamians. § 10301(b). The plaintiffs did not even prove that it is possible to achieve two majority-black districts without resorting to a racial gerrymander. The most that they can be said to have shown is that sophisticated mapmakers can proportionally allocate Alabama's congressional districts based on race in a way that exceeds the Federal Judiciary's ability to recognize as a racial gerrymander with the naked eye. The District Court held that this showing, plus racially polarized voting and its *gestalt* view of Alabama's racial climate, was enough to require the State to redraw its districting plan on the basis of race. If that is the benchmark for vote dilution under § 2, then § 2 is nothing more than a racial entitlement to roughly proportional control of elective offices—limited only by feasibility—wherever different racial groups consistently prefer different candidates.

If that is what § 2 means, the Court should hold that it is unconstitutional. If that is not what it means, but § 2 applies to districting, then the Court should hold that vote-dilution challenges require a race-neutral benchmark that bears no resemblance to unconstitutional racial registers. On the other hand, if the Court believes that finding a race-neutral benchmark is as impossible as much of its rhetoric suggests, it should hold that ****1545** § 2 cannot be applied to single-member districting plans for want of an "objective and ***90** workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Better yet, it could adopt the correct interpretation of § 2 and hold that a single-member districting plan is not a "voting qualification," a "prerequsite to voting," or a "standard, practice, or procedure," as the Act uses those terms. One way or another, the District Court should be reversed.

The majority goes to great lengths to decline all of these options and, in doing so, to fossilize all of the worst aspects of our long-deplorable vote-dilution jurisprudence. The majority recites *Gingles*' shopworn phrases as if their meaning were self-evident, and as if it were not common knowledge that they have spawned intractable difficulties of definition and application. It goes out of its way to reaffirm § 2's applicability to single-member districting plans both as a purported original matter and on highly exaggerated *stare decisis* grounds. It virtually ignores Alabama's primary argument—that, whatever the benchmark is, it must be race neutral—choosing, instead, to quixotically joust with an imaginary adversary. In the process, it uses special pleading to close the door on the hope cherished by some thoughtful observers, see *Gonzalez*, 535 F.3d at 599–600, that computational redistricting methods might offer a principled, race-neutral way out of the thicket *Gingles* carried us into. Finally, it dismisses grave constitutional questions with an insupportably broad holding based on demonstrably inapposite cases.[22]

I find it difficult to understand these maneuvers except as proceeding from a perception that what the District Court did here is essentially no different from what many courts ***91** have done for decades under this Court's superintendence, joined with a sentiment that it would be unthinkable to disturb that approach to the Voting Rights Act in any way. I share the perception, but I cannot understand the sentiment. It is true that, "under our direction, federal courts [have been] engaged in methodically carving the country into racially designated electoral districts" for decades now. *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). But that fact should inspire us to repentance, not resignation. I am even more convinced of the opinion that I formed 29 years ago:

> "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary. The 'inherent tension'—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the Federal Judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate ****1546** understanding of the Act." *Id.*, at 944, 114 S.Ct. 2581.

I respectfully dissent.

APPENDIX

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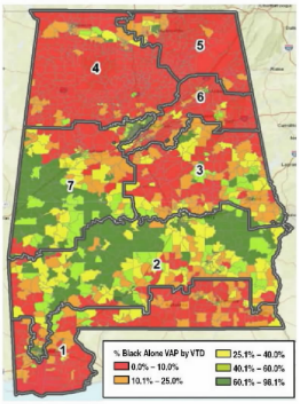
Duchin Plan 1



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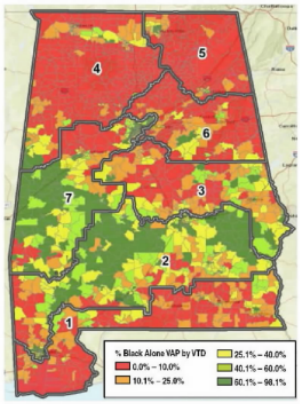

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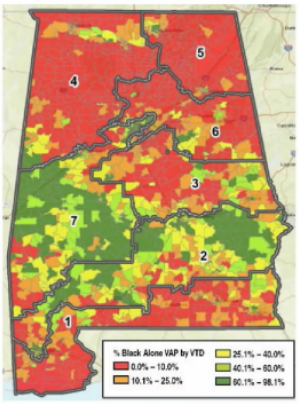

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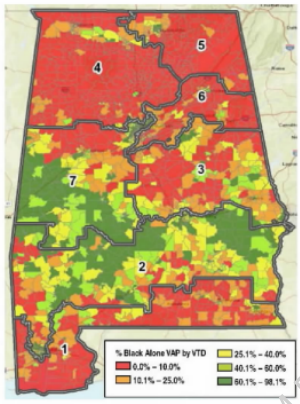

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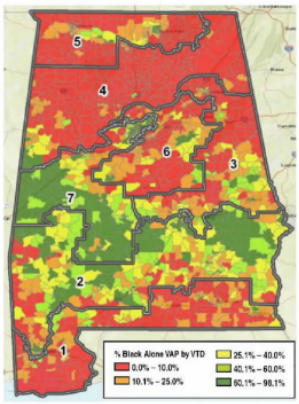
Cooper Plan 1



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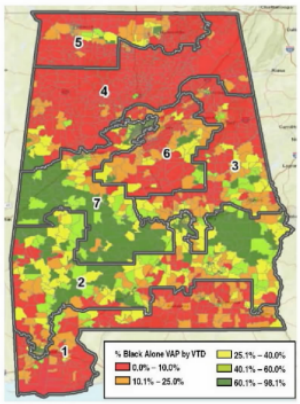

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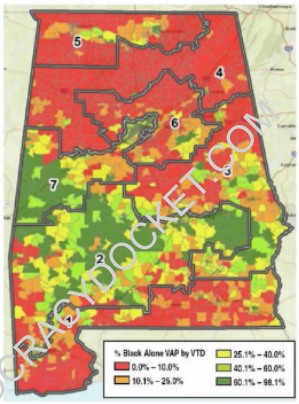

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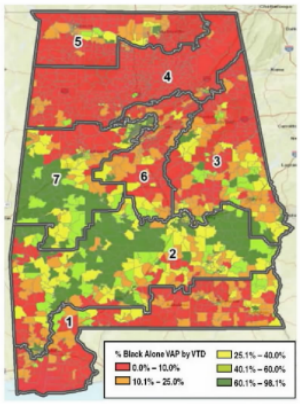

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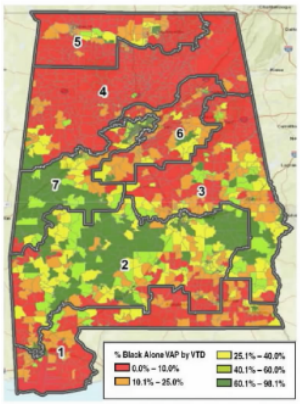
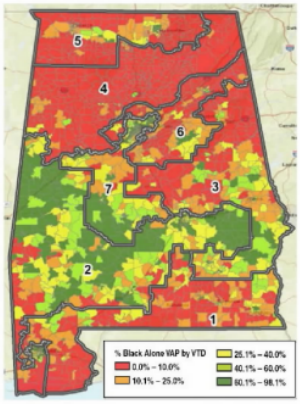
Cooper Plan 5



Cooper Plan 6



Cooper Plan 7

Justice ALITO, with whom Justice GORSUCH joins, dissenting.

***95** Based on a flawed understanding of the framework adopted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Court now holds that the congressional districting map adopted by the Alabama Legislature violates § 2 of the Voting Rights Act. Like the Court, I am happy to apply *Gingles* in these cases. But I would interpret that precedent in a way that heeds what § 2 actually says, and I would take constitutional requirements into account. When ****1549** the *Gingles* framework is viewed in this way, it is apparent that the decisions below must be vacated.

I

A

Gingles marked the Court's first encounter with the amended version of § 2 that Congress enacted in 1982, and the Court's opinion set out an elaborate framework that has since been used to analyze a variety of § 2 claims. Under that framework, a plaintiff must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. As summarized in more recent opinions, they are as follows:

> "First, [the] 'minority group' [whose interest the plaintiff represents] must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote[ ] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.' " *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (citations omitted).

See also *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*); ***96** *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 886–888, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting from grant of applications for stays).

If a § 2 plaintiff can satisfy all these preconditions, the court must then decide whether, based on the totality of the circumstances, the plaintiff 's right to vote was diluted. See *Gingles*, 478 U.S. at 46–48, 79, 106 S.Ct. 2752. And to aid in that inquiry, *Gingles* approved consideration of a long list of factors set out in the Senate Judiciary Committee's Majority Report on the 1982 VRA amendments. *Id.*, at 44–45, 106 S.Ct. 2752 (citing S. Rep. No. 97–417, pp. 28–30 (1982)).

B

My fundamental disagreement with the Court concerns the first *Gingles* precondition. In cases like these, where the claim is that § 2 requires the creation of an additional majority-minority district, the first precondition means that the plaintiff must produce an additional illustrative majority-minority district that is "reasonably configured." *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455; *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; see also *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

The Court's basic error is that it misunderstands what it means for a district to be "reasonably configured." Our cases make it clear that "reasonably configured" is not a synonym for

"compact." We have explained that the first precondition also takes into account other traditional districting criteria like attempting to avoid the splitting of political subdivisions and "communities of interest." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433–434, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).

To its credit, the Court recognizes that compactness is not enough and that a district is not reasonably configured if it flouts other "traditional districting criteria." *Ante*, at 1503. At various points in its opinion it names quite a few: minimizing the splitting of counties and other political subdivisions, keeping "communities of interest" together where possible, and avoiding the creation of new districts that require ***97** two incumbents to run against each other. *Ante*, at 1504 – 1505, 1512 – 1513. In addition, the Court acknowledges that a district is not "reasonably configured" if it does not comport with the Equal Protection ****1550** Clause's one-person, one-vote requirement. *Ante*, at 1513. But the Court fails to explain why compliance with "traditional districting criteria" matters under § 2 or why the only relevant equal protection principle is the one-person, one-vote requirement. If the Court had attempted to answer these questions, the defect in its understanding of the first *Gingles* precondition would be unmistakable.

To explain this, I begin with what is probably the most frequently mentioned traditional districting criterion and ask why it should matter under § 2 whether a proposed majority-minority district is "compact." Neither the Voting Rights Act (VRA) nor the Constitution imposes a compactness requirement. The Court notes that we have struck down bizarrely shaped districts, *ante*, at 1508 – 1509, but we did not do that for esthetic reasons. Compactness in and of itself is not a legal requirement—or even necessarily an esthetic one. (Some may find fancifully shaped districts more pleasing to the eye than boring squares.)

The same is true of departures from other traditional districting criteria. Again, nothing in the Constitution or the VRA demands compliance with these criteria. If a whimsical state legislature cavalierly disregards county and municipal lines and communities of interest, draws weirdly shaped districts, departs radically from a prior map solely for the purpose of change, and forces many incumbents to run against each other, neither the Constitution nor the VRA would make any of that illegal *per se*. Bizarrely shaped districts and other marked departures from traditional districting criteria matter because mapmakers usually heed these criteria, and when it is evident that they have not done so, there is reason to suspect that something untoward—specifically, unconstitutional racial gerrymandering—is afoot. ***98** See, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643–644, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); cf. *LULAC*, 548 U.S. at 433–435, 126 S.Ct. 2594.

Conspicuous violations of traditional districting criteria constitute strong *circumstantial evidence* of unconstitutionality. And when it is shown that the configuration of a district is attributable predominantly to race, that is more than circumstantial evidence that the district is unlawful. That is *direct evidence* of illegality because, as we have often held, race may not "predominate" in the drawing of district lines. See, *e.g.*, *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455; *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 191–192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017); *Shaw v. Hunt*, 517 U.S. 899, 906–907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).[1]

Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff 's illustrative district. If race predominated in the creation of such a district, the plaintiff has failed to satisfy both our precedent, which requires "reasonably configured" districts, and the terms of § 2, which demand equal openness. Two Terms ago, we engaged in a close analysis of the text of § 2 and explained that its "key requirement" is that the political processes leading to nomination or election must be " 'equally open to participation' by members of a protected class." ****1551** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2332, 2337, 210 L.Ed.2d 753 (2021) (quoting 52 U.S.C. § 10301(b); emphasis deleted). "[E]qual openness," we stressed, must be our "touchstone" in interpreting and applying that provision. 594 U. S., at ——, 141 S.Ct., at 2338.

When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open to the members of the group in question. It gives the members of that group an ***99** advantage that § 2 does not require and that the Constitution may forbid. And because the creation of majority-minority districts is something of a zero-sum endeavor, giving an advantage to one minority group may disadvantage others.

C

What all this means is that a § 2 plaintiff who claims that a districting map violates § 2 because it fails to include an additional majority-minority district must show at the outset that such a district can be created without making race the predominant factor in its creation. The plaintiff bears both the burden of production and the burden of persuasion on this issue, see *Voinovich v. Quilter*, 507 U.S. 146, 155–156, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), but a plaintiff can satisfy the former burden simply by adducing evidence—in any acceptable form—that race did not predominate.

A plaintiff need not offer computer-related evidence. Once upon a time, legislative maps were drawn without using a computer, and nothing prevents a § 2 plaintiff from taking this old-school approach in creating an illustrative district. See, *e.g.*, M. Altman, K. McDonald, & M. McDonald, From Crayons to Computers: The Evolution of Computer Use in Redistricting, 23 Soc. Sci. Computer Rev. 334, 335–336 (2005). In that event, the plaintiff can simply call upon the mapmaker to testify about the process he or she used and the role, if any, that race played in that process. The defendant may seek to refute that testimony in any way that the rules of civil procedure and evidence allow.

If, as will often be the case today, a § 2 plaintiff 's mapmaker uses a computer program, the expert can testify about the weight, if any, that the program gives to race. The plaintiff will presumably argue that any role assigned to race was not predominant, and the defendant can contest this by cross-examining the plaintiff 's expert, seeking the actual program in discovery, and calling its own expert to testify ***100** about the program's treatment of race. After this, the trial court will be in a position to determine whether the program gave race a "predominant" role.

This is an entirely workable scheme. It does not obligate either party to offer computer evidence, and it minimizes the likelihood of a clash between what § 2 requires and what the Constitution forbids. We have long assumed that § 2 is consistent with the Constitution. See, *e.g.*, *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (assuming States have a compelling interest in complying with § 2); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894 (same); *Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion) (same). But that cannot mean that every conceivable interpretation of § 2 is constitutional, and I do not understand the majority's analysis of Alabama's constitutional claim to suggest otherwise. *Ante*, at 1516 – 1517; *ante*, at 1518 – 1519 (KAVANAUGH, J., concurring in part).

Our cases make it perfectly clear that using race as a "predominant factor" in drawing legislative districts is unconstitutional unless the stringent requirements of ****1552** strict scrutiny can be satisfied,[2] and therefore if § 2 can be found to require the adoption of an additional majority-minority district that was created under a process that assigned race a "predominant" role, § 2 and the Constitution would be headed for a collision.

II

When the meaning of a "reasonably configured" district is properly understood, it is apparent that the decisions below must be vacated and that the cases must be remanded for the application of the proper test. In its analysis of whether the plaintiffs satisfied the first *Gingles* precondition, the District Court gave much attention to some traditional districting criteria—specifically, compactness and avoiding the splitting of political subdivisions and communities of interest—but ***101** it failed to consider whether the plaintiffs had shown that their illustrative districts were created without giving race a "predominant role." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1008–1016 (ND Ala. 2022). For this reason, the District Court's § 2 analysis was deficient.

It is true that the District Court addressed the question of race-predominance when it discussed and rejected the State's argument that the plaintiffs' maps violated the Equal Protection Clause, but the court's understanding of predominance was deeply flawed. The court began this part of its opinion with this revealing statement:

> "Dr. Duchin and Mr. Cooper [plaintiffs' experts] testified that they *prioritized race* only for the purpose of determining and to the extent necessary to determine whether it was possible for the *Milligan* plaintiffs and the *Caster* plaintiffs to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria." *Id.*, at 1029–1030 (emphasis added).

This statement overlooks the obvious point that by "prioritiz[ing] race" at the outset, Dr. Duchin and Mr. Cooper gave race a predominant role.

The next step in the District Court's analysis was even more troubling. The court wrote, "Dr. Duchin's testimony that she considered two majority-Black districts as 'nonnegotiable' does not" show that race played a predominant role in her districting process. *Id.*, at 1030. But if achieving a certain objective is "non-negotiable," then achieving that objective will necessarily play a predominant role. Suppose that a couple are relocating to the Washington, D. C., metropolitan area, and suppose that one says to the other, "I'm flexible about where we live, but it has to be in Maryland. That's non-negotiable." Could anyone say that finding a home in Maryland was not a "predominant" factor in the couple's search? Or suppose that a person looking for ***102** a flight tells a travel agent, "It has to be non-stop. That's non-negotiable." Could it be said that the number of stops between the city of origin and the destination was not a "predominant" factor in the search for a good flight? The obvious answer to both these questions is no, and the same is true about the role of race in the creation of a new district. If it is "non-negotiable" that the district be majority black, then race is given a predominant role.

The District Court wrapped up this portion of its opinion with a passage that highlighted its misunderstanding of the first *Gingles* precondition. The court ****1553** thought that a § 2 plaintiff cannot proffer a reasonably configured majority-minority district without first attempting to see if it is possible to create such a district—that is, by first making the identification of such a district "non-negotiable." *Ibid.* But that is simply not so. A plaintiff 's expert can first create maps using only criteria that do not give race a predominant role and then determine how many contain the desired number of majority-minority districts.

One final observation about the District Court's opinion is in order. The opinion gives substantial weight to the disparity between the percentage of majority-black House districts in the legislature's plan (14%) and the percentage of black voting-age Alabamians (27%), while the percentage in the plaintiffs' plan (29%) came closer to that 27% mark. See, *e.g.*, *id.*, at 946, 1016, 1018, 1025–1026; see also *id.*, at 958–959, 969, 976, 982, 991–992, 996–997. Section 2 of the VRA, however, states expressly that no group has a right to representation "in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). This provision was a critical component of the compromise that led to the adoption of the 1982 amendments, as the Court unanimously agreed two Terms ago. See *Brnovich*, 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14); *id.*, at ——, n. 6, 141 S.Ct., at 2360, n. 6 (KAGAN, J., dissenting). The District Court's reasoning contravened this statutory proviso. See *ante*, at 1524 – 1525, 1534 – 1535 (THOMAS, J., dissenting).

***103** III

The Court spends much of its opinion attacking what it takes to be the argument that Alabama has advanced in this litigation. I will not debate whether the Court's characterization of that argument is entirely correct, but as applied to the analysis I have just set out, the Court's criticisms miss the mark.

A

The major theme of this part of the Court's opinion is that Alabama's argument, in effect, is that "*Gingles* must be overruled." *Ante*, at 1512. But as I wrote at the beginning of this opinion, I would decide these cases under the *Gingles* framework. We should recognize, however, that the *Gingles* framework is not the same thing as a statutory provision, and it is a mistake to regard it as such. *National Pork Producers Council* v. *Ross*, 598 U. S. ——, ——, 143 S.Ct. 1142, 1155, —— L.Ed.2d —— (2023) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979))). In applying that framework today, we should keep in mind subsequent developments in our case law.

One important development has been a sharpening of the methodology used in interpreting statutes. *Gingles* was decided at a time when the Court's statutory interpretation decisions sometimes paid less attention to the actual text of the statute than to its legislative history, and *Gingles* falls into that category. The Court quoted § 2 but then moved briskly to the Senate Report. See 478 U.S. at 36–37, 43, and n. 7, 106 S.Ct. 2752. Today, our statutory interpretation decisions focus squarely on the statutory text. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, 127, 138 S.Ct. 617, 199 L.Ed.2d 501 (2018); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125, 136 S.Ct. 1938, 195 L.Ed.2d 298 (2016); cf. *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2337. And as we held in *Brnovich*, "[t]he key requirement" set out in the text of § 2 is that a State's electoral process must be " 'equally ****1554** open' " ***104** to members of all

racial groups. *Id.*, at ——, 141 S.Ct., at 2337. The *Gingles* framework should be interpreted in a way that gives effect to this standard.

Another development that we should not ignore concerns our case law on racial predominance. Post-*Gingles* decisions like *Miller*, 515 U.S. at 920, 115 S.Ct. 2475, *Shaw II*, 517 U.S. at 906–907, 116 S.Ct. 1894, and *Vera*, 517 U.S. at 979, 116 S.Ct. 1941 (plurality opinion), made it clear that it is unconstitutional to use race as a "predominant" factor in legislative districting. "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018). This same principle logically applies with even greater force when we interpret language in one of our prior opinions. It therefore goes without question that we should apply the *Gingles* framework in a way that does not set up a confrontation between § 2 and the Constitution, and understanding the first *Gingles* precondition in the way I have outlined achieves that result.[3]

B

The Court's subsidiary criticisms of Alabama's arguments are likewise inapplicable to my analysis. The Court suggests that the "centerpiece" of Alabama's argument regarding the role race can permissibly play in a plaintiff 's illustrative map seeks the imposition of "a new rule." *Ante*, at 1506, 1510. But I would require only what our cases already demand: ***105** that all legislative districts be produced without giving race a "predominant" role.[4]

The Court maintains that Alabama's benchmark scheme would be unworkable because of the huge number of different race-neutral maps that could be drawn. As the Court notes, there are apparently numerous "competing metrics on the issue of compactness" alone, and each race-neutral computer program may assign different values to each traditional districting criterion. *Ante*, at 1513 (internal quotation marks omitted).

My analysis does not create such problems. If a § 2 plaintiff chooses to use a computer program to create an illustrative district, the court need ask only whether *that program* assigned race a predominant role.

The Court argues that Alabama's focus on race-neutral maps cannot be squared with a totality-of-the-circumstances test because "Alabama suggests there is only one 'circumstance[ ]' that matters—how the State's map stacks up relative to the ****1555** benchmark" maps. *Ante*, at 1507. My analysis, however, simply follows the *Gingles* framework, under which a court must first determine whether a § 2 plaintiff has satisfied three "preconditions" before moving on to consider the remainder of relevant circumstances. See *Growe v. Emison*, 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (unless plaintiffs establish all three preconditions, there "neither has been a wrong nor can be a remedy").

***106** IV

As noted, I would vacate and remand for the District Court to apply the correct understanding of *Gingles* in the first instance. Such a remand would require the District Court to determine whether the plaintiffs have shown that their illustrative maps did not give race a predominant role, and I will therefore comment briefly on my understanding of the relevant evidence in the record as it now stands.

A

In my view, there is strong evidence that race played a predominant role in the production of the plaintiffs' illustrative maps and that it is most unlikely that a map with more than one majority-black district could be created without giving race such a role. An expert hired by the *Milligan* plaintiffs, Dr. Kosuke Imai, used a computer algorithm to create 30,000 potential maps, none of which contained two majority-black districts. See 2 App. 571–572; Supp. App. 59, 72. In fact, in 20,000 of those simulations, Dr. Imai intentionally created one majority-minority district, and yet even with one majority-minority district guaranteed as a baseline, none of those 20,000 attempts produced a second one. See 2 App. 571–572; Supp. App. 72.

Similarly, Dr. Moon Duchin, another expert hired by the *Milligan* plaintiffs, opined that "it is hard to draw two majority-black districts by accident." 2 App. 714. Dr. Duchin also referred to a study where she generated two million maps of potential district configurations in Alabama, none of which contained a second majority-minority district. *Id.*, at 710. And the first team of trained mapmakers that plaintiff Milligan

consulted was literally unable to draw a two-majority-black-district map, even when they tried. *Id.*, at 511–512. Milligan concluded at the time that the feat was impossible. *Id.*, at 512.

The majority quibbles about the strength of this evidence, protesting that Dr. Imai's studies failed to include as controls ***107** certain redistricting criteria and that Dr. Duchin's two-million-map study was based on 2010 census data, see *ante*, at 1512 – 1513, and nn. 6–7, but this is unconvincing for several reasons. It is plaintiffs' burden to produce evidence and satisfy the *Gingles* preconditions, so if their experts' maps were deficient, that is no strike against Alabama. And the racial demographics of the State changed little between 2010 and 2020, Supp. App. 82, which is presumably why Dr. Duchin herself raised the older study in answering questions about her work in this litigation, see 2 App. 710. If it was impossible to draw two such districts in 2010, it surely at least requires a great deal of intentional effort now.

The Court suggests that little can be inferred from Dr. Duchin's two-million-map study because two million maps are not that many in comparison to the "trillion trillion" maps that are possible. See *ante*, at 1513 – 1514, and n. 9. In making this argument, the Court relies entirely on an *amicus* brief submitted by three computational redistricting experts in support of the appellees. See Brief for Computational Redistricting Experts 2, 6, n. 7. These experts' argument concerns a complicated statistical issue, and I think it is ****1556** unwise for the Court to make their argument part of our case law based solely on this brief. By the time this *amicus* brief was submitted, the appellants had already filed their main brief, and it was too late for any experts with contrary views to submit an *amicus* brief in support of appellants. Computer simulations are widely used today to make predictions about many important matters, and I would not place stringent limits on their use in VRA litigation without being quite sure of our ground. If the cases were remanded, the parties could take up this issue if they wished and call experts to support their positions on the extent to which the two million maps in the study are or can be probative of the full universe of maps.

In sum, based on my understanding of the current record, I am doubtful that the plaintiffs could get by the first *Gingles* ***108** precondition, but I would let the District Court sort this matter out on remand.

B

Despite the strong evidence that two majority-minority districts cannot be drawn without singular emphasis on race, a plurality nonetheless concludes that race did not predominate in the drawing of the plaintiffs' illustrative maps. See *ante*, at 1510 – 1512. Their conclusion, however, rests on a faulty view of what non-predominance means.

The plurality's position seems to be that race does not predominate in the creation of a districting map so long as the map does not violate other traditional districting criteria such as compactness, contiguity, equally populated districts, minimizing county splits, etc. *Ibid*. But this conclusion is irreconcilable with our cases. In *Miller*, for instance, we acknowledged that the particular district at issue was not "shape[d] ... bizarre[ly] on its face," but we nonetheless held that race predominated because of the legislature's "overriding desire to assign black populations" in a way that would create an additional "majority-black district." 515 U.S. at 917, 115 S.Ct. 2475.

Later cases drove home the point that conformity with traditional districting principles does not necessarily mean that a district was created without giving race a predominant role. In *Cooper*, we held that once it was shown that race was " 'the overriding reason' " for the selection of a particular map, "a further showing of 'inconsistency between the enacted plan and traditional redistricting criteria' is unnecessary to a finding of racial predominance." 581 U.S. at 301, n. 3, 137 S.Ct. 1455 (quoting *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788). We noted that the contrary argument was "foreclosed almost as soon as it was raised in this Court." *Cooper*, 581 U.S. at 301, n. 3, 137 S.Ct. 1455; see also *Vera*, 517 U.S. at 966, 116 S.Ct. 1941 (plurality opinion) (race may still predominate even if "traditional districting principle[s] do correlate to some extent with the district's layout"). "Traditional redistricting principles ... are numerous and ***109** malleable.... By deploying those factors in various combinations and permutations, a [mapmaker] could construct a plethora of potential maps that look consistent with traditional, race-neutral principles." *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788. Here, a plurality allows plaintiffs to do precisely what we warned against in *Bethune-Hill*.

The plurality's analysis of predominance contravenes our precedents in another way. We have been sensitive to the gravity of " 'trapp[ing]' " States " 'between the competing

hazards of liability' " imposed by the Constitution and the VRA. *Id.*, at 196, 137 S.Ct. 788 (quoting *Vera*, 517 U.S. at 977, 116 S.Ct. 1941). The VRA's demand that States not unintentionally "dilute" the ****1557** votes of particular groups must be reconciled with the Constitution's demand that States generally avoid intentional augmentation of the political power of any one racial group (and thus the diminution of the power of other groups). The plurality's predominance analysis shreds that prudential concern. If a private plaintiff can demonstrate § 2 liability based on the production of a map that the State has every reason to believe it could not constitutionally draw, we have left "state legislatures too little breathing room" and virtually guaranteed that they will be on the losing end of a federal court's judgment. *Bethune-Hill*, 580 U.S. at 196, 137 S.Ct. 788.

* * *

The Court's treatment of *Gingles* is inconsistent with the text of § 2, our precedents on racial predominance, and the fundamental principle that States are almost always prohibited from basing decisions on race. Today's decision unnecessarily sets the VRA on a perilous and unfortunate path. I respectfully dissent.

All Citations

599 U.S. 1, 143 S.Ct. 1487, 216 L.Ed.2d 60, 23 Cal. Daily Op. Serv. 5172, 29 Fla. L. Weekly Fed. S 905

Footnotes

* Together with No. 21–1087, *Allen, Alabama Secretary of State, et al*. v. *Caster et al.*, on certiorari before judgment to the United States Court of Appeals for the Eleventh Circuit.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice KAVANAUGH joins all but Part III–B–1 of this opinion.

1 As originally enacted, § 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970 ed.).

2 Judge Manasco, presiding in *Caster*, also preliminarily enjoined Alabama from using HB1. Her opinion was based on the same evidentiary record as was before the three-judge Court, and it adopted in full that Court's "recitation of the evidence, legal analysis, findings of fact and conclusions of law." 1 App. to Emergency Application for Stay in No. 2:21–cv–1536, p. 4; see also 582 F.Supp.3d at 942–943, and n. 4. Any reference to the "District Court" in this opinion applies to the *Caster* Court as well as to the three-judge Court.

3 The principal dissent complains that "what the District Court did here is essentially no different from what many courts have done for decades under this Court's superintendence." *Post*, at 1545 (opinion of THOMAS, J.). That is not such a bad definition of *stare decisis*.

4 Despite this all, the dissent argues that courts have apparently been "methodically carving the country into racially designated electoral districts" for decades. *Post*, at 1545 (opinion of THOMAS, J.). And that, the dissent inveighs, "should inspire us to repentance." *Ibid.* But proportional representation of minority voters is absent from nearly every corner of this country despite § 2 being in effect for over 40 years. And in case after case, we have rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria. See *supra*, at 1508 – 1509. It seems it is the dissent that is "quixotically joust[ing] with an imaginary adversary." *Post*, at 1545 (opinion of THOMAS, J.).

5 The dissent claims that Cooper "treated 'the minority population in and of itself' as the paramount community of interest in his plans." *Post*, at 1526 (opinion of THOMAS, J.) (quoting 2 App. 601). But Cooper testified that he was "aware that the minority population in and of itself *can* be a community of interest." *Id.,* at 601 (emphasis added). Cooper then explained that the relevant community of interest here—the Black Belt—was a "*historical* feature" of the State, not a demographic

one. *Ibid.* (emphasis added). The Black Belt, he emphasized, was defined by its "historical boundaries"—namely, the group of "rural counties plus Montgomery County in the central part of the state." *Ibid.* The District Court treated the Black Belt as a community of interest for the same reason.

The dissent also protests that Cooper's "plans prioritized race over neutral districting criteria." *Post*, at 1526 (opinion of THOMAS, J.). But as the District Court found, and as Alabama does not contest, Cooper's maps satisfied other traditional criteria, such as compactness, contiguity, equal populations, and respect for political subdivisions.

6 Dr. Duchin created her two million map sample as part of an academic article that she helped author, not for her work on this case, and the article was neither entered into evidence below nor made part of the record here. See 2 App. 710; see also M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 763–764 (2021) (Duchin & Spencer).

7 The principal dissent decrees that Dr. Duchin's and Dr. Imai's maps are "surely probative," forgiving the former's use of stale census data as well as both mapmakers' collective failure to incorporate many traditional districting guidelines. *Post*, at 1531 – 1532, and n. 14 (opinion of THOMAS, J.); see also *post*, at 1527, n. 9, 1527 – 1528. In doing so, that dissent ignores Dr. Duchin's testimony that—when using the correct census data—the "randomized algorithms" she employed "found plans with two majority-black districts in literally thousands of different ways." MSA 316–317. The principal dissent and the dissent by Justice ALITO also ignore Duchin's testimony that "it is certainly possible" to draw the illustrative maps she produced in a race-blind manner. 2 App. 713. In that way, even the race-blind standard that the dissents urge would be satisfied here. See *post*, at 1530 (opinion of THOMAS, J.); *post*, at 1551 (opinion of ALITO, J.). So too could that standard be satisfied in every § 2 case; after all, as Duchin explained, any map produced in a deliberately race-predominant manner would necessarily emerge at some point in a random, race-neutral process. 2 App. 713. And although Justice ALITO voices support for an "old-school approach" to § 2, even that approach cannot be squared with his understanding of *Gingles*. *Post*, at 1551. The very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist.

8 None of this is to suggest that algorithmic mapmaking is categorically irrelevant in voting rights cases. Instead, we note only that, in light of the difficulties discussed above, courts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim. And in evaluating algorithmic evidence more generally in this context, courts should be attentive to the concerns we have discussed.

9 The dissent suggests that *Growe* does not support the proposition that § 2 applies to single-member redistricting. *Post*, at 1520 – 1521 (opinion of THOMAS, J.). The Court has understood *Growe* much differently. See, *e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 90, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) ("Our decision in [*Gingles*] set out the basic framework for establishing a vote dilution claim against at-large, multimembers districts; we have since extended the framework to single-member districts." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)); *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("In *Growe*, we held that a claim of vote dilution in a single-member district requires proof meeting *the same* three threshold conditions for a dilution challenge to a multimember district ...."); *Bartlett v. Strickland*, 556 U.S. 1, 12, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion) ("The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts ...." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)).

10 Justice ALITO argues that "[t]he *Gingles* framework should be [re]interpreted" in light of changing methods in statutory interpretation. *Post*, at 1554 (dissenting opinion). But as we have explained, *Gingles* effectuates the delicate legislative bargain that § 2 embodies. And statutory *stare decisis* counsels strongly in favor of not "undo[ing] ... the compromise that was reached between the House and Senate when § 2 was amended in 1982." *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2341.

1 Unlike ordinary statutory precedents, the "Court's precedents applying common-law statutes and pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*." *Ramos*, 590 U. S., at ——, n. 2, 140 S.Ct., at 1413, n. 2 (opinion of KAVANAUGH, J.); see also, *e.g.*, *Kisor* v. *Wilkie*, 588 U. S. ——, —— – ——, 139 S.Ct. 2400, 2443–2445, 204 L.Ed.2d 841 (2019) (GORSUCH, J., concurring in judgment); *id.*, at —— – ——, 139 S.Ct., at 2448–2449 (KAVANAUGH, J., concurring in judgment); *Leegin Creative Leather Products,*

Inc. v. PSKS, Inc., 551 U.S. 877, 899–907, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

2 To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply the "geographically compact" and "reasonably configured" requirements. See *ante*, at 1510 (§ 2 requirements under *Gingles* are "exacting"). In this case, for example, it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan. See *ante*, at 1504 – 1505.

1 "No person acting under color of law shall ... in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 52 U.S.C. § 10101(a)(2)(A).

2 The majority suggests that districting lines are a " 'prerequisite to voting' " because they "determin[e] where" voters "cast [their] ballot[s]." *Ante*, at 1515. But, of course, a voter's polling place is a separate matter from the district to which he is assigned, and communities are often moved between districts without changing where their residents go to vote. The majority's other example ("who [voters] are eligible to vote for," *ibid.*) is so far a stretch from the Act's focus on voting qualifications and voter action that it speaks for itself.

3 The majority chides Alabama for declining to specifically argue that § 2 is inapplicable to multimember and at-large districting plans. But these cases are about a single-member districting plan, and it is hardly uncommon for parties to limit their arguments to the question presented. Further, while I do not myself believe that the text of § 2 applies to multimember or at-large plans, the idea that such plans might be especially problematic from a vote-dilution standpoint is hardly foreign to the Court's precedents, see *Johnson v. De Grandy*, 512 U.S. 997, 1012, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); cf. *Holder v. Hall*, 512 U.S. 874, 888, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (O'Connor, J., concurring in part and concurring in judgment) (explaining that single-member districts may provide the benchmark when multimember or at-large systems are challenged, but suggesting no benchmark for challenges to single-member districts), or to the historical evolution of vote-dilution claims. Neither the case from which the 1982 Congress drew § 2(b)'s current operative language, see *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), nor the one it was responding to, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), involved single-member districts.

4 Justice KAVANAUGH's partial concurrence emphasizes the supposedly enhanced *stare decisis* force of statutory-interpretation precedents. See *ante*, at 1517 – 1518. This emphasis is puzzling in several respects. As an initial matter, I can perceive no conceptual "basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions"; rather, "our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change." *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1987, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). Nor does that approach appear to have any historical foundation in judicial practice at the founding or for more than a century thereafter. See T. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 708–732 (1999). But, even putting those problems aside, any appeal to heightened statutory *stare decisis* is particularly misplaced in this context. As the remainder of this dissent explains in depth, the Court's § 2 precedents differ from "ordinary statutory precedents" in two vital ways. *Ante*, at 1517, n. 1 (opinion of KAVANAUGH, J.). The first is their profound tension with the Constitution's hostility to racial classifications, a tension that Justice KAVANAUGH acknowledges and that makes every § 2 question the reverse side of a corresponding constitutional question. See *ante*, at 1518 – 1519. The second is that, to whatever extent § 2 applies to districting, it can only "be understood as a delegation of authority to the courts to develop a common law of racially fair elections." C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 383 (2012). It would be absurd to maintain that this Court's "notoriously unclear and confusing" § 2 case law follows, in any straightforward way, from the statutory text's high-flown language about the equal openness of political processes. *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 881, —— L.Ed.2d —— (2022) (KAVANAUGH, J., concurring in grant of applications for stays).

5 Like the majority, I refer to both courts below as "the District Court" without distinction.

6 While *Brnovich* involved a time-place-and-manner voting rule, not a vote-dilution challenge to a districting plan, its analysis logically must apply to vote-dilution cases if the text of § 2 covers such claims at all.

7 District 7 owes its majority-black status to a 1992 court order. See *Wesch v. Hunt*, 785 F.Supp. 1491, 1493–1494, 1496–1497, 1501–1502 (SD Ala.), aff'd *sub nom. Camp v. Wesch*, 504 U.S. 902, 112 S.Ct. 1926, 118 L.Ed.2d 535 (1992). At the time, the Justice Department's approach to preclearance under § 5 of the Act followed the "so-called 'max-black' policy," which "required States, including Alabama, to create supermajority-black voting districts or face denial of preclearance." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 298, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting). Although *Wesch* was a § 2 case and the court-imposed plan that resulted was not subject to preclearance, see 785 F.Supp. at 1499–1500, there can be little doubt that a similar ethos dominated that litigation, in which all parties stipulated to the desirability of a *65%-plus* majority-black district. See *id.*, at 1498–1499. To satisfy that dubious need, the *Wesch* court aggressively adjusted the northeast and southeast corners of the previous District 7. In the northeast, where District 7 once encompassed all of Tuscaloosa County and the more or less rectangular portion of Jefferson County not included in District 6, the 1992 plan drew a long, thin "finger" that traversed the southeastern third of Tuscaloosa County to reach deep into the heart of urban Birmingham. See Supp. App. 207–208. Of the Jefferson County residents captured by the "finger," 75.48% were black. *Wesch*, 785 F.Supp. at 1569. In the southeast, District 7 swallowed a jigsaw-shaped portion of Montgomery County, the residents of which were 80.18% black. *Id.*, at 1575. Three years later, in *Miller v. Johnson*, 515 U.S. 900, 923–927, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), we rejected the "max-black" policy as unwarranted by § 5 and inconsistent with the Constitution. But "much damage to the States' congressional and legislative district maps had already been done," including in Alabama. *Alabama Legislative Black Caucus*, 575 U.S. at 299, 135 S.Ct. 1257 (THOMAS, J., dissenting).

8 I have included an Appendix, *infra*, illustrating the plaintiffs' 11 proposed maps. The first 10 images display the "black-only" voting-age population of census-designated voting districts in relation to the maps' hypothetical district lines. The record does not contain a similar illustration for the 11th map, but a simple visual comparison with the other maps suffices.

9 The majority notes that this study used demographic data from the 2010 census, not the 2020 one. That is irrelevant, since the black population share in Alabama changed little (from 26.8% to 27.16%) between the two censuses. To think that this minor increase might have changed Dr. Duchin's results would be to entirely miss her point: that proportional representation for *any* minority, unless achieved "by design," is a statistical anomaly in almost all single-member-districting systems. Duchin & Spencer 764.

10 Of course, bizarreness is in the eye of the beholder, and, while labels like " 'tentacles' " or " 'appendages' " have no ultimate legal significance, it is far from clear that they do not apply here. See *ante*, at 1504 – 1505. The tendrils with which the various versions of illustrative District 2 would capture black Mobilians are visually striking and are easily recognized as a racial grab against the backdrop of the State's demography. The District 7 "finger," which encircles the black population of the Birmingham metropolitan area in order to separate them from their white neighbors and link them with black rural areas in the west of the State, also stands out to the naked eye. The District Court disregarded the "finger" because it has been present in every districting plan since 1992, including the State's latest enacted plan. *Singleton v. Merrill*, 582 F.Supp.3d 924, 1011 (ND Ala. 2022) (*per curiam*). But that reasoning would allow plaintiffs to bootstrap one racial gerrymander as a reason for permitting a second. Because the question is not before us, I express no opinion on whether existing District 7 is constitutional as enacted by the State. It is indisputable, however, that race predominated in the original creation of the district, see n. 7, *supra*, and it is plain that the primary race-neutral justification for the district today must be the State's legitimate interest in "preserving the cores of prior districts" and the fact that the areas constituting District 7's core have been grouped together for decades. *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); see also *id.*, at 758, 103 S.Ct. 2653 (Stevens, J., concurring) (explaining that residents of a political unit "often develop a community of interest"). The plaintiffs' maps, however, necessarily would require the State to assign little weight to core retention with respect to other districts. There could then be no principled race-neutral justification for prioritizing core retention only when it preserved an existing majority-black district, while discarding it when it stood in the way of creating a new one.

11 The equal-population baseline for Alabama's seven districts is 717,154 persons per district.

12 The plurality's somewhat elliptical discussion of "the line between racial predominance and racial consciousness," *ante*, at 1510, suggests that it may have fallen into a similar error. To the extent the plurality supposes that, under our precedents, a State may purposefully sort voters based on race to some indefinite extent without crossing the line into predominance, it is wrong, and its predominance analysis would water down decades of racial-gerrymandering jurisprudence. Our constitutional precedents' line between racial awareness and racial predominance simply tracks the distinction between awareness of consequences, on the one hand, and discriminatory *purpose*, on the other. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (" 'Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects' " (alterations and some internal quotation marks omitted)); accord, *Shaw I*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). And our statements that § 2 "demands consideration of race," *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2315, 201 L.Ed.2d 714 (2018), and uses a "race-conscious calculus," *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647, did not imply that a State can ever purposefully sort voters on a race-predominant basis without triggering strict scrutiny.

13 The plurality's reasoning does not withstand scrutiny even on its own terms. Like Dr. Duchin, Mr. Cooper found it "necessary to consider race" to construct two majority-black districts, 2 App. 591, and he frankly acknowledged "reconfigur[ing]" the southern part of the State "to create the second African-American majority district," *id.*, at 610. Further, his conclusory statement that race did not "predominate" in his plans, *id.*, at 595, must be interpreted in light of the rest of his testimony and the record as a whole. Mr. Cooper recognized communities of interest as a traditional districting principle, but he applied that principle in a nakedly race-focused manner, explaining that "the minority population in and of itself " was the community of interest that was "top of mind as [he] was drawing the plan[s]." *Id.*, at 601. As noted, he also testified that he considered "minority voting strengt[h]" to be a "traditional redistricting principl[e]" in its own right. *Id.*, at 591. His testimony therefore buttresses, rather than undermines, the conclusion already obvious from the maps themselves: Only a mapmaker pursuing a fixed racial target would produce them.

14 The majority points to limitations of Dr. Duchin's and Dr. Imai's algorithms that do not undermine the strong inference from their results to the conclusion that no two-majority-black-district plan could be an appropriate proxy for the undiluted benchmark. *Ante*, at 1512, 1513 – 1514. I have already explained why the fact that Dr. Duchin's study used 2010 census data is irrelevant. See n. 9, *supra*. As for the algorithms' inability to incorporate all possible districting considerations, the absence of additional *constraints* cannot explain their failure to produce any maps hitting the plaintiffs' preferred racial target. Next, while it is true that the number of possible districting plans is extremely large, that does not mean it is impossible to generate a statistically significant sample. Here, for instance, Dr. Imai explained that "10,000 simulated plans" was sufficient to "yield statistically precise conclusions" and that any higher number would "not materially affect" the results. Supp. App. 60. Finally, the majority notes Dr. Duchin's testimony that her "exploratory algorithms" found "thousands" of possible two-majority-black-district maps. 2 App. 622; see *ante*, at 1512 – 1513, n. 7. Setting aside that Dr. Duchin never provided the denominator of which those "thousands" were the numerator, it is no wonder that the algorithms in question generated such maps; as Dr. Duchin explained, she programmed them with "an algorithmic preference" for "plans in which there would be a second majority-minority district." 2 App. 709. Thus, all that those algorithmic results prove is that it is *possible* to draw two majority-black districts in Alabama if one sets out to do so, especially with the help of sophisticated mapmaking software. What is still lacking is any justification for treating a two-majority-black-district map as a proxy for the undiluted benchmark.

15 The majority lodges a similar accusation against the State's arguments (or what it takes to be the State's arguments). See *ante*, at 1507 ("Alabama suggests there is only one 'circumstance' that matters—how the State's map stacks up relative to the benchmark" (alteration omitted)). But its rebuke is misplaced. The "totality of circumstances" means that courts must consider all circumstances relevant to an issue. It does not mean that they are forbidden to attempt to define the substantive standard that governs that issue. In arguing that a vote-dilution claim requires judging a State's plan relative to an undiluted benchmark to be drawn from the totality of circumstances—including, where probative, the results of districting simulations—the State argues little more than what we have long acknowledged. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997).

16 To the extent it is any sort of answer to the benchmark question, it tends inevitably toward proportionality. By equating a voting minority's inability to win elections with a vote that has been "render[ed] ... unequal," *ante*, at 1507, the majority assumes "that members of [a] minority are denied a fully effective use of the franchise unless they are able to control seats

in an elected body." *Holder*, 512 U.S. at 899, 114 S.Ct. 2581 (opinion of THOMAS, J.). That is precisely the assumption that leads to the proportional-control benchmark. See *id.*, at 902, 937, 114 S.Ct. 2581.

17 Indeed, the majority's attempt to deflect this analysis only confirms its accuracy. The majority stresses that its understanding of *Gingles* permits the rejection of "plans that would bring States closer to proportionality *when those plans violate traditional districting criteria*." *Ante*, at 1509 – 1510, n. 4 (emphasis added). Justice KAVANAUGH, similarly, defends *Gingles* against the charge of "mandat[ing] a proportional number of majority-minority districts" by emphasizing that it requires only the creation of majority-minority districts that are compact and reasonably configured. *Ante*, at 1518 (opinion concurring in part). All of this precisely tracks my point: As construed by the District Court and the majority, § 2 mandates an ever closer approach to proportional control that stops only when a court decides that a further step in that direction would no longer be consistent with any reasonable application of traditional districting criteria.

18 In *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017), the Court upheld a race-predominant district based on the assumed compelling interest of complying with § 5 of the Voting Rights Act. *Id.*, at 193–196, 137 S.Ct. 788. There, the Court was explicit that it was still merely "assum[ing], without deciding," that the asserted interest was compelling, as the plaintiffs "d[id] not dispute that compliance with § 5 was a compelling interest at the relevant time." *Id.*, at 193, 137 S.Ct. 788.

19 While our congruence-and-proportionality cases have focused primarily on the Fourteenth Amendment, they make clear that the same principles govern "Congress' parallel power to enforce the provisions of the Fifteenth Amendment." *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157.

20 This formulation does not specifically account for the District Court's findings under the Senate factors, which, as I have explained, lack any traceable logical connection to the finding of a districting wrong or the need for a districting remedy.

21 Justice KAVANAUGH, at least, recognizes that § 2's constitutional footing is problematic, for he agrees that "race-based redistricting cannot extend indefinitely into the future." *Ante*, at 1519 (opinion concurring in part). Nonetheless, Justice KAVANAUGH votes to sustain a system of institutionalized racial discrimination in districting—under the aegis of a statute that applies nationwide and has no expiration date—and thus to prolong the "lasting harm to our society" caused by the use of racial classifications in the allocation of political power. *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. I cannot agree with that approach. The Constitution no more tolerates this discrimination today than it will tolerate it tomorrow.

22 The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court. See *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (GORSUCH, J., concurring).

1 Alabama's districting guidelines explicitly incorporate this nonpredominance requirement. See *Singleton v. Merrill*, 582 F.Supp.3d 924, 1036 (ND Ala. 2022).

2 Although our cases have posited that racial predominance may be acceptable if strict scrutiny is satisfied, the Court does not contend that it is satisfied here.

3 The second and third *Gingles* preconditions, which concern racially polarized voting, cannot contribute to avoiding a clash between § 2 and the Constitution over racial predominance in the drawing of lines. Those preconditions do not concern the drawing of lines in plaintiffs' maps, and in any event, because voting in much of the South is racially polarized, they are almost always satisfied anyway. Alabama does not contest that they are satisfied here.

4 The Court appears to contend that it does not matter if race predominated in the drawing of these maps because the maps *could have* been drawn without race predominating. See *ante*, at 1512 – 1513, n. 7. But of course, many policies *could be* selected for race-neutral reasons. They nonetheless must be assessed under the relevant standard for intentional reliance on race if their imposition was in fact motivated by race. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227–231, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 241–248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

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129 S.Ct. 1231
Supreme Court of the United States

Gary BARTLETT, Executive Director of North Carolina State Board of Elections, et al., Petitioners,

v.

Dwight STRICKLAND et al.

No. 07–689
|
Argued Oct. 14, 2008.
|
Decided March 9, 2009.

Synopsis

Background: County and county commissioners brought action against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials, alleging that legislative redistricting plan violated Whole County Provision of state constitution. A three-judge panel of the Superior Court, Wake County, entered summary judgment in favor of defendants, finding that redistricting plan complied, to the maximum extent practicable, with the Whole County Provision. The North Carolina Supreme Court, Edmunds, J., 361 N.C. 491, 649 S.E.2d 364, reversed and ordered state legislature to redraw the district at issue. State defendants' petition for writ of certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, announced the judgment of the court and delivered an opinion which held that crossover districts do not meet *Gingles* requirement that minority is sufficiently large and geographically compact enough to constitute majority in a single-member district, for purpose of claim under Voting Rights Act's vote dilution provision.

Affirmed.

Justice Thomas concurred in the judgment and filed opinion in which Justice Scalia joined.

Justice Souter filed dissenting opinion in which Justice Stevens, Justice Ginsburg, and Justice Breyer joined.

Justice Ginsburg filed dissenting opinion.

Justice Breyer filed dissenting opinion.

West Headnotes (16)

[1] Election Law Vote Dilution

In a case brought under Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, only when a party has established the *Gingles* requirements of a sufficiently large minority group that is politically cohesive and a majority that votes sufficiently as a bloc to usually defeat the minority's preferred candidate does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

12 Cases that cite this headnote

[2] Election Law Compactness and cohesiveness of minority group

Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race can require the creation of "majority-minority districts," in which a minority group composes a numerical, working majority of the voting-age population. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

24 Cases that cite this headnote

[3] Election Law Vote Dilution

For purpose of Voting Rights Act's vote dilution provision, prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, "influence districts" are districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[4] **Election Law** Compactness and cohesiveness of minority group

For purpose of Voting Rights Act's vote dilution provision, prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, a "crossover district" is one in which minority voters make up less than a majority of the voting-age population, but the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

37 Cases that cite this headnote

[5] **Election Law** Compactness and cohesiveness of minority group

Crossover districts, in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, do not meet *Gingles* requirement that minority is sufficiently large and geographically compact enough to constitute majority in a single-member district, for purpose of Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

104 Cases that cite this headnote

[6] **Election Law** Vote Dilution

Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

[7] **Constitutional Law** Political Questions

Though courts are capable of making refined and exacting factual inquiries, they are inherently ill-equipped to make decisions based on highly political judgments. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.)

4 Cases that cite this headnote

[8] **Election Law** Vote Dilution

Gingles requirements of a sufficiently large minority group that is politically cohesive and a majority that votes sufficiently as a bloc to usually defeat the minority's preferred candidate, in action alleging violation of Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, cannot be applied mechanically and without regard to the nature of the claim. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

5 Cases that cite this headnote

[9] **Election Law** Compactness and cohesiveness of minority group

A party asserting liability under Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

21 Cases that cite this headnote

[10] **Election Law** Dilution of voting power in general

Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice; Act does not guarantee minority voters an electoral advantage. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[11] **Constitutional Law** Race, National Origin, or Ethnicity

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause, and racial classifications are permitted only as a last resort. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[12] **Election Law** Dilution of voting power in general

Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race allows States to choose their own method of complying with the Act. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[13] **Election Law** Compactness and cohesiveness of minority group

Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race is not concerned with maximizing minority voting strength, and, as a statutory matter, that provision does not mandate creating or preserving crossover districts, in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

22 Cases that cite this headnote

[14] **States** Dilution of voting power in general

States Population as basis and deviation therefrom

States that wish to draw crossover voting districts, in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, are free to do so, under Voting Rights Act's vote

dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, where no other prohibition exists. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

58 Cases that cite this headnote

[15] **Election Law** Vote Dilution

Majority-minority districts are only required, under Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, if all three *Gingles* factors are met, namely, a sufficiently large minority group that is politically cohesive and a majority that votes sufficiently as a bloc to usually defeat the minority's preferred candidate, and if provision applies based on a totality of the circumstances. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

26 Cases that cite this headnote

[16] **States** Dilution of voting power in general

States Population as basis and deviation therefrom

Although creation of crossover districts, in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, cannot be required under Voting Rights Act's vote dilution provision prohibiting practices imposed or applied in a manner which results in a denial or abridgment of the right to vote based on race, separate section of Act prohibiting voter qualifications that have purpose or effect of diminishing ability of any citizens, on account of race or color, to elect their preferred candidates of choice leaves room for states to employ crossover districts. (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.) Voting Rights Act of 1965, §§ 2, 5, 42 U.S.C.A. §§ 1973, 1973c.

42 Cases that cite this headnote

****1235** *Syllabus*[*]

Despite the North Carolina Constitution's "Whole County Provision" prohibiting the General Assembly from dividing counties when drawing its own legislative districts, in 1991 the legislature drew House District 18 to include portions of four counties, including Pender County, for the asserted purpose of satisfying § 2 of the Voting Rights Act of 1965. At that time, District 18 was a geographically compact majority-minority district. By the time the district was to be redrawn in 2003, the African–American voting-age population in District 18 had fallen below 50 percent. Rather than redrawing the district to keep Pender County whole, the legislators split portions of it and another county. District 18's African–American voting-age population is now 39.36 percent. Keeping Pender County whole would have resulted in an African–American voting-age population of 35.33 percent. The legislators' rationale was that splitting Pender County gave African–American voters the potential to join with majority voters to elect the minority group's candidate of choice, while leaving Pender County whole would have violated § 2 of the Voting Rights Act.

Pender County and others filed suit, alleging that the redistricting plan violated the Whole County Provision. The state-official defendants answered that dividing Pender County was required by § 2. The trial court first considered whether the defendants had established the three threshold requirements for § 2 liability under *Thornburg v. Gingles*, 478 U.S. 30, 51, 106 S.Ct. 2752, 92 L.Ed.2d 25, only the first of which is relevant here: whether the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." The court concluded that although African–Americans were not a majority of District 18's voting-age population, the district was a "de facto" majority-minority district because African–Americans could get enough support from crossover majority voters to elect their preferred candidate. ****1236** The court ultimately determined, based on the totality of the circumstances, that § 2 required that Pender County be split, and it sustained District

18's lines on that rationale. The State Supreme Court reversed, holding that a minority group must constitute a numerical majority of the voting-age population in an area before § 2 requires the creation of a legislative district to prevent dilution of that group's votes. Because African–Americans did not have such a numerical majority in District 18, the court ordered the legislature to redraw the district.

Held: The judgment is affirmed.

361 N.C. 491, 649 S.E.2d 364, affirmed.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded that § 2 does not require state officials to draw election-district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice. Pp. 1240 – 1250.

1. As amended in 1982, § 2 provides that a violation "is established if, based on the totality of circumstances, it is shown that the [election] processes ... in the State or political subdivision are not equally open to participation by members of a [protected] class [who] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Construing the amended § 2 in *Gingles, supra,* at 50–51, 106 S.Ct. 2752, the Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution. It later held that those requirements apply equally in § 2 cases involving single-member districts. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388. Only when a party has established the requirements does a court proceed to analyze whether a § 2 violation has occurred based on the totality of the circumstances. See, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 1013, 114 S.Ct. 2647, 129 L.Ed.2d 775. Pp. 1240 – 1242.

2. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met. Pp. 1241 – 1250.

(a) A party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent. The Court has held both that § 2 can require the creation of a "majority-minority" district, in which a minority group composes a numerical, working majority of the voting-age population, see, *e.g., Voinovich v. Quilter,* 507 U.S. 146, 154–155, 113 S.Ct. 1149, 122 L.Ed.2d 500, and that § 2 does not require the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, see *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 445, 126 S.Ct. 2594, 165 L.Ed.2d 609 (*LULAC*). This case involves an intermediate, "crossover" district, in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate. Petitioners' theory that such districts satisfy the first *Gingles* requirement is contrary to § 2, which requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice," 42 U.S.C. § 1973(b). Because they form only 39 percent of District 18's voting-age population, African–Americans ****1237** standing alone have no better or worse opportunity to elect a candidate than any other group with the same relative voting strength. Recognizing a § 2 claim where minority voters cannot elect their candidate of choice based on their own votes and without assistance from others would grant special protection to their right to form political coalitions that is not authorized by the section. Nor does the reasoning of this Court's cases support petitioners' claims. In *Voinovich,* for example, the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U.S., at 158, 113 S.Ct. 1149. Indeed, mandatory recognition of such claims would create serious tension with the third *Gingles* requirement, that the majority votes as a bloc to defeat minority-preferred candidates, see 478 U.S., at 50–51, 106 S.Ct. 2752, and would call into question the entire *Gingles* framework. On the other hand, the plurality finds support for the clear line drawn by the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. By contrast, if § 2 required crossover districts, determining whether a § 2 claim would lie would require courts to make complex political predictions and tie them to race-based assumptions. Heightening these concerns is the fact that because § 2 applies nationwide to every jurisdiction required to draw election-district lines under state or local law, crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local elections. Unlike any of the standards proposed to allow crossover claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-

age population in the relevant geographic area? Given § 2's text, the Court's cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, all of the Federal Courts of Appeals that have interpreted the first *Gingles* factor have required a majority-minority standard. The plurality declines to depart from that uniform interpretation, which has stood for more than 20 years. Because this case does not involve allegations of intentional and wrongful conduct, the Court need not consider whether intentional discrimination affects the *Gingles* analysis. Pp. 1241 – 1246.

(b) Arguing for a less restrictive interpretation, petitioners point to § 2's guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity ... to elect representatives of their choice," 42 U.S.C. § 1973(b), and assert that such "opportunit[ies]" occur in crossover districts and require protection. But petitioners emphasize the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts have the same opportunity to elect their candidate as any other political group with the same relative voting strength. The majority-minority rule, furthermore, is not at odds with § 2's totality-of-the-circumstances test. See, *e.g., Growe, supra,* at 40, 113 S.Ct. 1075. Any doubt as to whether § 2 calls for this rule is resolved by applying the canon of constitutional avoidance to steer clear of serious constitutional concerns under the Equal Protection Clause. See *Clark v. Martinez,* 543 U.S. 371, 381–382, 125 S.Ct. 716, 160 L.Ed.2d 734. Such concerns would be ****1238** raised if § 2 were interpreted to require crossover districts throughout the Nation, thereby "unnecessarily infus[ing] race into virtually every redistricting." *LULAC, supra,* at 446, 126 S.Ct. 2594. Pp. 1246 – 1248.

(c) This holding does not consider the permissibility of crossover districts as a matter of legislative choice or discretion. Section 2 allows States to choose their own method of complying with the Voting Rights Act, which may include drawing crossover districts. See *Georgia v. Ashcroft,* 539 U.S. 461, 480–482, 123 S.Ct. 2498, 156 L.Ed.2d 428. Moreover, the holding should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. See, *e.g., Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such districts are only required if all three *Gingles* factors are met and if § 2 applies based on the totality of the circumstances. A claim similar to petitioners' assertion that the majority-minority rule is inconsistent with § 5 was rejected in *LULAC, supra,* at 446, 126 S.Ct. 2594. Pp. 1248 – 1250.

Justice THOMAS, joined by Justice SCALIA, adhered to his view in *Holder v. Hall,* 512 U.S. 874, 891, 893, 114 S.Ct. 2581, 129 L.Ed.2d 687 (opinion concurring in judgment), that the text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. The *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, framework for analyzing such claims has no basis in § 2's text and "has produced ... a disastrous misadventure in judicial policymaking," *Holder, supra,* at 893, 114 S.Ct. 2581. P. 1250.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C.J., and ALITO, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 1250. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, pp. 1250 – 1260. GINSBURG, J., *post*, p. 1260, and BREYER, J., *post*, pp. 1260 – 1262, filed dissenting opinions.

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Opinion

Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice ALITO join.

***6** This case requires us to interpret § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973 (2000 ed.). The question is whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn. To use election-law terminology: In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?

****1239** I

The case arises in a somewhat unusual posture. State authorities who created a district now invoke the Voting Rights ***7** Act as a defense. They argue that § 2 required them to draw the district in question in a particular way, despite state laws to the contrary. The state laws are provisions of the North Carolina Constitution that prohibit the General Assembly from dividing counties when drawing legislative districts for the State House and Senate. Art. II, §§ 3, 5. We will adopt the term used by the state courts and refer to both sections of the State Constitution as the Whole County Provision. See *Pender County v. Bartlett,* 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007) (case below).

It is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution. See *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Here the question is whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the Whole County Provision. That, in turn, depends on how the statute is interpreted.

We begin with the election district. The North Carolina House of Representatives is the larger of the two chambers in the State's General Assembly. District 18 of that body lies in the southeastern part of North Carolina. Starting in 1991, the General Assembly drew District 18 to include portions of four counties, including Pender County, in order to create a district with a majority African–American voting-age population and to satisfy the Voting Rights Act. Following the 2000 census, the North Carolina Supreme Court, to comply with the Whole County Provision, rejected the General Assembly's first two statewide redistricting plans. See *Stephenson v. Bartlett,* 355 N.C. 354, 375, 562 S.E.2d 377, 392, stay denied, 535 U.S. 1301, 122 S.Ct. 1751, 152 L.Ed.2d 1015 (2002) (Rehnquist, C. J., in chambers); *Stephenson v. Bartlett,* 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003).

District 18 in its present form emerged from the General Assembly's third redistricting attempt, in 2003. By that ***8** time the African–American voting-age population had fallen below 50 percent in the district as then drawn, and the General Assembly no longer could draw a geographically compact majority-minority district. Rather than draw District 18 to keep Pender County whole, however, the General Assembly drew it by splitting portions of Pender and New Hanover counties. District 18 has an African–American voting-age population of 39.36 percent. App. 139. Had it left Pender County whole, the General Assembly could have drawn District 18 with an African–American voting-age population of 35.33 percent. *Id.,* at 73. The General Assembly's reason for splitting Pender County was to give African–American voters the potential to join with majority voters to elect the minority group's candidate of its choice. *Ibid.* Failure to do so, state officials now submit, would have diluted the minority group's voting strength in violation of § 2.

In May 2004, Pender County and the five members of its board of commissioners filed the instant suit in North Carolina state court against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials. The plaintiffs alleged that the 2003 plan violated the Whole County Provision by splitting Pender County into two House districts. *Id.*, at 5–14. The state-official defendants answered that dividing Pender County was required by § 2. *Id.,* at 25. As the trial court recognized, the procedural posture of ****1240** this case differs from most § 2 cases. Here the defendants raise § 2 as a defense. As a result, the trial court stated, they are "in the unusual position" of bearing the burden of proving that a § 2 violation would have occurred absent splitting Pender County to draw District 18. App. to Pet. for Cert. 90a.

The trial court first considered whether the defendant state officials had established the three threshold requirements for § 2 liability under *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)—namely, (1) that the minority group "is sufficiently ***9** large and geographically compact to constitute a majority in a single-member district," (2) that the minority group is "politically cohesive," and (3) "that the white majority votes sufficiently

as a bloc to enable it ... usually to defeat the minority's preferred candidate."

As to the first *Gingles* requirement, the trial court concluded that, although African–Americans were not a majority of the voting-age population in District 18, the district was a "de facto" majority-minority district because African–Americans could get enough support from crossover majority voters to elect the African–Americans' preferred candidate. The court ruled that African–Americans in District 18 were politically cohesive, thus satisfying the second requirement. And later, the plaintiffs stipulated that the third *Gingles* requirement was met. App. to Pet. for Cert. 102a–103a, 130a. The court then determined, based on the totality of the circumstances, that § 2 required the General Assembly to split Pender County. The court sustained the lines for District 18 on that rationale. *Id.,* at 116a–118a.

Three of the Pender County Commissioners appealed the trial court's ruling that the defendants had established the first *Gingles* requirement. The Supreme Court of North Carolina reversed. It held that a "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 ... requires the creation of a legislative district to prevent dilution of the votes of that minority group." 361 N.C., at 502, 649 S.E.2d, at 371. On that premise the State Supreme Court determined District 18 was not mandated by § 2 because African–Americans do not "constitute a numerical majority of citizens of voting age." *Id.,* at 507, 649 S.E.2d, at 374. It ordered the General Assembly to redraw District 18. *Id.,* at 510, 649 S.E.2d, at 376.

We granted certiorari, 552 U.S. 1256, 128 S.Ct. 1648, 170 L.Ed.2d 352 (2008), and now affirm.

***10** II

Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote. Though the Act as a whole was the subject of debate and controversy, § 2 prompted little criticism. The likely explanation for its general acceptance is that, as first enacted, § 2 tracked, in part, the text of the Fifteenth Amendment. It prohibited practices "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437; cf. U.S. Const., Amdt. 15 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); see also S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). In *Mobile v. Bolden,* 446 U.S. 55, 60–61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), this Court held that § 2, as it ****1241** then read, "no more than elaborates upon ... the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."

In 1982, after the *Mobile* ruling, Congress amended § 2, giving the statute its current form. The original Act had employed an intent requirement, prohibiting only those practices "imposed or applied ... to deny or abridge" the right to vote. 79 Stat. 437. The amended version of § 2 requires consideration of effects, as it prohibits practices "imposed or applied ... in a manner which results in a denial or abridgment" of the right to vote. 96 Stat. 134, 42 U.S.C. § 1973(a) (2000 ed.). The 1982 amendments also added a subsection, § 2(b), providing a test for determining whether a § 2 violation has occurred. The relevant text of the statute now states:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or ***11** applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group], as provided in subsection (b) of this section.
>
> "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973.

This Court first construed the amended version of § 2 in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles,* the plaintiffs were African–American residents of North Carolina who alleged that multimember districts diluted minority voting strength by submerging black voters into the white majority, denying them an opportunity to elect a candidate of their choice. The Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable

vote dilution under § 2:(1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.,* at 50–51, 106 S.Ct. 2752.

[1] The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts, such as a claim alleging vote dilution because a geographically compact minority group has been split between two or more single-member districts. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). In a § 2 case, only when a party has established ***12** the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. *Gingles, supra,* at 79, 106 S.Ct. 2752; see also *Johnson v. De Grandy,* 512 U.S. 997, 1013, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

III

A

This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district. The parties ****1242** agree on all other parts of the *Gingles* analysis, so the dispositive question is: What size minority group is sufficient to satisfy the first *Gingles* requirement?

At the outset the answer might not appear difficult to reach, for the *Gingles* Court said the minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S., at 50, 106 S.Ct. 2752. This would seem to end the matter, as it indicates the minority group must demonstrate it can constitute "a majority." But in *Gingles* and again in *Growe* the Court reserved what it considered to be a separate question —whether, "when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." *Growe, supra,* at 41, n. 5, 113 S.Ct. 1075; see also *Gingles, supra,* at 46–47, n. 12, 106 S.Ct. 2752. The Court has since applied the *Gingles* requirements in § 2 cases but has declined to decide the minimum size minority group necessary to satisfy the first requirement. See *Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *De Grandy, supra,* at 1009, 114 S.Ct. 2647; *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 443, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) *(LULAC)* (opinion of KENNEDY, J.). We must consider the minimum-size question in this case.

[2] **[3]** ***13** It is appropriate to review the terminology often used to describe various features of election districts in relation to the requirements of the Voting Rights Act. In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts. See, *e.g., Voinovich, supra,* at 154, 113 S.Ct. 1149 ("Placing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidate of choice"); but see *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that § 2 does not require the creation of influence districts. *LULAC, supra,* at 445, 126 S.Ct. 2594 (opinion of KENNEDY, J.).

[4] The present case involves an intermediate type of district —a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. 361 N.C., at 501–502, 649 S.E.2d, at 371 (case below). This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. See *Georgia v. Ashcroft,* 539 U.S. 461, 483, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003); see also Pildes, Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1539 (2002) (hereinafter Pildes). But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. See, *e.g., Nixon v. Kent County,* 76 F.3d 1381, 1393 (C.A.6 1996) (en banc). We do not address ****1243** that type of coalition ***14** district here. The petitioners in the present case (the state officials who

were the defendants in the trial court) argue that § 2 requires a crossover district, in which minority voters might be able to persuade some members of the majority to cross over and join with them.

[5] Petitioners argue that although crossover districts do not include a numerical majority of minority voters, they still satisfy the first *Gingles* requirement because they are "effective minority districts." Under petitioners' theory keeping Pender County whole would have violated § 2 by cracking the potential crossover district that they drew as District 18. See *Gingles, supra*, at 46, n. 11, 106 S.Ct. 2752 (vote dilution "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters"). So, petitioners contend, § 2 required them to override state law and split Pender County, drawing District 18 with an African–American voting-age population of 39.36 percent rather than keeping Pender County whole and leaving District 18 with an African–American voting-age population of 35.33 percent. We reject that claim.

First, we conclude, petitioners' theory is contrary to the mandate of § 2. The statute requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). But because they form only 39 percent of the voting-age population in District 18, African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. That is, African–Americans in District 18 have the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters "a right to preserve their strength for the purposes ***15** of forging an advantageous political alliance." *Hall v. Virginia,* 385 F.3d 421, 431 (C.A.4 2004); see also *Voinovich,* 507 U.S., at 154, 113 S.Ct. 1149 (minorities in crossover districts "could not dictate electoral outcomes independently"). Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647.

[6] Although the Court has reserved the question we confront today and has cautioned that the *Gingles* requirements "cannot be applied mechanically," *Voinovich, supra,* at 158, 113 S.Ct. 1149, the reasoning of our cases does not support petitioners' claims. Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters. In setting out the first requirement for § 2 claims, the *Gingles* Court explained that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S., at 50, n. 17, 106 S.Ct. 2752. The *Growe* Court stated that the first *Gingles* requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." 507 U.S., at 40, 113 S.Ct. 1075. Without such a showing, "there neither has been a wrong nor can be a remedy." *Id.*, at 41, 113 S.Ct. 1075. ****1244** There is a difference between a racial minority group's "own choice" and the choice made by a coalition. In *Voinovich,* the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U.S., at 158, 113 S.Ct. 1149. Only once, in dicta, has this Court framed the first *Gingles* requirement as anything other than a majority-minority rule. See *De Grandy,* 512 U.S., at 1008, 114 S.Ct. 2647 (requiring "a sufficiently large minority population to elect candidates of its choice"). And in the same case, the Court rejected the proposition, inherent in petitioners' claim here, that § 2 entitles ***16** minority groups to the maximum possible voting strength:

> "[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.,* at 1016–1017, 114 S.Ct. 2647.

Allowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence. Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates. It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate. (We are skeptical that the bloc-voting test could be satisfied here, for example, where minority voters in District 18 cannot elect their candidate of choice without support

from almost 20 percent of white voters. We do not confront that issue, however, because for some reason respondents conceded the third *Gingles* requirement in state court.)

As the *Gingles* Court explained, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." 478 U.S., at 49, n. 15, 106 S.Ct. 2752. Were the Court to adopt petitioners' theory and dispense with the majority-minority requirement, the ruling would call in question the *Gingles* framework the Court has applied under § 2. See *LULAC,* 548 U.S., at 490, n. 8, 126 S.Ct. 2594. (SOUTER, J., concurring in part and dissenting in part) ("All aspects of our established analysis for majority-minority districts in *Gingles* and ***17** its progeny may have to be rethought in analyzing ostensible coalition districts"); cf. *Metts v. Murphy,* 363 F.3d 8, 12 (C.A.1 2004) (en banc) *(per curiam)* (allowing influence-district claim to survive motion to dismiss but noting "there is tension in this case for plaintiffs in any effort to satisfy both the first and third prong of *Gingles* ").

[7] We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a § 2 claim would lie —*i.e.,* determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The judiciary would be directed to make predictions or adopt premises that even experienced polling ****1245** analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2. Though courts are capable of making refined and exacting factual inquiries, they "are inherently ill-equipped" to "make decisions based on highly political judgments" of the sort that crossover-district claims would require. *Holder,* 512 U.S., at 894, 114 S.Ct. 2581 ***18** THOMAS, J., concurring in judgment). There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions. See *infra,* at 1246 – 1248.

Heightening these concerns even further is the fact that § 2 applies nationwide to every jurisdiction that must draw lines for election districts required by state or local law. Crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates. Under petitioners' view courts would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions. And predictions would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.

Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. See *LULAC, supra,* at 485, 126 S.Ct. 2594 (opinion of SOUTER, J.) (recognizing need for "clear-edged rule"). Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect ***19** a candidate of choice is a present and discernible wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims. Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute

a compact voting majority but, despite racially polarized **1246 bloc voting, that group is not put into a district.

Given the text of § 2, our cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, no federal court of appeals has held that § 2 requires creation of coalition districts. Instead, all to consider the question have interpreted the first *Gingles* factor to require a majority-minority standard. See *Hall,* 385 F.3d, at 427–430 (C.A.4 2004), cert. denied, 544 U.S. 961, 125 S.Ct. 1725, 161 L.Ed.2d 602 (2005); *Valdespino v. Alamo Heights Independent School Dist.,* 168 F.3d 848, 852–853 (C.A.5 1999), cert. denied, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000); *Cousin v. Sundquist,* 145 F.3d 818, 828–829 (C.A.6 1998), cert. denied, 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999); *Sanchez v. Colorado,* 97 F.3d 1303, 1311–1312 (C.A.10 1996), cert. denied, 520 U.S. 1229, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Romero v. Pomona,* 883 F.2d 1418, 1424, n. 7, 1425–1426 (C.A.9 1989), overruled on other grounds, 914 F.2d 1136, 1141 (C.A.9 1990); *McNeil v. Springfield Park Dist.,* 851 F.2d 937, 947 (C.A.7 1988), cert. denied, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989). Cf. *Metts, supra,* at 11 (expressing unwillingness "at the complaint stage to foreclose the *possibility* " of influence-district claims). We decline to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years.

[8] **[9]** To be sure, the *Gingles* requirements "cannot be applied mechanically and without regard to the nature of the claim." *Voinovich,* 507 U.S., at 158, 113 S.Ct. 1149. It remains the rule, however, that a party asserting § 2 liability must show by a preponderance *20 of the evidence that the minority population in the potential election district is greater than 50 percent. No one contends that the African–American voting-age population in District 18 exceeds that threshold. Nor does this case involve allegations of intentional and wrongful conduct. We therefore need not consider whether intentional discrimination affects the *Gingles* analysis. Cf. Brief for United States as *Amicus Curiae* 14 (evidence of discriminatory intent "tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis"); see also *Garza v. County of Los Angeles,* 918 F.2d 763, 771 (C.A.9 1990). Our holding does not apply to cases in which there is intentional discrimination against a racial minority.

B

In arguing for a less restrictive interpretation of the first *Gingles* requirement petitioners point to the text of § 2 and its guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity ... to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). An "opportunity," petitioners argue, occurs in crossover districts as well as majority-minority districts; and these extended opportunities, they say, require § 2 protection.

[10] But petitioners put emphasis on the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts cannot form a voting majority without crossover voters. In those districts minority voters have the same opportunity to elect their candidate as any **1247 other political group with the same relative voting strength.

*21 The majority-minority rule, furthermore, is not at odds with § 2's totality-of-the-circumstances test. The Court in *De Grandy* confirmed "the error of treating the three *Gingles* conditions as exhausting the enquiry required by § 2." 512 U.S., at 1013, 114 S.Ct. 2647. Instead the *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation. See *Growe,* 507 U.S., at 40, 113 S.Ct. 1075 (describing the "*Gingles* threshold factors").

[11] To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause. See *Clark v. Martinez,* 543 U.S. 371, 381–382, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). Of course, the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause," and racial classifications are permitted only "as a last resort." *Richmond*

v. J.A. Croson Co., 488 U.S. 469, 518, 519, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (KENNEDY, J., concurring in part and concurring in judgment). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno*, 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). If § 2 were interpreted to require crossover districts throughout the Nation, "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.); see also *Ashcroft*, 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring). That interpretation would result in a substantial increase in the number of mandatory ***22** districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).

On petitioners' view of the case courts and legislatures would need to scrutinize every factor that enters into districting to gauge its effect on crossover voting. Injecting this racial measure into the nationwide districting process would be of particular concern with respect to consideration of party registration or party influence. The easiest and most likely alliance for a group of minority voters is one with a political party, and some have suggested using minority voters' strength within a particular party as the proper yardstick under the first *Gingles* requirement. See, *e.g.*, *LULAC*, *supra*, at 485–486, 126 S.Ct. 2594 (opinion of SOUTER, J.) (requiring only "that minority voters ... constitute a majority of those voting in the primary of ... the party tending to win in the general election"). That approach would replace an objective, administrable rule with a difficult "judicial inquiry into party rules and local politics" to determine whether a minority group truly "controls" the dominant party's primary process. McLoughlin, *Gingles* in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N.Y.U.L.Rev. 312, 349 (2005). More troubling still is the inquiry's ****1248** fusion of race and party affiliation as a determinant when partisan considerations themselves may be suspect in the drawing of district lines. See *Vieth v. Jubelirer*, 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (STEVENS, J., dissenting); *id.*, at 316, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment); see also Pildes 1565 (crossover-district requirement would essentially result in political party "entitlement to ... a certain number of seats"). Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve the law and courts in a perilous enterprise. It would rest on judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportionment ***23** cycles and likely beyond. And thus would the relationship between race and party further distort and frustrate the search for neutral factors and principled rationales for districting.

Petitioners' approach would reverse the canon of avoidance. It invites the divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act. Given the consequences of extending racial considerations even further into the districting process, we must not interpret § 2 to require crossover districts.

C

[12] **[13]** Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more. And as the Court has noted in the context of § 5 of the Voting Rights Act, "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts." *Ashcroft*, 539 U.S., at 482, 123 S.Ct. 2498. Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. See *id.*, at 480–483, 123 S.Ct. 2498. When we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, *De Grandy*, *supra*, at 1022, 114 S.Ct. 2647; and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts.

[14] **[15]** Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, ***24** too, could pose constitutional concerns. See

Miller v. Johnson, supra; *Shaw v. Reno,* 509 U.S. 630. States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. See *supra,* at 1244. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. See Pildes 1567 ("Districts could still be designed in such places that encouraged coalitions across racial lines, ****1249** but these districts would result from legislative choice, not ... obligation"). States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments. See *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); Brief for United States as *Amicus Curiae* 13–14. There is no evidence of discriminatory intent in this case, however. Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.

[16] Petitioners claim the majority-minority rule is inconsistent with § 5, but we rejected a similar argument in *LULAC,* 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.). The inquiries under §§ 2 and 5 are different. Section 2 concerns minority ***25** groups' opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b) (2000 ed.), while the more stringent § 5 asks whether a change has the purpose or effect of "denying or abridging the right to vote," § 1973c. See *LULAC, supra,* at 446, 126 S.Ct. 2594; *Bossier Parish, supra,* at 476–480, 117 S.Ct. 1491. In *LULAC,* we held that although the presence of influence districts is relevant for the § 5 retrogression analysis, "the lack of such districts cannot establish a § 2 violation." 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.); see also *Ashcroft,* 539 U.S., at 482–483, 123 S.Ct. 2498. The same analysis applies for crossover districts: Section 5 "leaves room" for States to employ crossover districts, *id.,* at 483, 123 S.Ct. 2498, but § 2 does not require them.

IV

Some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white. See Note, The Future of Majority–Minority Districts in Light of Declining Racially Polarized Voting, 116 Harv. L.Rev. 2208, 2209 (2003); see also *id.,* at 2216–2222; Pildes 1529–1539; Bullock & Dunn, The Demise of Racial Districting and the Future of Black Representation, 48 Emory L.J. 1209 (1999). Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress.

It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a "statute meant to hasten the waning of racism in American politics." *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647. Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of § 2 to require, by force of ***26** law, the voluntary cooperation our society has achieved. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.

****1250** The judgment of the Supreme Court of North Carolina is affirmed.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment.

I continue to adhere to the views expressed in my opinion in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment). The text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. See 42 U.S.C. § 1973(a) (2000 ed.) (permitting only a challenge to a "voting qualification or prerequisite to voting or standard, practice, or procedure"); see also *Holder, supra,* at 893, 114 S.Ct. 2581 (stating that the terms " 'standard, practice, or procedure' " "reach only

state enactments that limit citizens' access to the ballot"). I continue to disagree, therefore, with the framework set forth in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), for analyzing vote dilution claims because it has no basis in the text of § 2. I would not evaluate any Voting Rights Act claim under a test that "has produced such a disastrous misadventure in judicial policymaking." *Holder, supra,* at 893, 114 S.Ct. 2581. For these reasons, I concur only in the judgment.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under § 2 of the Voting Rights Act of 1965(VRA) as residents of a putative district whose minority voters ***27** would have an opportunity "to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). If the answer is no, minority voters in such a district will have no right to claim relief under § 2 from a statewide districting scheme that dilutes minority voting rights. I would hold that the answer in law as well as in fact is sometimes yes: a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.

In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity "to elect representatives of their choice." This is incorrect as a factual matter if the statutory phrase is given its natural meaning; minority voters in districts with minority populations under 50% routinely "elect representatives of their choice." The effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the VRA. If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under § 2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the VRA will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened by any measure.

I

Recalling the basic premises of vote-dilution claims under § 2 will show just ****1251** how far astray the plurality has gone. ***28** Section 2 of the VRA prohibits districting practices that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 42 U.S.C. § 1973(a). A denial or abridgment is established if, "based on the totality of circumstances," it is shown that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 1973(b).

Since § 2 was amended in 1982, 96 Stat. 134, we have read it to prohibit practices that result in "vote dilution," see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), understood as distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength. See *id.,* at 47–48, 106 S.Ct. 2752. There are two classic patterns. Where voting is racially polarized, a districting plan can systemically discount the minority vote either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters" or from "the concentration of blacks into districts where they constitute an excessive majority," so as to eliminate their influence in neighboring districts. *Id.,* at 46, n. 11, 106 S.Ct. 2752. Treating dilution as a remediable harm recognizes that § 2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective. See *id.,* at 47, 106 S.Ct. 2752.

Three points follow. First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength. *Id.,* at 88, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, ... it is ... necessary to construct a measure of 'undiluted' minority voting strength"). Several baselines can be imagined; one could, for example, compare a minority's voting strength under a particular districting plan with the maximum strength possible ***29** under any alternative.[1] Not surprisingly, we have conclusively rejected this approach; the VRA was passed to guarantee minority voters a fair game, not a killing. See *Johnson v. De Grandy,* 512 U.S. 997, 1016–1017, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We have held that the

better baseline for measuring opportunity to elect under § 2, although not dispositive, is the minority's rough proportion of the relevant population. *Id.,* at 1013–1023, 114 S.Ct. 2647. Thus, in assessing § 2 claims under a totality of the circumstances, including the facts of history and geography, the starting point is a comparison of the number of districts where minority voters can elect their chosen candidate with the group's population percentage. *Ibid.;* see also ****1252** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 436, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) *(LULAC)* ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are [minority] opportunity districts with the [minority] share of the citizen voting-age population").[2]

***30** Second, the significance of proportionality means that a § 2 claim must be assessed by looking at the overall effect of a multidistrict plan. A State with one congressional seat cannot dilute a minority's congressional vote, and only the systemic submergence of minority votes where a number of single-member districts could be drawn can be treated as harm under § 2. So a § 2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-opportunity districts in the territory as a whole. See *id.,* at 436–437, 126 S.Ct. 2594.

Third, while a § 2 violation ultimately results from the dilutive effect of a districting plan as a whole, a § 2 plaintiff must also be able to place himself in a reasonably compact district that could have been drawn to improve upon the plan actually selected. See, *e.g., De Grandy, supra,* at 1001–1002, 114 S.Ct. 2647. That is, a plaintiff must show both an overall deficiency and a personal injury open to redress.

Our first essay at understanding these features of statutory vote dilution was *Thornburg v. Gingles,* which asked whether a multimember district plan for choosing representatives by at-large voting deprived minority voters of an equal opportunity to elect their preferred candidates. In answering, we set three now-familiar conditions that a § 2 claim must meet at the threshold before a court will analyze it under the totality of circumstances:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district .... Second, the minority group must be able to show that it is politically cohesive .... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." 478 U.S., at 50–51, 106 S.Ct. 2752.

***31** As we have emphasized over and over, the *Gingles* conditions do not state the ultimate standard under § 2, nor could they, since the totality of the circumstances standard has been set explicitly by Congress. See *LULAC, supra,* at 425–426, 126 S.Ct. 2594; *De Grandy, supra,* at 1011, 114 S.Ct. 2647. Instead, each condition serves as a gatekeeper, ensuring that a plaintiff who proceeds to plenary review has a real chance to show a redressable violation of the ultimate § 2 standard. The third condition, majority racial bloc voting, is necessary to establish the premise of vote-dilution claims: that the minority as a whole is placed at a disadvantage owing to race, not the happenstance of independent politics. *Gingles,* 478 U.S., at 51, 106 S.Ct. 2752. The second, minority cohesion, is there to show that minority voters will vote together to elect a distinct representative of choice. *Ibid.* And the ****1253** first, a large and geographically compact minority population, is the condition for demonstrating that a dilutive plan injures the § 2 plaintiffs by failing to draw an available remedial district that would give them a chance to elect their chosen candidate. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Gingles, supra,* at 50, 106 S.Ct. 2752.

II

Though this case arose under the Constitution of North Carolina, the dispositive issue is one of federal statutory law: whether a district with a minority population under 50%, but large enough to elect its chosen candidate with the help of majority voters disposed to support the minority favorite, can ever count as a district where minority voters have the opportunity "to elect representatives of their choice" for purposes of § 2. I think it clear from the nature of a vote-dilution claim and the text of § 2 that the answer must be yes. There is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts. See *Voinovich v. Quilter,* 507 U.S. 146, 155, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) ("[Section 2] ***32** says nothing about majority-minority districts"). On the contrary, § 2 "focuses exclusively on the consequences of apportionment," *ibid.,* as Congress made clear when it explicitly prescribed the ultimate functional approach: a totality of the circumstances test. See 42 U.S.C. § 1973(b) ("[a] violation ... is established

if, based on the totality of circumstances, it is shown ...”). And a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by § 2: the opportunity to elect a desired representative.

It has been apparent from the moment the Court first took up § 2 that no reason exists in the statute to treat a crossover district as a less legitimate remedy for dilution than a majority-minority one (let alone to rule it out). See *Gingles, supra,* at 90, n. 1, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) (“[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably ... enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice”); see also Pildes, Is Voting–Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1553 (2002) (hereinafter Pildes) (“What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional ‘safe’ district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?”).

As these earlier comments as much as say, whether a district with a minority population under 50% of the CVAP may redress a violation of § 2 is a question of fact with an obvious answer: of course minority voters constituting less than 50% of the voting population can have an opportunity to elect the ***33** candidates of their choice, as amply shown by empirical studies confirming that such minority groups regularly elect their preferred candidates with the help of modest crossover by members of the majority. See, *e.g., id.,* at 1531–1534, 1538. The North Carolina Supreme Court, for example, determined that voting districts with a black voting age population of as little as 38.37% have an opportunity to elect black candidates, ****1254** *Pender Cty. v. Bartlett,* 361 N.C. 491, 494–495, 649 S.E.2d 364, 366–367 (2007), a factual finding that has gone unchallenged and is well supported by electoral results in North Carolina. Of the nine House districts in which blacks make up more than 50% of the voting age population (VAP), all but two elected a black representative in the 2004 election. See App. 109. Of the 12 additional House districts in which blacks are over 39% of the VAP, all but one elected a black representative in the 2004 election. *Ibid*. It would surely surprise legislators in North Carolina to suggest that black voters in these 12 districts cannot possibly have an opportunity to “elect [the] representatives of their choice.”

It is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past. See Pildes 1527–1532 (explaining that blacks in the 1980s required well over 50% of the population in a district to elect the candidates of their choice, but that this number has gradually fallen to well below 50%); *id.,* at 1527, n. 26 (stating that some courts went so far as to refer to 65% “as a ‘rule of thumb’ for the black population required to constitute a safe district”). That is, racial polarization has declined, and if it continues downward the first *Gingles* condition will get easier to satisfy.

But this is no reason to create an arbitrary threshold; the functional approach will continue to allow dismissal of claims for districts with minority populations too small to demonstrate ***34** an ability to elect, and with “crossovers” too numerous to allow an inference of vote dilution in the first place. No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition. And the third *Gingles* requirement, majority-bloc voting, may well provide an analytical limit to claims based on crossover districts. See *LULAC,* 548 U.S., at 490, n. 8, 126 S.Ct. 2594 (SOUTER, J., concurring in part and dissenting in part) (noting the interrelationship of the first and third *Gingles* factors); see also *post,* at 1260 – 1262 (BREYER, J., dissenting) (looking to the third *Gingles* condition to suggest a mathematical limit to the minority population necessary for a cognizable crossover district). But whatever this limit may be, we have no need to set it here, since the respondent state officials have stipulated to majority-bloc voting, App. to Pet. for Cert. 130a. In sum, § 2 addresses voting realities, and for practical purposes a 39%-minority district in which we know minorities have the potential to elect their preferred candidate is every bit as good as a 50%-minority district.

In fact, a crossover district is better. Recognizing crossover districts has the value of giving States greater flexibility to draw districting plans with a fair number of minority-opportunity districts, and this in turn allows for a beneficent reduction in the number of majority-minority districts with their “quintessentially race-conscious calculus,” *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647, thereby moderating reliance on race as an exclusive determinant in districting decisions, cf. *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125

L.Ed.2d 511 (1993). See also Pildes 1547–1548 ("In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could 'convey the message that political identity is, or should be, predominantly racial.' ... Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution" (quoting ****1255** *Bush v. Vera,* 517 U.S. 952, 980, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996))). A crossover ***35** is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.

III

A

The plurality's contrary conclusion that § 2 does not recognize a crossover claim is based on a fundamental misunderstanding of vote-dilution claims, a mistake epitomized in the following assessment of the crossover district in question:

> "[B]ecause they form only 39 percent of the voting-age population in District 18, African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength [in District 18]." *Ante,* at 1242 – 1243.

See also *ante,* at 1246 ("[In crossover districts,] minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength").

The claim that another political group in a particular district might have the same relative voting strength as the minority if it had the same share of the population takes the form of a tautology: the plurality simply looks to one district and says that a 39% group of blacks is no worse off than a 39% group of whites would be. This statement might be true, or it might not be, and standing alone it demonstrates nothing.

Even if the two 39% groups were assumed to be comparable in fact because they will attract sufficient crossover (and so should be credited with satisfying the first *Gingles* condition), neither of them could prove a § 2 violation without looking beyond the 39% district and showing a disproportionately small potential for success in the State's overall configuration of districts. As this Court has explained before, the ultimate question in a § 2 case (that is, whether the ***36** minority group in question is being denied an equal opportunity to participate and elect) can be answered only by examining the broader pattern of districts to see whether the minority is being denied a roughly proportionate opportunity. See *LULAC, supra,* at 436–437, 126 S.Ct. 2594. Hence, saying one group's 39% equals another's, even if true in particular districts where facts are known, does not mean that either, both, or neither group could show a § 2 violation. The plurality simply fails to grasp that an alleged § 2 violation can only be proved or disproved by looking statewide.

B

The plurality's more specific justifications for its counterfactual position are no more supportable than its 39% tautology.

1

The plurality seems to suggest that our prior cases somehow require its conclusion that a minority population under 50% will never support a § 2 remedy, emphasizing that *Gingles* spoke of a majority and referred to the requirement that minority voters have " 'the *potential* to elect' " their chosen representatives. *Ante,* at 1243 (quoting *Gingles,* 478 U.S., at 50, n. 17, 106 S.Ct. 2752). It is hard to know what to make of this point since the plurality also concedes that we have explicitly and repeatedly reserved decision on today's question. See *LULAC, supra*, at 443, 126 S.Ct. 2594 (plurality opinion); *De Grandy, supra*, at 1009, 114 S.Ct. 2647; *Voinovich,* 507 U.S., at 154, 113 S.Ct. 1149; *Growe,* 507 U.S., at 41, n. 5, 113 S.Ct. 1075; *Gingles, supra,* at 46–47, n. 12, 106 S.Ct. 2752. In fact, in our more recent cases applying ****1256** § 2, Court majorities have formulated the first *Gingles* prong in a way more consistent with a functional approach. See *LULAC, supra,* at 430, 126 S.Ct. 2594 ("[I]n the context of a challenge to the drawing of district lines, 'the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice' " (quoting ***37** *De Grandy, supra,* at 1008, 114 S.Ct. 2647)). These Court majorities get short shrift from today's plurality.

In any event, even if we ignored *Gingles*'s reservation of today's question and looked to *Gingles*'s "*potential* to elect" as if it were statutory text, I fail to see how that phrase dictates that a minority's ability to compete must be singlehanded in order to count under § 2. As explained already, a crossover district serves the same interest in obtaining representation as a majority-minority district; the potential of 45% with a 6% crossover promises the same result as 51% with no crossover, and there is nothing in the logic of § 2 to allow a distinction between the two types of district.

In fact, the plurality's distinction is artificial on its own terms. In the past, when black voter registration and black voter turnout were relatively low, even black voters with 55% of a district's CVAP would have had to rely on crossover voters to elect their candidate of choice. See Pildes 1527–1528. But no one on this Court (and, so far as I am aware, any other court addressing it) ever suggested that reliance on crossover voting in such a district rendered minority success any less significant under § 2, or meant that the district failed to satisfy the first *Gingles* factor. Nor would it be any answer to say that black voters in such a district, assuming unrealistic voter turnout, theoretically had the "potential" to elect their candidate without crossover support; that would be about as relevant as arguing in the abstract that a black CVAP of 45% is potentially successful, on the assumption that black voters could turn out en masse to elect the candidate of their choice without reliance on crossovers if enough majority voters stay home.

2

The plurality is also concerned that recognizing the "potential" of anything under 50% would entail an exponential expansion of special minority districting; the plurality goes so far as to suggest that recognizing crossover districts as possible minority-opportunity districts would inherently "entitl[e] ***38** minority groups to the maximum possible voting strength." *Ante,* at 1244. But this conclusion again reflects a confusion of the gatekeeping function of the *Gingles* conditions with the ultimate test for relief under § 2. See *ante,* at 1242 – 1243 ("African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength").

As already explained, *supra,* at 1252 – 1253, the mere fact that all threshold *Gingles* conditions could be met and a district could be drawn with a minority population sufficiently large to elect the candidate of its choice does not require drawing such a district. This case simply is about the first *Gingles* condition, not about the number of minority-opportunity districts needed under § 2, and accepting Bartlett's position would in no way imply an obligation to maximize districts with minority voter potential. Under any interpretation of the first *Gingles* factor, the State must draw districts in a way that provides minority voters with a fair number of districts in ****1257** which they have an opportunity to elect candidates of their choice; the only question here is which districts will count toward that total.

3

The plurality's fear of maximization finds a parallel in the concern that treating crossover districts as minority-opportunity districts would "create serious tension" with the third *Gingles* prerequisite of majority-bloc voting. *Ante,* at 1244. The plurality finds "[i]t ... difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Ibid.*

It is not difficult to see. If a minority population with 49% of the CVAP can elect the candidate of its choice with crossover by 2% of white voters, the minority "by definition" relies on white support to elect its preferred candidate. But this fact alone would raise no doubt, as a matter of definition ***39** or otherwise, that the majority-bloc-voting requirement could be met, since as much as 98% of the majority may have voted against the minority's candidate of choice. As explained above, *supra,* at 1254, the third *Gingles* condition may well impose an analytical floor to the minority population and a ceiling on the degree of crossover allowed in a crossover district; that is, the concept of majority-bloc voting requires that majority voters tend to stick together in a relatively high degree. The precise standard for determining majority-bloc voting is not at issue in this case, however; to refute the plurality's 50% rule, one need only recognize that racial cohesion of 98% would be bloc voting by any standard.[3]

4

The plurality argues that qualifying crossover districts as minority-opportunity districts would be less administrable

than demanding 50%, forcing courts to engage with the various factual and predictive questions that would come up in determining what percentage of majority voters would provide the voting minority with a chance at electoral success. *Ante,* at 1244 – 1245. But claims based on a State's failure to draw majority-minority districts raise the same issues of judicial judgment; even when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about ***40** the "potential" such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote dilution under a totality of the circumstances. See *supra,* at 1252 – 1253, 1254. The plurality's rule, therefore, conserves an uncertain amount of judicial resources, and only at the expense of ignoring a class of § 2 claims that this Court has no authority to strike from the statute's coverage.

5

The plurality again misunderstands the nature of § 2 in suggesting that its rule ****1258** does not conflict with what the Court said in *Georgia v. Ashcroft,* 539 U.S. 461, 480–482, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003): that crossover districts count as minority-opportunity districts for the purpose of assessing whether minorities have the opportunity "to elect their preferred candidates of choice" under § 5 of the VRA, 42 U.S.C. § 1973c(b) (2006 ed.). While the plurality is, of course, correct that there are differences between the enquiries under §§ 2 and 5, *ante,* at 1249, those differences do not save today's decision from inconsistency with the prior pronouncement. A districting plan violates § 5 if it diminishes the ability of minority voters to "elect their preferred candidates of choice," § 1973c(b), as measured against the minority's previous electoral opportunity, *Ashcroft, supra,* at 477, 123 S.Ct. 2498. A districting plan violates § 2 if it diminishes the ability of minority voters to "elect representatives of their choice," 42 U.S.C. § 1973(b) (2000 ed.), as measured under a totality of the circumstances against a baseline of rough proportionality. It makes no sense to say that a crossover district counts as a minority-opportunity district when comparing the past and the present under § 5, but not when comparing the present and the possible under § 2.

6

Finally, the plurality tries to support its insistence on a 50% threshold by invoking the policy of constitutional avoidance, which calls for construing a statute so as to avoid a ***41** possibly unconstitutional result. The plurality suggests that allowing a lower threshold would "require crossover districts throughout the Nation," *ante,* at 1247, thereby implicating the principle of *Shaw v. Reno* that districting with an excessive reliance on race is unconstitutional ("excessive" now being equated by the plurality with the frequency of creating opportunity districts). But the plurality has it precisely backwards. A State will inevitably draw some crossover districts as the natural byproduct of districting based on traditional factors. If these crossover districts count as minority-opportunity districts, the State will be much closer to meeting its § 2 obligation without any reference to race, and fewer minority-opportunity districts will, therefore, need to be created purposefully. But if, as a matter of law, only majority-minority districts provide a minority seeking equality with the opportunity to elect its preferred candidates, the State will have much further to go to create a sufficient number of minority-opportunity districts, will be required to bridge this gap by creating exclusively majority-minority districts, and will inevitably produce a districting plan that reflects a greater focus on race. The plurality, however, seems to believe that any reference to race in districting poses a constitutional concern, even a State's decision to reduce racial blocs in favor of crossover districts. A judicial position with these consequences is not constitutional avoidance.

IV

More serious than the plurality opinion's inconsistency with prior cases construing § 2 is the perversity of the results it portends. Consider the effect of the plurality's rule on North Carolina's districting scheme. Black voters make up approximately 20% of North Carolina's VAP[4] and are distributed ***42** throughout 120 State ****1259** House districts, App. to Pet. for Cert. 58a. As noted before, black voters constitute more than 50% of the VAP in 9 of these districts and over 39% of the VAP in an additional 12. *Supra,* at 1253 – 1254. Under a functional approach to § 2, black voters in North Carolina have an opportunity to elect (and regularly do elect) the representative of their choice in as many as 21 House districts, or 17.5% of North Carolina's total districts. See App. 109–110. North Carolina's districting plan is therefore close to providing black voters with proportionate electoral opportunity. According to the plurality, however, the remedy of a crossover district cannot

provide opportunity to minority voters who lack it, and the requisite opportunity must therefore be lacking for minority voters already living in districts where they must rely on crossover. By the plurality's reckoning, then, black voters have an opportunity to elect representatives of their choice in, at most, nine North Carolina House districts. See *ibid*. In the plurality's view, North Carolina must have a long way to go before it satisfies the § 2 requirement of equal electoral opportunity.[5]

***43** A State like North Carolina faced with the plurality's opinion, whether it wants to comply with § 2 or simply to avoid litigation, will, therefore, have no reason to create crossover districts. Section 2 recognizes no need for such districts, from which it follows that they can neither be required nor be created to help the State meet its obligation of equal electoral opportunity under § 2. And if a legislature were induced to draw a crossover district by the plurality's encouragement to create them voluntarily, *ante,* at 1249 – 1250, it would open itself to attack by the plurality based on the pointed suggestion that a policy favoring crossover districts runs counter to *Shaw*. The plurality has thus boiled § 2 down to one option: the best way to avoid suit under § 2, and the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.

Perhaps the plurality recognizes this aberrant implication, for it eventually attempts to disavow it. It asserts that "§ 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.... [But] § 2 does not mandate creating or preserving crossover districts." *Ante,* at 1248. See also, *ante,* at 1249 (crossover districts "can be evidence ... of equal political opportunity ..."). But this is judicial fiat, not legal reasoning; the plurality does not even attempt to explain how a crossover district can be a minority-opportunity district when assessing the compliance of a districting plan with § 2, but cannot be one when sought as a remedy to a § 2 violation. The plurality cannot have it both ways. If voluntarily drawing a crossover ****1260** district brings a State into compliance with § 2, then requiring creation of a crossover district must be a way to remedy a violation of § 2, and eliminating a crossover district must in some cases take a State out of compliance with the statute. And when the elimination of a crossover district does cause a violation of ***44** § 2, I cannot fathom why a voter in that district should not be able to bring a claim to remedy it.

In short, to the extent the plurality's holding is taken to control future results, the plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics.

I respectfully dissent.

Justice GINSBURG, dissenting.
I join Justice SOUTER's powerfully persuasive dissenting opinion, and would make concrete what is implicit in his exposition. The plurality's interpretation of § 2 of the Voting Rights Act of 1965 is difficult to fathom and severely undermines the statute's estimable aim. Today's decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of § 2.

Justice BREYER, dissenting.
I join Justice SOUTER's opinion in full. I write separately in light of the plurality's claim that a bright-line 50% rule (used as a *Thornburg v. Gingles,* 478 U.S. 30 (1986), gateway) serves administrative objectives. In the plurality's view, that rule amounts to a relatively simple administrative device that will help separate at the outset those cases that are more likely meritorious from those that are not. Even were that objective as critically important as the plurality believes, however, it is not difficult to find other numerical gateway rules that would work better.

Assume that a basic purpose of a gateway number is to separate (1) districts where a minority group can "elect representatives of their choice," from (2) districts where the minority, because of the need to obtain majority crossover votes, can only "elect representatives" that are consensus candidates. 42 U.S.C. § 1973(b) (2000 ed.); ***45** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 445, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (plurality opinion). At first blush, one might think that a 50% rule will work in this respect. After all, if a 50% minority population votes as a bloc, can it not always elect the candidate of its choice? And if a minority population constitutes less than 50% of a district, is not any candidate elected from that district always a consensus choice of minority and majority voters? The realities of voting behavior, however, make clear that the

answer to both these questions is "no." See, *e.g.,* Brief for Nathaniel Persily et al. as *Amici Curiae* 5–6 ("Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. *In practice, such extreme conditions are never present* .... [S]ome districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community to have an equal opportunity to elect its candidate of choice" (emphasis added)); see also *ante,* at 1254 (SOUTER, J., dissenting).

No voting group is 100% cohesive. Except in districts with overwhelming minority populations, some crossover votes are often necessary. The question is how likely it is that the need for crossover votes will force a minority to reject its "preferred ****1261** choice" in favor of a "consensus candidate." A 50% number does not even try to answer that question. To the contrary, it includes, say, 51% minority districts, where imperfect cohesion may, in context, prevent election of the "minority-preferred" candidate, while it excludes, say, 45% districts where a smaller but more cohesive minority can, with the help of a small and reliable majority crossover vote, elect its preferred candidate.

Why not use a numerical gateway rule that looks more directly at the relevant question: Is the minority bloc large enough, is it cohesive enough, is the necessary majority crossover vote small enough, so that the minority (tending ***46** to vote cohesively) can likely vote its preferred candidate (rather than a consensus candidate) into office? See *ante,* at 1253 (SOUTER, J., dissenting) ("[E]mpirical studies confir[m] that ... minority groups' constituting less than 50% of the voting population "regularly elect their preferred candidates with the help of modest crossover by members of the majority"); see also Pildes, Is Voting–Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1529–1535 (2002) (reviewing studies showing small but reliable crossover voting by whites in districts where minority voters have demonstrated the ability to elect their preferred candidates without constituting 50% of the population in that district). We can likely find a reasonably administrable mathematical formula more directly tied to the factors in question.

To take a possible example: Suppose we pick a numerical ratio that requires the minority voting age population to be twice as large as the percentage of majority crossover votes needed to elect the minority's preferred candidate. We would calculate the latter (the percentage of majority crossover votes the minority voters need) to take account of both the percentage of minority voting age population in the district and the cohesiveness with which they vote. Thus, if minority voters account for 45% of the voters in a district and 89% of those voters tend to vote cohesively as a group, then the minority needs a crossover vote of about 20% of the majority voters to elect its preferred candidate. (Such a district with 100 voters would have 45 minority voters and 55 majority voters; 40 minority voters would vote for the minority group's preferred candidate at election time; the minority voters would need 11 more votes to elect their preferred candidate; and 11 is about 20% of the majority's 55.) The larger the minority population, the greater its cohesiveness, and thus the smaller the crossover vote needed to assure success, the greater the likelihood that the minority can ***47** elect its preferred candidate and the smaller the likelihood that the cohesive minority, in order to find the needed majority crossover vote, must support a consensus, rather than its preferred, candidate.

In reflecting the reality that minority voters can elect the candidate of their choice when they constitute less than 50% of a district by relying on a small majority crossover vote, this approach is in no way contradictory to, or even in tension with, the third *Gingles* requirement. Since *Gingles* itself, we have acknowledged that the requirement of majority-bloc voting can be satisfied even when some small number of majority voters cross over to support a minority-preferred candidate. See 478 U.S., at 59, 106 S.Ct. 2752, 92 L.Ed.2d 25 (finding majority-bloc voting where the majority group supported African–American candidates in the general election at a rate of between 26% and 49%, with an average support of one-third). Given the difficulty of obtaining totally accurate statistics about cohesion, or even voting age ****1262** population, the district courts should administer the numerical ratio flexibly, opening (or closing) the *Gingles* gate (in light of the probable merits of a case) where only small variances are at issue (*e.g.,* where the minority group is 39% instead of 40% of a district). But the same is true with a 50% number (*e.g.,* where the minority group is 49% instead of 50% of a district). See, *e.g.,* Brief for United States as *Amicus Curiae* 15.

I do not claim that the 2–to–1 ratio is a perfect rule; I claim only that it is better than the plurality's 50% rule. After all, unlike 50%, a 2–to–1 ratio (of voting age minority population to necessary nonminority crossover votes) focuses directly upon the problem at hand, better reflects voting realities, and consequently far better separates at the gateway likely

sheep from likely goats. See *Gingles, supra,* at 45, 106 S.Ct. 2752 (The § 2 inquiry depends on a " 'functional' view of the political process" and " 'a searching practical evaluation of the past and present reality' ") (quoting S.Rep. No. 97–417, p. 30, and n. 120 (1982))); *Gingles, supra,* at 94–95, 106 S.Ct. 2752 (O'Connor, J., ***48** concurring in judgment) ("[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions ... "). In most cases, the 50% rule and the 2–to–1 rule would have roughly similar effects. Most districts where the minority voting age population is greater than 50% will almost always satisfy the 2–to–1 rule; and most districts where the minority population is below 40% will almost never satisfy the 2–to–1 rule. But in districts with minority voting age populations that range from 40% to 50%, the divergent approaches of the two standards can make a critical difference —as well they should.

In a word, Justice SOUTER well explains why the majority's test is ill suited to the statute's objectives. I add that the test the majority adopts is ill suited to its own administrative ends. Better gateway tests, if needed, can be found.

With respect, I dissent.

All Citations

556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173, 77 USLW 4187, 09 Cal. Daily Op. Serv. 2838, 2009 Daily Journal D.A.R. 3408, 21 Fla. L. Weekly Fed. S 705, 51 A.L.R. Fed. 2d 709

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 We have previously illustrated this in stylized fashion:

"Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts." *Johnson v. De Grandy,* 512 U.S. 997, 1016, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

2 Of course, this does not create an entitlement to proportionate minority representation. Nothing in the statute promises electoral success. Rather, § 2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to a practical chance to compete in a roughly proportionate number of districts. *Id.,* at 1014, n. 11, 114 S.Ct. 2647. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.,* at 1020, 114 S.Ct. 2647.

3 This case is an entirely inappropriate vehicle for speculation about a more exact definition of majority-bloc voting. See *supra,* at 1254 – 1255. The political science literature has developed statistical methods for assessing the extent of majority-bloc voting that are far more nuanced than the plurality's 50% rule. See, *e.g.,* Pildes 1534–1535 (describing a "falloff rate" that social scientists use to measure the comparative rate at which whites vote for black Democratic candidates compared to white Democratic candidates and noting that the falloff rate for congressional elections during the 1990s in North Carolina was 9%). But this issue was never briefed in this case and is not before us, the respondents having stipulated to the existence of majority-bloc voting, App. to Pet. for Cert. 130a, and there is no reason to attempt to accomplish in this case through the first *Gingles* factor what would actually be a quantification of the third.

4 Compare Dept. of Commerce, Bureau of Census, 2000 Voting Age Population and Voting–Age Citizens (PHC–T–31) (Table 1–1), online at http:/ /www.census.gov/population/www /cen2000/briefs/phc-t31/index.html (as visited Mar. 5, 2009, and available in Clerk of Court's case file) (total VAP in North Carolina is 6,087,996), with *id.,* Table 1–3 (black or African–American VAP is 1,216,622).

5 Under the same logic, North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population and routinely elect the candidates of their choice without ever implicating § 2, and could do so in districts not covered by § 5 without implicating the VRA at all. The untenable implications of the plurality's rule do not end there. The plurality declares that its holding "does not apply to cases in which there is intentional discrimination against a racial minority." *Ante,* at 1246. But the logic of the plurality's position compels the absurd conclusion that the invidious and intentional fracturing of crossover districts in order to harm minority voters would not state a claim under § 2. After all, if the elimination of a crossover district can never deprive minority voters in the district of the opportunity "to elect representatives of their choice," minorities in an invidiously eliminated district simply cannot show an injury under § 2.

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United States District Court, E.D. New York.

Bruce A. BLAKEMAN, in his official capacity as County Executive of the County of Nassau; County of Nassau; Marc Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years; and Jeanine Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years, Plaintiffs,

v.

Letitia JAMES, as Attorney General of the State of New York; State of New York Office of the Attorney General; and State of New York, Defendants.

2:24-cv-1655 (NJC) (LGD)
|
Signed April 4, 2024

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OPINION AND ORDER

NUSRAT J. CHOUDHURY, District Judge:

***1** Plaintiffs Bruce A. Blakeman ("Blakeman") and Nassau County (together "County Plaintiffs"), and Marc and Jeanine Mullen (together "Individual Plaintiffs") filed a Complaint for declaratory and injunctive relief against the State of New York ("New York"), the State of New York Office of the Attorney General ("OAG"),[1] and Letitia James ("James"), in her capacity as the Attorney General of the State of New York ("NY Attorney General," collectively, "Defendants"). (Compl., ECF No. 1.) The Complaint brings a single claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–35.) Plaintiffs' claim concerns a cease-and-desist letter from the OAG to Nassau County asserting that Nassau County Executive Order 2-2024 ("Executive Order") violates the New York Human Rights Law's prohibition against discrimination on the bases of sex and gender identity and expression. (OAG Ltr., ECF No. 10-3 (citing N.Y. Exec. Law §§ 296(2), (6)).) The letter calls for the County Plaintiffs to rescind the Executive Order and produce the documents that supported its issuance, or else face further legal action by the OAG. (*Id.* at 9.) The Complaint alleges that the OAG's action to enforce the New York Human Rights Law as applied to the Executive Order violates the rights of women and girl athletes in Nassau County to equal protection under the law. (Compl. ¶¶ 35, 38–41.)

On March 7, 2024, the County Plaintiffs filed an Order to Show Cause seeking an order "temporarily restrain[ing] and enjoin[ing]" Defendants "from initiating any legal proceedings and/or actions" against Blakeman "related to [the Executive Order]." (ECF No. 10 at 2.) The County Plaintiffs' supporting brief asks for an order "staying AG James' demand for document production, preventing her from taking further legal action and declaring Executive Order Number 2-2024 valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5, ECF No. 10-5.) On March 11, 2024, following the reassignment of this case to this Court's docket, the County Plaintiffs filed a proposed Temporary Restraining Order ("TRO") reiterating these requests for a temporary restraining order and preliminary injunction. (*See* Proposed TRO, ECF No. 17 at 3–4.) The Court construes the Order to Show Cause as the County Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction ("TRO/PI Motion").[2]

***2** The Court has reviewed the parties' submissions on the fully briefed TRO/PI Motion: (1) the Complaint (ECF No. 1); (2) the County Plaintiffs' Order to Show Cause and Proposed Temporary Restraining Order (ECF Nos. 10, 17); (3) the County Plaintiffs' Memorandum of Law (ECF No. 10-5); (4) the Affidavit of Bruce A. Blakeman (ECF No. 10-4); (5) the Declaration of County Plaintiffs' counsel,

Victoria LaGreca, and attached exhibits (ECF Nos. 10-1–10-3); (6) the Defendants' opposition brief (ECF No. 18); and (7) the County Plaintiffs' reply brief (ECF No. 21). The Individual Plaintiffs did not join in the County Plaintiffs' TRO/PI Motion. (*See* ECF Nos. 10, 17.) Although the Court provided the Individual Plaintiffs an opportunity to present their position on the TRO/PI Motion, they elected not to do so.[3]

At a conference with the Court on March 12, 2024, the County Plaintiffs requested an expedited resolution of the TRO Motion. (Conf., Mar. 12, 2024.) No party requested discovery or an evidentiary hearing on the PI Motion, whether during the conference or in their submissions to the Court. (*Id.*; *see also* ECF Nos. 1, 10, 10-1–10-5, 17, 18, 21.)

The County Plaintiffs' TRO/PI Motion falls far short of meeting the high bar for securing the extraordinary relief of a temporary restraining order from this Court. Plaintiffs' claims are nonjusticiable for multiple reasons: (1) Eleventh Amendment sovereign immunity bars the declaratory and injunctive relief claim against Defendants New York and the OAG, as well as any claim for retrospective declaratory relief against Defendant James in her official capacity; (2) the County Plaintiffs lack capacity to bring the equal protection claim under Rule 17(b), Fed. R. Civ. P., and New York's capacity-to-sue rule; and (3) the record does not establish Plaintiffs' standing to bring the equal protection claim pled in the Complaint. Moreover, the County Plaintiffs' submission fails to demonstrate irreparable harm—a critical prerequisite for the issuance of a temporary restraining order. For the reasons addressed below, the Court denies the County Plaintiffs' TRO Motion and reserves decision on the PI Motion following the resolution of Defendants' Motion to Dismiss (ECF No. 20).

BACKGROUND

The NY Attorney General is New York's chief legal officer. *See* N.Y. Const. art. V, § 4; N.Y. Exec. Law § 63(1). Under New York law, the Attorney General:

> [p]rosecut[es] and defend[s] all actions and proceedings in which the state is interested, and ha[s] charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state ....

N.Y. Exec. Law § 63(1). The New York Legislature has granted the Attorney General a central role in ensuring the consistent application and enforcement of laws enacted by the legislature, including New York's anti-discrimination laws. The New York Executive Law empowers the Attorney General to "[b]ring and prosecute or defend upon request of the commissioner of labor or the state division of human rights, any civil action or proceeding ... necessary for effective enforcement of the laws of this state against discrimination ...." *Id.* § 63(9). It also grants the Attorney General authority to prosecute people for criminal violations of state anti-discrimination laws in certain circumstances, *id.* § 63(10), to file a complaint of Human Rights Law violations, *id.* § 297(1), and to play a role in the investigation and handling of Human Rights Law complaints, *id.* § 297. The New York Civil Rights Law requires notice to be served upon the Attorney General prior to the commencement of any private litigation alleging the violation of state civil rights laws. N.Y. Civ. Rts. Law § 40-d.

***3** On February 22, 2024, Blakeman signed into law Executive Order 2024-2, titled "An Executive Order for Fairness for Women and Girls in Sports." (E.O., ECF No. 10-2.) The Executive Order relates to the process for securing a permit to use Nassau County Parks property[4] for "organizing a sporting event or competition" and does three main things. (E.O. at 1.) First, it requires that any permit applicant seeking to use Nassau County Parks property for a sporting event or competition "must expressly designate" whether the activity relates to (1) "[m]ales, men, or boys," (2) "[f]emales, women, or girls," or (3) "[c]oed or mixed, including both males and females" "based on [participants'] biological sex at birth." (*Id.*) Second, the Executive Order prohibits the Nassau County Department of Parks, Recreation and Museums (the "Parks Department") from issuing a permit for any sporting event or competition designated for "females, women, or girls" that allows "biological males" to participate, but allows the Parks Department to issue permits for sporting events or competitions designated for "males, men, or boys" that include participation by "biological females." (*Id.* at 1–2.)[5] Third, the Executive Order defines "gender" as "the individual's biological sex at birth" and permits the Parks Department to consider a birth certificate as identification of a participant's sex only when the birth certificate was "filed at or near the time" of the participant's birth. (*Id.* at 2.)

The plain text of the Executive Order prohibits transgender[6] women and girls, as well as any women and girls' sports teams that include them, from participating in women and

girls' sporting events on Nassau County Parks property. (*Id.* at 1–2.) Transgender women and girls are only permitted to participate in sporting events designated as "male" or "coed." (*Id.*) By contrast, the plain text of the Executive Order permits transgender men and boys to participate in any sporting events on Nassau County Parks property, whether the events are designated as "female," "male," or "coed." (*Id.* at 2.) The Executive Order does not address people who may identify as intersex or nonbinary. (*See* Defs.' Br. at 4.)

***4** On March 1, 2024, the OAG's Civil Rights Bureau sent a letter to Blakeman indicating that the office had reviewed the Executive Order and concluded that it is "in clear violation of New York State anti-discrimination laws." (OAG Ltr. at 1, ECF No. 10-3.) In the letter, the OAG demands rescission of the Executive Order within five business days and that Blakeman "immediately produce any and all documents constituting the record supporting [his] decision to issue the Order." (*Id.* at 3.) The OAG also states that "[f]ailure to comply with this directive may result in further legal action by the OAG." (*Id.*)

According to the March 1, 2024 letter, facilities covered by the Executive Order "rang[e] from general playing fields in parks to baseball, football, and soccer fields, basketball and tennis courts, indoor and outdoor swimming pools, as well as ice rinks and shooting ranges" and "would apply to approximately 100 venues." (*Id.* at 2.) The OAG asserts that the immediate effect of the Order is "to force sports leagues to make an impossible choice: discriminate against transgender women and girls, in violation of New York law, or find somewhere else to play." (*Id.*) It argues that the Executive Order violates the New York Human Rights Law's prohibition against discrimination on the bases of "sex" and "gender identity or expression" in places of public accommodation, N.Y. Exec. Law §§ 292(9), 296(2), and its prohibition against " 'compel[ling]' others to discriminate in ways that will violate the Human Rights Law" under N.Y. Exec. Law § 296(6). (OAG Ltr. at 2.) The OAG further argues that the Executive Order violates the New York Civil Rights Law, which provides that "no person shall be subjected to any discrimination in [their] civil rights" based on "sex ... [or] gender expression or identity," N.Y. Civ. Rts. Law § 40-c, as well as the Equal Protection Clause of the New York State Constitution. (OAG Ltr. at 2–3.)

Rather than respond to the letter, Plaintiffs filed suit in this Court on March 5, 2024. (*See* Compl.) The Complaint pleads a single cause of action alleging that the OAG's March 1, 2024 letter, as well as any other actions by Defendants "to prevent enforcement of" the Executive Order, violates the rights of "biological girls and women" under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–43.) Plaintiffs bring this claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, but do not cite 42 U.S.C. § 1983 ("Section 1983") or any other basis for the cause of action. (*Id.*) The Complaint alleges that the Executive Order advances the important government interest of "ensuring equality in women's athletics," and that the OAG's position "effectively vitiates biological females' right to equal opportunities in athletics as well as the right to a safe playing field by exposing biological females to the risk of injury by transgender women (i.e., biological males) as well as unfair competitive advantage." (*Id.* ¶¶ 29, 38.) It alleges that the New York Human Rights Law "is unconstitutional" as applied to the Executive Order because it purportedly "elevates transgender women to a level not recognized by Federal law in the athletics context all to the detriment of biological girls and women." (*Id.* ¶ 40.) Plaintiffs seek relief in the form of: (1) a declaration that Defendants' application of the New York Human Rights Law against the Executive Order violates the Equal Protection Clause;[7] (2) a declaration that the Executive Order "is valid under the United States Constitution, Federal law, and state law"; (3) a permanent injunction preventing "Defendants from taking any action to prevent" the County Plaintiffs "from implementing and enforcing" the Executive Order; and (4) costs, disbursements, reasonable attorney fees, and any further relief. (Compl. at 12.)

***5** On March 7, 2024, the County Plaintiffs filed the TRO/PI Motion (ECF No. 10), seeking to bar Defendants from "taking further action" relating to the Executive Order, including by "initiating any legal proceedings and/or actions" against the County Plaintiffs. (Cnty. Pls.' Br. at 27; TRO/PI Mot. at 2.) The County Plaintiffs' supporting brief also requests an order "staying AG James' demand for document production ... and declaring [the Executive Order] valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5.)[8] Blakeman attests that, without immediate injunctive relief, Nassau County "will suffer immediate and irreparable injury, loss, and damage in that women and girls in Nassau County will be discriminated against and their constitutional rights under the United States Constitution will be violated." (Blakeman Aff. ¶ 3, ECF No. 10-4.) According to Blakeman, without the Executive Order:

> [W]omen and girls will not receive equal and fair opportunities to obtain recognition and accolades, college scholarships, and numerous other long-term benefits that result from participating and competing in athletic endeavors; women and girls will not have access to a supportive and safe environment for the purpose of engaging in sports; and biological males will have an unfair advantage over women and girls in sports.

(*Id.* ¶ 4.)

The Court permitted Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion by March 22, 2024. (Elec. Order, Mar. 23, 2024.) Defendants opposed the Motion (Defs.' Br.), but the Individual Plaintiffs did not provide a brief or factual submissions addressing any position on the Motion (*see* Elec. Order, Mar. 23, 2024). The Court further permitted the County Plaintiffs the opportunity to submit a reply brief addressing the arguments raised in Defendants' opposition brief by March 28, 2024. (*Id.*; Elec. Order, Mar. 26, 2024.) The County Plaintiffs filed a timely reply. (Cnty. Pls.' Reply, ECF No. 21.)

The County Plaintiffs have not provided any factual submissions addressing how the Executive Order is implemented in practice. Their brief asserts that permit applicants must "merely indicate whether said [athletic] competition is male, female, or coed and ... supply a copy of the applicants['] 'athlete participation policy.' " (Cnty. Pls.' Br. at 6.) The "athlete participation policy" has not been introduced into evidence, nor have the County Plaintiffs provided any sworn statements about what information applicants must provide on this document to ensure compliance with the terms of the Executive Order or how applicants procure that information from their participants. The record is further silent as to whether any athletic/sports entity has applied for a permit to use Nassau County Parks property since the enactment of the Executive Order. The County Plaintiffs' brief asserts that "[n]o permit has been denied since the County's Executive Order was executed." (*Id.*)

VENUE AND JURISDICTION

Venue is proper under 28 U.S.C. § 1391(b)(2) because, as described above, a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

There is no dispute that this Court has personal jurisdiction over Defendants. New York State and the OAG are clearly state entities and James is sued in her role as NY Attorney General—a state official.

Plaintiffs assert that this Court has federal question jurisdiction over Plaintiffs' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Fourteenth Amendment pursuant to 18 U.S.C. § 1331. (Compl. ¶¶ 12, 34–35.) Defendants challenge Plaintiffs' standing to bring this claim under Article III of the U.S. Constitution. (Defs.' Br. at 13–14.) "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 283 (2d Cir. 2023) (quotation marks omitted). As discussed in detail below, this Court lacks subject matter jurisdiction because Plaintiffs lack standing to bring the sole claim pled in the Complaint (Compl. ¶¶ 33–34). *Bohnak*, 79 F.4th at 283; *see infra*, Section I.C.

STANDARD OF REVIEW

*6 The Second Circuit has long established that a party seeking a preliminary injunction must show three things: (1) irreparable harm in the absence of an injunction pending resolution of the action, (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party, and (3) that a preliminary injunction is in the public interest. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n*, 883 F.3d 32, 37 (2d Cir. 2018). The Second Circuit has "consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme," in lieu of the lower standard requiring a showing only of serious questions on the merits and a balance of hardships decidedly favoring the moving party. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 279 n.13 (2d Cir. 2021), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *N. Am. Soccer League*, 883 F.3d at 37; *see, e.g.*, *Gazzola v. Hochul*, 88 F.4th 186, 194 (2d Cir. 2023) (requiring showing of a likelihood of success on the merits on preliminary injunction motion against New York commercial regulations on firearms and ammunition sales and related state licensing scheme and background-check and training requirements), *petition for cert. filed*, No. 23-995 (Mar. 12, 2024). Courts apply the same standard when considering an application for a TRO. *See e.g.*, *Dukes v. Cold Spring Harbor Cent. Sch. Dist. Bd. of Educ.*, No.

20CV4532JMAST, 2021 WL 308341, at *4 (E.D.N.Y. Jan. 29, 2021); *Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 8200607, at *1 (S.D.N.Y. Jan. 8, 2021).

The Second Circuit has made clear that when a party seeks "mandatory" rather than "prohibitory" preliminary relief, "the likelihood-of-success and irreparable-harm requirements become more demanding still, requiring that the plaintiff show a *clear or substantial* likelihood of success on the merits and make a *strong showing* of irreparable harm." *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, No. 23-690, 2024 WL 1145347, at *3 (2d Cir. Mar. 18, 2024) (citing *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)) (quotation marks and citations omitted). A mandatory temporary restraining order typically requires the non-movant to take some action, whereas a prohibitory temporary restraining order "typically requires the non-movant to refrain from taking some action." *Id.* "This higher standard is particularly appropriate when a plaintiff seeks a preliminary injunction against a government body ...." *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (citations omitted); *see also C.C. v. New York City Dep't of Educ.*, No. 22-0459, 2023 WL 2545665, at *2 (2d Cir. Mar. 17, 2023) (recognizing that this higher standard applies to a request for a mandatory injunction against governmental action) (citing *Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021)). Determining whether requested preliminary relief is mandatory or prohibitory "is sometimes unclear":

> In borderline cases, essentially identical injunctions can be phrased either in mandatory or prohibitory terms. We have therefore explained that [p]rohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. In this context, the status quo is really the status quo *ante* – that is, the last actual, peaceable[,] uncontested status which preceded the pending controversy.

Daileader, 2024 WL 1145347, at *3 (citing *N. Am. Soccer League*, 883 F.3d at 36 n.4, 37 n.5) (quotation marks and citations omitted).

The County Plaintiffs contend, without explanation, that they may secure a temporary restraining order by meeting the lowest standard, which requires showing only "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor." (Cnty. Pls.' Br. at 23.) Defendants argue that the highest standard applicable to mandatory injunctions—requiring a showing of a "clear or substantial likelihood of success on the merits"—applies because the requested relief "will affect government action taken in the public interest pursuant to a statutory or regulatory scheme." (Defs.' Br. at 6.) Defendants do not explicitly address, however, whether the requested preliminary relief is mandatory or prohibitory in nature.

***7** The lesser "serious questions" standard is inapplicable here because the requested temporary restraining order will affect the OAG and James' enforcement of the New York Human Rights Law, which constitutes "government action taken in the public interest pursuant to a statutory or regulatory scheme." *We the Patriots USA, Inc.*, 17 F.4th at 279 n.13; *see* N.Y. Exec. Law § 292 *et seq.*; *id.* § 63(1). The Court does not resolve at this time, however, whether the TRO/PI Motion seeks mandatory or prohibitory relief. The status quo *ante*—the last actual, peaceable, uncontested status that preceded the pending controversy—was shortly after Blakeman issued the Executive Order and before the OAG issued the March 1, 2024 letter calling for the Executive Order's rescission and requesting the documents supporting its issuance. At that time, James and the OAG could exercise discretion under New York law to bring an enforcement action against the County Plaintiffs under the New York Human Rights Law. *See* N.Y. Exec. Law § 63(1). On the one hand, the County Plaintiffs' requested temporary restraining order is prohibitory because it would require the "non-movant to refrain from taking some action"—here, OAG and James' action to enforce state anti-discrimination laws. *Daileader*, 2024 WL 1145347, at *3. On the other hand, the requested temporary restraining order is mandatory because it would upend the status quo in which the New York Legislature has granted the NY Attorney General broad discretion to enforce the state's anti-discrimination laws. *See* N.Y. Exec. Law § 63. There is an additional question about whether the requested order may "provide the movant with substantially all the relief sought" and whether "that relief cannot be undone even if the defendant prevails at a trial on the merits," factors that weigh in favor of framing the requested TRO as mandatory. *Yang v. Kosinski*, 960 F.3d 119, 127–28 (2d Cir. 2020).

The Court need not resolve these questions at this time because, as explained in this opinion, the County Plaintiffs fail to meet the lower "likelihood of success on the merits" standard applied to a motion for a temporary restraining order seeking prohibitory relief against government actions taken in the public interest pursuant to a statutory or regulatory scheme. *See, e.g.*, *We the Patriots USA, Inc.*, 17 F.4th at 279; *Gazzola*, 88 F.4th at 194.

DISCUSSION

The County Plaintiffs fail to meet the standard for securing the "extraordinary remedy" of a temporary restraining order for two principal reasons. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) ("[A] preliminary injunction is an extraordinary remedy never awarded as of right.") (quotation marks omitted); *Gazzola*, 88 F.4th at 193–94 (same). First and foremost, the County Plaintiffs' TRO Motion fails to demonstrate a likelihood of success on the merits of the sole equal protection claim pled in the Complaint. Based on the record before the Court, the claim is nonjusticiable under the doctrine of Eleventh Amendment sovereign immunity, the application of Rule 17(b) and New York's capacity-to-sue rule, and the requirements of Article III standing. Second, the County Plaintiffs' submissions fail to show that they will suffer irreparable harm without the requested temporary restraining order.

I. Likelihood of Success on the Merits

The Plaintiffs' single claim for declaratory and injunctive relief under the Equal Protection Clause suffers from defects that render it nonjusticiable. The Eleventh Amendment affords New York and the OAG sovereign immunity from Plaintiffs' claim for injunctive and declaratory relief and bars any claim for retrospective declaratory relief against James. Additionally, the County Plaintiffs lack the capacity to sue all Defendants under Rule 17(b), Fed. R. Civ. P., and New York law. Furthermore, the record does not establish that any of the Plaintiffs—whether Nassau County, Blakeman, or the Individual Plaintiffs—have demonstrated an actual and imminent injury that is concrete and particularized as required for Article III standing to bring the equal protection claim pled in the Complaint.

A. Eleventh Amendment Sovereign Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' claim for injunctive and declaratory relief against New York and the OAG, as well as any claim for "retroactive relief" against James for conduct taken in her official capacity as the NY Attorney General. (Defs.' Br. at 8–9.) The County Plaintiffs fail to address the Eleventh Amendment in their opening brief and to respond to any of Defendants' arguments in their reply brief in support of the TRO Motion. (*See generally* Defs.' Br. at 8–9; Cnty. Pls.' Reply.) Defendants are correct. The Eleventh Amendment bars almost all aspects of Plaintiffs' equal protection claim, with the sole exception of an equal protection claim for injunctive and prospective declaratory relief against James in her official capacity as the NY Attorney General.[9]

***8** The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Though not set forth in the text, the Eleventh Amendment also bars "suits in federal court against a state brought by that state's own citizens." *Mary Jo C. v. New York State & Loc. Ret. Sys.*, 707 F.3d 144, 151 (2d Cir. 2013). Eleventh Amendment sovereign immunity also applies to suits by a municipality—such as Nassau County—against a state. *See Monroe Cnty. v. State of Fla.*, 678 F.2d 1124, 1131 (2d Cir. 1982) (holding that a New York county bringing suit against Florida is a "Citizen of another State" within the meaning of the Eleventh Amendment), *cert. denied*, 459 U.S. 1104 (1983); *see also Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (holding that the Eleventh Amendment bars a county's cross-claim against New York for indemnification), *reh'g denied*, 471 U.S. 1062 (1985). Eleventh Amendment sovereign immunity applies not just to lawsuits filed in federal court against states themselves, but also to "certain actions against state agents and instrumentalities." *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)); *see also Mary Jo C.*, 707 F.3d at 151–52 (same). An entity "asserting Eleventh Amendment immunity ... bear[s] the burden of demonstrating entitlement." *Leitner*, 779 F.3d at 134. "[T]he question is whether the state instrumentality is independent or whether it is an 'arm of the state.' " *Id.*; *see, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009) (holding that the New York State Unified Court System is an "arm of the State" entitled to Eleventh Amendment sovereign immunity). The Second Circuit has applied two different tests to answer this question. *Leitner*, 779 F.3d at 134–35, 137.[10] Both tests are ultimately guided by what the Supreme Court has recognized are the Eleventh Amendment's "twin reasons for being": the need to "preserv[e] the state's treasury and protect[ ] the integrity of the state." *Id.* at 134 (citing *Hess v. PATH*, 513 U.S. 30, 47–48 (1994)).

Entities shielded from suit by the Eleventh Amendment "may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogate[d] the states' Eleventh Amendment immunity

when acting pursuant to its authority under Section 5 of the Fourteenth Amendment." *Gollomp*, 568 F.3d at 366 (quotation marks omitted). The Eleventh Amendment thus "generally bars suits in federal court" against "non-consenting states." *Leitner*, 779 F.3d at 134. This bar applies to federal court suits against a state and its agents and instrumentalities "regardless of the nature of the relief sought." *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023), *cert. denied*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) ("[I]f a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting *any relief* on that claim.") (emphasis supplied). Accordingly, states and their agents and instrumentalities are immune from suits seeking monetary damages and injunctive relief, *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001) (citations omitted), as well as declaratory relief, *Ashmore v. Prus*, 510 F. App'x 47, 48 (2d Cir. 2013) (citing *Pennhurst*, 465 U.S. at 100–01); *Manners v. New York*, 175 F.3d 1008, 1999 WL 96136 at *1 (2d Cir. 1999) (summary order) (citing *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993)).

***9** Notwithstanding the Eleventh Amendment's bar to federal court suits against states and their agents and instrumentalities, a plaintiff may sue a state official acting in their official capacity "for prospective, injunctive relief from violations of federal law" under the doctrine established by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908). *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 94 (2d Cir. 2007). The *Ex parte Young* exception applies to a claim against a state official when the "complaint (a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized as prospective." *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (citing *Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)) (quotation marks omitted). The *Ex parte Young* exception does not apply if a plaintiff seeks declaratory relief that "would have the same effect as an award of damages against the state." *Williams v. Marinelli*, 987 F.3d 188, 197 (2d Cir. 2021) (citing *Green v. Mansour*, 474 U.S. 64, 73 (1985)); *see also Bythewood v. New York*, No. 22-2542-CV, 2023 WL 6152796, at *1 (2d Cir. Sept. 21, 2023) ("Retrospective declaratory relief cannot otherwise serve as an end run around the Eleventh Amendment's bar on retrospective awards of monetary relief.") (citing *Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000)) (quotation marks omitted).

1) Plaintiffs' Claim against New York and the OAG

The Eleventh Amendment precludes Plaintiffs' claim against New York and the OAG because New York has not waived its Eleventh Amendment immunity to claims brought under the Fourteenth Amendment's Equal Protection Clause and Congress has not abrogated that immunity. *Gollomp*, 568 F.3d at 366; *Barone v. Laws.' Fund for Client Prot.*, 2023 WL 1975783, at *2 (2d Cir. 2023).

First, the Eleventh Amendment applies to both New York and the OAG. As one of the "United States," New York is squarely covered by the plain text of the Eleventh Amendment. U.S. Const. Amend. XI. The OAG also falls within the Amendment's reach because it "is unquestionably an arm of the State of New York for purposes of Eleventh Amendment immunity." *Giordani v. U.S. Dep't of Just.*, No. 22-CV-642 (AMD) (LB), 2022 WL 17488494, at *6 (E.D.N.Y. Dec. 7, 2022) (citation omitted), *appeal dismissed* (Nov. 6, 2023); *see also Butler v. New York State Dep't of L.*, 211 F.3d 739, 746 (2d Cir. 2000) (affirming dismissal of employment discrimination claim against the OAG (referred to as the "New York State Department of Law") as barred by Eleventh Amendment sovereign immunity); *Mitchell v. New York*, No. 23-705, 2024 WL 319106, at *2 (2d Cir. Jan. 29, 2024) (holding that "no relief, either legal or equitable, is available against ... the New York Attorney General" because it is entitled to Eleventh Amendment immunity); *Smith v. United States*, 554 F. App'x 30, 31 (2d Cir. 2013) (affirming district court's dismissal of a suit against New York and the NY Attorney General as barred by the Eleventh Amendment); *Petreykov v. Vacco*, 159 F.3d 1347 (2d Cir. 1998) (same); *Rivera v. United States Citizenship & Immigr. Servs.*, No. 19-CV-3101, 2020 WL 4705220, at *9 (S.D.N.Y. Aug. 12, 2020) (collecting district court decisions holding that the Eleventh Amendment bars claims against the OAG).[11]

***10** Second, Congress has not abrogated the States' Eleventh Amendment immunity as to Plaintiffs' Fourteenth Amendment claim. The Complaint appears to assert a claim under the Declaratory Judgment Act and the Fourteenth Amendment's Equal Protection Clause without identifying a valid cause of action under which Plaintiffs bring this claim. (*See generally* Compl.)[12] Even if the Court were to liberally construe the Complaint to assert a Fourteenth Amendment claim pursuant to 42 U.S.C. § 1983, it is well established that "Congress did not abrogate the state's Eleventh Amendment

immunity by enacting 42 U.S.C. § 1983." *Barone*, 2023 WL 1975783, at *2 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)).

Third, there is no indication that New York has waived its immunity by "voluntarily invok[ing] federal court jurisdiction, or else ... mak[ing] a clear declaration that it intends to submit itself to federal court jurisdiction." *Kelly v. New York State Unified Ct. Sys.*, No. 21-1633, 2022 WL 1210665, at *2 (2d Cir. Apr. 25, 2022) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999)) (brackets omitted); *see also, e.g.*, *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 37–38 (2d Cir. 1977) (finding that clause in interstate charter permitting New York to "sue and be sued," was not a clear declaration that New York intended to waive sovereign immunity).

Fourth, the Eleventh Amendment applies to the injunctive and declaratory relief Plaintiffs seek through their equal protection claim against New York and the OAG, as well as the specific relief they seek on the TRO/PI Motion. Plaintiffs' requests for a temporary restraining order, preliminary injunction, and permanent injunction all include requests for injunctive relief that is squarely barred by the Eleventh Amendment. *See McGinty*, 251 F.3d at 91 (holding that the Eleventh Amendment bars claims for "injunctive relief" against nonconsenting states).[13] Plaintiffs' request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Fourteenth Amendment and a declaration that the Executive Order is lawful under federal and state law concern declaratory relief that is also barred by the Eleventh Amendment. *See Ashmore*, 510 F. App'x at 48; *Manners*, 1999 WL 96136 at *1.

***11** Accordingly, Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG are barred by Eleventh Amendment sovereign immunity.

2) Claims against Defendant James, in her Capacity as NY Attorney General

Defendants argue that any claims for "retroactive relief" against Defendant James acting in her official capacity are also barred by Eleventh Amendment sovereign immunity. (Defs.' Br. at 9.) This raises the question of whether any part of Plaintiffs' claim against James withstands Defendants' invocation of immunity.

The Complaint by its caption sues James "as attorney General of the State of New York" and its allegations solely address conduct by James' staff at the OAG, both of which suggest that Plaintiffs sue James only in her official capacity, rather than in her individual capacity. (*See* Compl. at 1.) The Complaint's request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Equal Protection Clause could be construed to include a request for a declaration that the OAG's March 1, 2024 letter violated the Equal Protection Clause. (*See* Compl. ¶ 41 (alleging that "[i]n fact, the cease-and-desist order violates the constitutional rights of biologically [sic] girls and women who are a federally recognized protected class")). The Eleventh Amendment bars this demand for retrospective declaratory relief against James in her official capacity. *Williams*, 987 F.3d at 197; *Green*, 474 U.S. at 73; *Bythewood*, 2023 WL 6152796, at *1.

At least a portion of the requested declaratory relief pled against James, however, is forward looking. That portion seeks to establish that the Executive Order is lawful going forward and that the New York Human Rights Law's provisions prohibiting discrimination on the bases of sex and gender identity and expression are invalid. These aspects of Plaintiffs' declaratory relief claim against James, as well as the request for an injunction barring James from taking any action to prevent implementation of the Executive Order, fall within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Seneca Nation*, 58 F.4th at 672 n.39; *Rowland*, 494 F.3d at 95–98. As discussed below, however, those aspects of Plaintiffs' declaratory relief claim against James are nonjusticiable for other reasons.

B. The County Plaintiffs' Capacity to Sue

Defendants argue that both Nassau County and Blakeman, who sues in his official capacity as the Nassau County Executive, lack the capacity to sue Defendants for the equal protection claim pled in the Complaint.

Rule 17(b) of the Federal Rules of Civil Procedure governs the capacity of an entity to bring a claim in federal court. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 136 (E.D.N.Y. 2013), *aff'd* 868 F.3d 104 (2d Cir. 2017). "Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing." *Sonterra Cap. Master Fund, Ltd. v. Barclays*

Bank PLC, 403 F. Supp. 3d 257, 267 (S.D.N.Y. 2019). As relevant here, the "[c]apacity to sue or be sued is determined ... by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3); *Orraca v. City of New York*, 897 F. Supp. 148, 152 (S.D.N.Y. 1995) (noting that under Rule 17(b), "the capacity of a governmental entity to sue or be sued is a question of state law"); *see, e.g.*, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63–64 (2d Cir. 2017) (applying New York law to determine whether a public benefit corporation had the capacity to challenge a New York claim-revival statute under the New York Constitution). "[A] party must maintain its capacity to sue throughout litigation, and lack of capacity is grounds for dismissal." *Sonterra*, 403 F. Supp. 3d at 267 (quotation marks and citation omitted). If not raised by motion, a defense of lack of capacity to sue "can be waived." *City of New York v. State of New York*, 86 N.Y.2d 286, 292 (1995).

***12** New York follows the "traditional" capacity-to-sue rule, according to which "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York*, 86 N.Y.2d at 289; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63. This rule "flows" from the recognition that "municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York*, 86 N.Y.2d at 289. The Second Circuit has recognized that "[t]his rule is also a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63 (citing *City of New York*, 86 N.Y.2d at 296). Thus, New York counties "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York*, 86 N.Y.2d at 290. "Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent." *Id.* at 291.[14]

The New York Court of Appeals recognizes only four limited exceptions to the general rule that municipal corporate entities and their officers lack capacity to mount constitutional challenges to State action and legislation:

> (1) [where there is] an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.

City of New York, 86 N.Y.2d at 291–92 (quotation marks and citations omitted); *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63–64. The New York Court of Appeals has emphasized that these four exceptions are "narrow." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 387 (2017). Thus, the capacity-to-sue rule has been applied to bar:

> public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, laws mandating that counties make certain expenditures, state land use regulations and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines.

Id. (citations to New York Court of Appeals decisions omitted).

Defendants have timely raised the County Plaintiffs' lack of capacity to sue in their opposition to the TRO/PI Motion and in a timely filed Motion to Dismiss the Complaint. (*See* Defs.' Br. at 9; Defs.' Mem. Supp. Mot. Dismiss at 9, ECF No. 20-1.) Under well-established New York law, both Nassau County and Blakeman lack the capacity to sue Defendants for the sole claim pled in the Complaint. Plaintiffs explicitly seek a ruling from this Court that Defendants violate the rights of women and girl athletes to equal protection by applying state anti-discrimination laws to the Executive Order. (Compl. ¶¶ 35–41; *id.* at 12.) Blakeman attests that he and Nassau County bring this suit to vindicate the rights of women and girls in Nassau County. (Blakeman Aff. ¶¶ 3–4.) As a subdivision and creation of Defendant New York, Nassau County lacks the authority to bring such a claim "contest[ing] the actions of [its] principal or creator affecting [it] in [its] governmental capacity or as representatives of [its] inhabitants." *City of New York*, 86 N.Y.2d at 290. Because Blakeman sues in his role as Nassau County's top official, he too lacks the authority to

bring such a claim. *See id.* at 291 ("Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent.").

***13** The County Plaintiffs fail to show that any of the four limited exceptions to New York's capacity-to-sue rule apply to their claim. First, they do not identify any express statutory language or legislative history showing that the New York Legislature intended to confer upon a county or a county executive the capacity to sue Defendants under the Fourteenth Amendment for any type of relief, much less the specific relief sought in the Complaint. *See e.g.*, *City of New York*, 86 N.Y.2d at 289 (holding that the New York capacity-to-sue doctrine barred an equal protection claim by New York City, its Mayor, and other city entities against New York State and "various State officials" for public school funding issues where there was no "any express statutory language or legislative history" showing "capacity to bring suit challenging State legislation").[15]

This case does not trigger the second exception to New York's capacity-to-sue rule because the Plaintiffs do not show that the challenged provisions of the New York Human Rights Law adversely affect Nassau County's "proprietary interest in a specific fund of moneys." *City of New York*, 86 N.Y.2d at 287. There is no argument, much less a showing, that Plaintiffs' claims concern any Nassau County proprietary interest in any monetary fund.

The County Plaintiffs argue that the third exception to New York's capacity-to-sue rule—the "home rule" exception—applies to their Fourteenth Amendment equal protection claim because the New York Constitution's home rule provision "provides protections to local governments more extensive than those in many other states," the "laws enacted and adopted by the Nassau County Legislature carry the weight of state law," and that body delegated to the County Executive the authority to develop policies and procedures for the issuance of permits to use Nassau County Park property. (Cnty. Pls.' Reply at 2–3.) This argument is unpersuasive.

The New York Court of Appeals first recognized the home rule exception in *Town of Black Brook v. State*, 41 N.Y.2d 486 (1977), finding "a limited exception" to the rule that a municipality cannot attack "state legislative action affecting its powers" where the "local government's claim is based on one of the [home rule] protections of article IX [of the New York Constitution]." *Id.* at 487–89. This "limited exception" applies only to a municipality's claim that a state statute violates Article IX of the New York Constitution. *See id.* at 489 (noting that the home rule exception applies "when a home rule challenge is brought"); *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 758 (2011) (affirming the lower court's ruling "that the municipal petitioners lack capacity to sue on all claims other than that alleging a violation of their home rule powers" under "article IX of the N.Y. Constitution"), *appeal dismissed* 17 N.Y.3d 947 (2011), *lv. denied* 18 N.Y.3d 806 (2012); *Town of Verona v. Cuomo*, 136 A.D.3d 36, 41 (2015) (noting that the home rule exception "applies when a municipality's claim is based upon a violation of its home rule powers").[16]

***14** Here, the home rule exception does not apply because the Complaint does not plead a claim that the New York Human Rights law, as applied to the Executive Order, violates the home rule provision of the New York Constitution. *See New York Blue Line Council*, 86 A.D.3d at 759 (2011) (applying the home rule exception to hold that municipal entities only had capacity to sue state agency under article IX of the NY. Constitution, but not to bring other claims); *Town of Black Brook*, 41 N.Y.2d at 489 (the home rule exception applies "when a home rule challenge is brought"). The sole claim set forth in the Complaint concerns an alleged violation of the Equal Protection Clause and the Declaratory Judgment Act. (Compl. ¶¶ 33–43.) Without providing any legal authority, the County Plaintiffs appear to argue that the home rule exception permits a municipality and a municipal official to sue state defendants for claims *other than* an alleged violation of the home rule protections of article IX of the New York Constitution. (*See* Reply Br. at 2–3). This Court will not expand the home rule exception beyond the contours laid out by New York courts. Based on the record before the Court, the home rule exception is inapplicable to this case and the County Plaintiffs lack capacity to sue Defendants for violation of the Fourteenth Amendment's Equal Protection Clause and the Declaratory Judgment Act.

Finally, the fourth exception to the New York capacity-to-sue rule, which the County Plaintiffs invoke on reply, does not apply. (*Id.*) The record does not establish that any action by Defendants to enforce the New York Human Rights Law against the Executive Order would compel either Nassau County or Blakeman "to violate a constitutional proscription." *City of New York*, 86 N.Y.2d at 292. "New York courts have interpreted constitutional ... proscriptions to be something expressly forbidden ...." *Merola v. Cuomo*, 427 F. Supp. 3d 286, 292 (2019). The County Plaintiffs broadly argue that rescission of the Executive Order would "allow[ ]

transgender females (biological males) to play sports with biological females, thereby violating the constitutional rights of women as a protected class" and that rescission of the Executive Order would "violate the rights afforded to [women] by Title IX." (Cnty. Pls.' Reply at 2.) The County Plaintiffs' claim that rescission of the Executive Order would lead to Title IX violations is confusing and out of place because that statute applies to educational institutions, and the County Plaintiffs concede that Title IX does not apply to any sporting and athletic endeavors on Nassau County Parks property. (Cnty. Pls.' Br. at 7 n.1.) The County Plaintiffs' assertion that invalidation of the Executive Order would compel them to violate the equal protection rights of women and girls is also unpersuasive. There is no record evidence that the County Plaintiffs would be forced to violate the Equal Protection Clause's prohibition against intentional discrimination with respect to any individual or group if Nassau County were to revert to the procedures in place prior to enactment of the Executive Order for evaluating and granting permits to use Nassau County Parks facilities. *See Howard v. City of New York*, 602 F. App'x 545, 547 (2d Cir. 2015) ("[T]he Equal Protection Clause[ ] only prohibits intentional ... discrimination.") (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000)). Indeed, the County Plaintiffs' argument suggests that prior to the Executive Order's enactment, the County Plaintiffs were violating the rights of women and girls by not having such a permitting process in place.

C. Standing

Plaintiffs' equal protection claim boils down to the argument that the OAG's application of the New York Human Rights Law's prohibitions against discrimination on the bases of gender identity and expression to the Executive Order will cause violations of women and girls' rights under the Equal Protection Clause of the Fourteenth Amendment. (*See* Compl. ¶¶ 33–43.) Based on this claim, Plaintiffs seek a declaration that those provisions of the New York Human Rights Law are unconstitutional as applied to the Executive Order and that the Executive Order complies with federal and state law, and an injunction barring New York, the OAG, and James in her role as NY Attorney General, from taking any enforcement action that might lead to invalidation of the Executive Order. (*Id.* at 12.) The Court lacks jurisdiction over this claim under Article III of the Constitution because none of the Plaintiffs have standing to bring it.

***15** Article III of the Constitution "limits the federal judicial power to deciding 'Cases' and 'Controversies.' " *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 45 (2d Cir. 2023) (citing U.S. Const. art. III § 2). A case or controversy only exists when the plaintiff has "standing" to sue because they have "a personal stake in the outcome of the litigation." *Id.* (citing *United States v. Texas*, 599 U.S. 670 (2023)) (quotation marks omitted). In order to establish Article III standing, a plaintiff must show: "(1) that they suffered an injury in fact, (2) that the injury is fairly traceable to Defendants' challenged conduct, and (3) that the injury is likely to be redressed by a favorable judicial decision." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)) (quotation marks omitted). A "plaintiff[ ] must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021)). When seeking the extraordinary relief of a temporary restraining order or preliminary injunction, a plaintiff's burden to demonstrate standing "will normally be no less than that required on a motion for summary judgment." *Do No Harm v. Pfizer Inc.*, No. 23-15, 2024 WL 949506, at *7 (2d Cir. Mar. 6, 2024) (citing *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011)). Accordingly, a plaintiff seeking such extraordinary relief "cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts" to establish injury-in-fact, redressability, and standing. *Id.* (citing *Cacchillo*, 638 F.3d at 404); *see also Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. New York State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78–79 (2d Cir. 2021) (same); *Pers. v. United States*, No. 19 CIV. 154 (LGS), 2019 WL 258095, at *1 n.2 (S.D.N.Y. Jan. 18, 2019) (applying the same rule "in the context of a temporary restraining order, since the legal standard for granting temporary restraining orders and preliminary injunctions is the same").

In order to demonstrate an "injury in fact," a plaintiff must establish "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted); *see also Soule*, 90 F.4th at 45, 50 (citing *TransUnion*, 594 U.S. at 423). To be "concrete," an injury must be "real, and not abstract." *Id.* at 45. An injury is "particularized" only when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 45–46 (citing *Spokeo*, 578 U.S. at 339). Lastly, an injury is "actual or imminent" where the injury "has actually happened or is certainly impending." *Id.* at 46, 50 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S.

398, 409 (2013), and then citing *Lujan*, 504 U.S. at 560–61) (quotation marks omitted).

Under these standards, the County Plaintiffs' submissions fail to establish that any Plaintiff—Nassau County, Blakeman, or K.E.M., whose claim is brought by the Mullens—have the required injury-in-fact for standing to bring a claim for the requested relief against Defendants. (Compl. at 12.)

1) County Plaintiffs

The County Plaintiffs' submissions fail to show they have standing for two reasons. First, in the Second Circuit, it is well established that a county lacks standing to challenge the constitutionality of a state statute under the Fourteenth Amendment. Blakeman does not demonstrate that he meets any exception to this rule for county officials who bring a legal claim in their official capacity. Second, the County Plaintiffs fail to show that they have any constitutional interest implicated by an OAG enforcement action against them related to the Executive Order. Even if an OAG enforcement action implicated the constitutional interest of third-parties —such as women and girls in Nassau County—the County Plaintiffs lack standing to assert an equal protection claim on behalf of these third-parties.

a. Standing to Challenge the Constitutionality of the New York Human Rights Law

The County Plaintiffs lack standing to bring the equal protection claim pled in the Complaint. (*See* Compl. ¶¶ 33–43.) The Second Circuit has squarely held that "a political subdivision" of a state, such as a county, "does not have standing to sue its state under the Fourteenth Amendment." *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019). "Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) (citations omitted); *see also Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).[17] Accordingly, under longstanding Second Circuit precedent, Nassau County, as a political subdivision of New York, does not have standing to bring a claim for injunctive and declaratory relief against any of the Defendants to challenge the OAG's application of the New York Human Rights Law to the Executive Order under the Fourteenth Amendment's Equal Protection Clause. *See Tweed*, 930 F.3d at 73 n.7.[18]

***16** The Second Circuit has recognized a limited theory of standing—the so-called "dilemma" theory—where, unlike a municipal corporation, a municipal official acting in their official capacity may have standing to challenge a state statute under the Fourteenth Amendment in certain circumstances. *See Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Tchrs. Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995) (citing *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968)). The county official must demonstrate that "compliance with state law will require them to violate their oaths to act constitutionally" and "that their positions as officials or funding for [their governmental entity] is in jeopardy if they refuse" to comply. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 110–112 (finding that county officials who did not make such allegations lacked standing to bring Fourteenth Amendment and Contracts Clause claims against a state statute under the dilemma theory); *see also Merola v. Cuomo*, 427 F. Supp. 3d 286, 290–91 (N.D.N.Y. 2019).

Blakeman has failed to make the required showing. The County Plaintiffs have not set forth any evidence that an OAG enforcement action against them or even the eventual invalidation of the Executive Order would require Blakeman to violate his oath to act in accordance with the U.S. Constitution. Further, the County Plaintiffs have not submitted evidence showing that Blakeman's failure to comply with the New York Human Rights Law would likely result in the loss of his position as County Executive or a reduction in funding for Nassau County. Without evidence as to any "realistic threat of harm" to Blakeman if the OAG were to prevail on its theory that the Executive Order violates the New York Human Rights Law's prohibitions against discrimination on the bases of sex and gender identity and expression, the County Plaintiffs fail to establish any dilemma that could support Blakeman's standing to bring the Fourteenth Amendment claim pled in the Complaint. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 112.

b. Standing to Bring a Pre-Enforcement Challenge

Finally, the County Plaintiffs' submissions fail to establish their standing to bring a pre-enforcement equal protection claim challenging Defendants' application of the New York Human Rights Law to the Executive Order. The OAG has not initiated any legal action against Nassau County related to the

Executive Order, although the March 1, 2024 letter conveys a demand that the County Plaintiffs rescind the Executive Order and produce the documentary record supporting its issuance or face "further legal action by the OAG." (OAG Ltr. at 3). For standing to bring a pre-enforcement challenge, a plaintiff must show a "sufficiently imminent" injury-in-fact by demonstrating (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and (2) that there exists "a credible threat of prosecution thereunder." *Silva v. Farrish*, 47 F.4th 78, 86 (2d Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)) (quotations omitted); *see, e.g.*, *Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687–691 (2d Cir. 2013) (holding that an organization had standing to bring a pre-enforcement First Amendment challenge to a state law where the plaintiff intended to engage in arguably protected speech and fear of violating the law had a chilling effect on that speech).

Defendants argue that implementation of the Executive Order does not implicate any "constitutional interest" of the County Plaintiffs themselves as required for a pre-enforcement challenge. (Defs.' Br. at 13.) Indeed, the County Plaintiffs have not pointed to any constitutional interest in maintaining the Executive Order that they themselves—rather than third parties—possess. *Cf. Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525 (N.D. Cal. 2017) (finding that plaintiff counties demonstrated injury-in-fact to support standing for a pre-enforcement challenge to a federal executive order where plaintiffs' failure to comply would lead to the withdrawal of federal funding and "implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment"). Instead, the County Plaintiffs allege that the OAG's enforcement actions will cause "women and girls in Nassau County" to face "discriminat[ion]" and violations of "their constitutional rights." (Blakeman Aff. ¶ 3.) The County Plaintiffs contend that they have standing because of an asserted "increased risk of future physical injury" to these third parties and rely on two district court decisions that address organizational standing. (Cnty. Pls.' Br. at 23–24) (citing *Rural & Migrant Ministry v. United States EPA*, 510 F. Supp. 3d 138, 155 (S.D.N.Y. 2020), *amended and superseded by Rural & Migrant Ministry v. United States EPA*, 565 F. Supp. 3d 578 (S.D.N.Y. 2021); *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 416 (S.D.N.Y. 2012)). The County is not an organization, however, and the County Plaintiffs do not provide any legal authority for the proposition that a municipality is treated as an organization for purposes of Article III standing. *Cf. City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 268 (D.C. Cir. 2002) (assuming, without deciding, that a city may not establish standing on behalf of its citizens under the doctrine of organizational standing).

***17** Moreover, even if Nassau County could avail itself of organizational standing doctrine, it would not be able to assert the equal protection rights of its female residents. It is well established in the Second Circuit that an organization lacks "standing to assert the rights of its members" under 42 U.S.C. § 1983. *Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 447 (2d Cir. 2021) (quotation marks omitted); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983, as we have 'interpret[ed] the rights [§ 1983] secures to be personal to those purportedly injured.").

In the section of their reply brief addressing irreparable harm, the County Plaintiffs also argue that Nassau County and Blakeman will suffer an injury in the form of budget uncertainty due to the potential for "[a]n influx of [personal injury] lawsuits against the County" in the absence of the Executive Order, which "can result in millions of dollars of increase in the County budget in the form of settlements or verdicts." (Cnty. Pls.' Reply at 4.) These assertions, which are not alleged in the Complaint or supported by any evidence, are speculative and fail to establish that enforcement of the Executive Order implicates any constitutional interest of the County itself. *Cf. County of Santa Clara*, 250 F. Supp. 3d at 528–29.

Accordingly, the record fails to show that the County Plaintiffs have standing to sue Defendants in a pre-enforcement claim that the New York Human Rights Law as applied to the Executive Order violates the Equal Protection Clause.

2) Individual Plaintiffs

In addition to the County Plaintiffs, the Individual Plaintiffs bring an equal protection claim against Defendants on behalf of their minor child, K.E.M. The record also fails to demonstrate an injury in fact supporting K.E.M.'s Article III standing to sue Defendants for the requested relief.

"Parents generally have standing to assert the claims of their minor children." *Nguyen v. Milliken*, No. 15-CV-0587 (MKB), 2016 WL 2962204, at *7 (E.D.N.Y. May 20, 2016) (citing *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001)) (quotation marks omitted); *see, e.g.*, *Soule*, 90 F.4th 51 (finding standing to bring Title IX claim for some requested injunctive relief where parents sued on behalf of their minor daughters). Where a parent asserts a claim in federal court on behalf of a child, the child must meet the requirements for Article III standing. *See id.* at 45–51 (analyzing whether the plaintiffs' children met the Article III requirements); *see also McCormick ex. Rel. v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004) (same).

There is no evidence in the record relating to K.E.M. The Complaint alleges only that K.E.M. is a "16-year-old biological female high school volleyball player" whose parents reside in Nassau County, and that "the Mullens are being forced into making the impossible determination whether to expose their 16-year-old daughter to the risk of injury by a transgender girl or simply to not play volleyball at all and forego whatever opportunities may present because of her participation in volleyball." (Compl. ¶¶ 7–8, 30.) Plaintiffs have not put forward any evidence addressing whether K.E.M. plays on a volleyball team, whether that team engages in athletic endeavors on Nassau County Parks property, whether K.E.M. plays against or alongside transgender girls in those activities, or how rescission of the Executive Order will directly cause K.E.M. any concrete and imminent injury. The record lacks any evidence showing that K.E.M. has suffered, or imminently will suffer, an injury that is real, and not abstract and actual and imminent based on the OAG's application of the New York Human Rights Law to the Executive Order. The record thus fails to show that K.E.M has standing to seek a declaration that the New York Human Rights Law's prohibition against discrimination on the bases of gender identity and expression violates the Equal Protection Clause, a declaration that the Executive Order is lawful, or an injunction barring the OAG's enforcement of the New York Human Rights Law against the Executive Order. *See Do No Harm v. Pfizer Inc.*, 2024 WL 949506, at *7 (requiring plaintiff seeking preliminary relief to establish injury-in-fact, causation and redressability as required for standing by "affidavit or other evidence"); *Green Haven Prison*, 16 F.4th at 78–79 (same); *cf. Soule*, 90 F.4th 45 (finding plaintiffs established an injury in a Title IX action against a sports conference policy permitting athletes to play on teams consistent with their gender identities, where each plaintiff alleged, among other things, that they had competed in covered events and finished behind a transgender girl at least once).

***18** Further, to the extent the Complaint alleges that the Individual Plaintiffs themselves will suffer an injury based on any violation of K.E.M.'s constitutional right to equal protection, they lack standing to pursue such a claim. *Nguyen*, 2016 WL 2962204, at *7 ("[A]lthough parents may sue on behalf of their minor child, they do not have standing to assert claims on their own behalf for a violation of their child's rights."); *see also T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 CV 5133 VB, 2012 WL 860367, at *3 (S.D.N.Y. Feb. 27, 2012) (finding that a mother could not recover on a derivative claim under Section 1983 for the violation of her child's constitution rights).

D. The Merits of Plaintiffs' Equal Protection Claim

The County Plaintiffs cannot show a likelihood of success on the merits of their equal protection claim where, as here, the Court finds that (1)Eleventh Amendment sovereign immunity bars all aspects of the claim except for the portion seeking injunctive and prospective declaratory relief against James in her official capacity; (2) the County Plaintiffs lack the capacity to sue Defendants under Rule 17(b) and New York law; and (3) the record fails to show that Nassau County, Blakeman, or the Individual Plaintiffs have standing to bring the sole equal protection claim pled in the Complaint. In this context, the Court need not address the merits of Plaintiffs' equal protection challenge to Defendants' application of the New York Human Rights Law to the Executive Order. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 134 (2d Cir. 2020) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.") (citation and quotation marks omitted); *see also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

II. Irreparable Harm

The County Plaintiffs fail to show that they will suffer irreparable harm absent the requested TRO. A demonstration of irreparable harm is "the single most important prerequisite for the issuance of" a temporary restraining order. *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 672 (2d Cir. 2023) (internal citation omitted). That is because a temporary restraining order, like a preliminary injunction, seeks to maintain the

status quo in order "to protect [the] plaintiff from irreparable injury" while awaiting final decision on the merits. 11A Charles Alan Wright et al., Federal Practice and Procedure § 2947 (3d ed. April 2023 Update). Therefore, Plaintiffs must show that without a temporary restraining order, "they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *JTH Tax*, 62 F.4th at 672.

In cases concerning claims of constitutional injury, a bare assertion of a constitutional injury, without evidence "*convincingly show[ing]*" the existence of noncompensable damages, is insufficient to automatically trigger a finding of irreparable harm. *KM Enters. v. McDonald*, 11-cv-5098, 2012 WL 540955, at *4 (E.D.N.Y. Feb. 16, 2012) (citing *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988), *aff'd* 518 Fed. App'x 12 (2d Cir. 2013)) (emphasis supplied); *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (same). By contrast, irreparable harm is satisfied when "the constitutional deprivation is convincingly shown and that violation carries noncompensable damages." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012). Indeed, when "the violation of a constitutional right is the irreparable harm ... the two prongs of the preliminary injunction threshold merge into one: in order to show irreparable injury, plaintiff must show a likelihood of success on the merits." *Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000) (citation omitted); *Jansen v. New York City Dep't of Educ.*, No. 23-cv-6756, 2023 WL 6160691, at *3 (E.D.N.Y. Sept. 20, 2023), *recons. denied*, No. 23-cv-6756, 2023 WL 6541901 (E.D.N.Y. Oct. 6, 2023). Even in a case concerning an alleged constitutional injury, "it often will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights." *Time Warner Cable of New York City, a division of Time Warner Ent. Co., L.P. v. Bloomberg L.P.*, 118 F.3d 917, 924 (2d Cir. 1997) (addressing motion for a preliminary injunction on a First Amendment claim).

***19** The County Plaintiffs make three irreparable harm arguments—none of which are persuasive or supported by the record. First, Blakeman attests that if the Executive Order is rescinded, "women and girls in Nassau County" will "not have access to a supportive and safe environment" for sporting activities and will face "discriminat[ion]" and exclusion from the "long-term benefits" of participation in these endeavors, including "recognition and accolades, [and] college scholarships." (Blakeman Aff. ¶¶ 3–4; *see also* Cnty. Pls.' Reply at 3.) The County Plaintiffs have not put forward evidence about any specific women and girls in Nassau County who would face an imminent threat of physical injury, discrimination, or exclusion from recognition, accolades, or college scholarships, or any other long-term benefit from any current or future athletic activities on Nassau County Parks property in the absence of a temporary restraining barring the OAG from securing documents supporting the Executive Order's issuance and from exercising discretion to take legal action against the Executive Order, or even in the event the Executive Order is rescinded. As discussed above, the record provides no facts addressing whether K.E.M. plays on a volleyball team that uses Nassau County Parks property or involves the participation of transgender women or girls, much less that any transgender women or girls pose to K.E.M. an actual or imminent threat of either physical injury or exclusion from recognition or other benefits from athletic activities. Instead, the County Plaintiffs rely on several media reports of injuries to cisgender women and girls in athletic endeavors with transgender women and girls outside of Nassau County (and even outside of New York) (*see* TRO/PI Motion at 20; Reply Br. at 4), which do not meet their high burden to demonstrate that "they will suffer an injury that is neither remote nor speculative, but actual and imminent" as required for the extraordinary relief of a temporary restraining order. *JTH Tax*, 62 F.4th at 672.

The County Plaintiffs cite several cases to support the undisputed proposition that a "substantial risk of serious illness or death" presents a situation where "monetary damages are difficult to ascertain or are inadequate." (Cnty. Pls.' Br. at 25.) Those cases concerning serious medical illness and death are readily distinguishable because the plaintiffs were able to establish, through both expert and lay testimonial evidence, that a specific illness or disease from which they suffered would result in injury or illness absent the requested preliminary relief. In *Shapiro v. Cadman Towers, Inc.*, for example, the Second Circuit upheld the district court's finding that the plaintiff established irreparable harm to support a preliminary injunction requiring her apartment complex to provide her a parking space inside the apartment's garage where the district court found, based upon testimony from medical experts, that the plaintiff suffered from multiple sclerosis and that requiring her to park on the street could result in humiliation and injury from urinary dysfunction and loss of balance. 51 F.3d 328, 332–33 (2d Cir. 1995). In other words, the plaintiff established, through expert

testimonial evidence, that a disease from which she presently suffered could cause symptoms that would increase her risk of injury and humiliation absent injunctive relief. Likewise, in *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit upheld the district court's finding of irreparable harm if a drug and alcohol treatment center were to close based on testimonial evidence that the plaintiffs being treated for substance abuse at the center were at risk of relapse and consequent harms, including illness, disability, or death. 117 F.3d 37, 43–44 (2d Cir. 1997), *superseded on other grounds in Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2001). Further, the Circuit upheld a finding that one plaintiff in particular would *not* suffer irreparable harm where that individual had completed treatment at the program and provided no evidence that he continued to use their services. *Id.*[19] By contrast, here, the County Plaintiffs have not presented any evidence showing that K.E.M. or any other woman or girl would be physically injured or be excluded from recognition, accolades, or other long-term benefits from athletic activities by invalidation of the Executive Order, much less a denial of the requested TRO barring Defendants from securing the record supporting issuance of the Executive Order and from taking enforcement action related to the Executive Order.

***20** The County Plaintiffs' second irreparable harm argument is that without the Executive Order, they face "the risk of substantial personal injury judgments by allowing participation on women's athletic teams based on gender identity." (Cnty. Pls.' Br. at 19). This argument has no basis in the record. The County Plaintiffs fail to identify a single past or current personal injury lawsuit filed against them due to an alleged injury suffered by a cisgender women during an athletic endeavor involving the participation of a transgender woman or girl on Nassau County Parks property. Moreover, as noted above, the record does not support the conclusion that any such personal injury lawsuits would imminently be filed against the County if the requested TRO is denied because there are no facts in the record showing that any specific cisgender woman or girl in Nassau County will face imminent injury in an athletic event involving a transgender woman or girl on Nassau County Parks property if the Executive Order is invalidated.

Third, the County Plaintiffs argue that irreparable harm is "presumed" in this case because the Complaint alleges that "the NYS AG is effectively seeking to deprive Plaintiffs their constitutional right to equal protection." (Cnty. Pls.' Br. at 25.) The County Plaintiffs misstate the law. As discussed, "the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996). The burden remains on the County Plaintiffs to "convincingly show[ ]" irreparable constitutional injury in order to secure a temporary restraining order. *Donohue*, 886 F. Supp. 2d at 150; *KM Enters.*, 2012 WL 540955, at *4 (same); *Weinstein*, 120 F. Supp. 3d at 297 (same). Based on the current record before the Court, the County Plaintiffs fail to meet this burden because: (1) Eleventh Amendment sovereign immunity bars Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG, and Plaintiffs' claim for retrospective declaratory relief against James; (2) the County Plaintiffs lack the capacity to bring their equal protection claim under Rule 17(b) and New York's capacity-to-sue rule; and (3) all of the Plaintiffs lack standing to bring the sole equal protection claim pled in the Complaint. *See supra*, Section I.

III. Balance of Hardships and Public Interest

A plaintiff seeking a temporary restraining order must additionally establish that the "public interest" and "balance of equities" of the parties weigh in favor of granting the injunction. *Yang*, 960 F.3d at 127. "When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge." *We the Patriots USA, Inc.*, 17 F.4th at 295. The Court declines to address these factors because the County Plaintiffs' submissions do not meet the critical requirements of showing a likelihood of success on the merits of their equal protection claim and irreparable harm in the absence of the requested temporary restraining order.

CONCLUSION

For the reasons set forth above, the Court denies the County Plaintiffs' TRO Motion (ECF No. 10) and reserves decision on the PI Motion pending resolution of Defendants' Motion to Dismiss (ECF No. 20).

All Citations

Slip Copy, 2024 WL 3201671

Footnotes

1 New York law refers to the OAG as the "New York Department of Law." *See* N.Y. Const. art. V, § 4 ("The head of the ... department of law[shall be] the attorney-general."); *see also* N.Y. Exec. Law § 60.

2 The Court overlooks any procedural deficiency in the County Plaintiffs' submission and construes it as a TRO/PI Motion because Plaintiffs "submitt[ed] a memorandum of law and supporting documents that allow the Court to consider the proposed motion" (ECF Nos. 10-5, 14, 17) and because "the parties are fairly and adequately apprised of the nature and basis of the application." *Fiedler v. Incandela*, 222 F. Supp. 3d 141, 155 (E.D.N.Y. 2016) (quotation marks omitted).

3 As discussed below, the Court set a March 22, 2024 deadline for the Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion. Although the Defendants provided a timely response, the Individual Plaintiffs did not submit anything. (Elec. Order, Mar. 28, 2024.)

4 The plain text of the Executive Order refers to permits to use and occupy "Nassau County Parks property" (*see* E.O. at 1), but Defendants characterize the Executive Order as applying to all property under the purview of the Nassau County Department of Parks, Recreation and Museums. (Defs.' Br. at 3.) The full name of the department overseeing Nassau County Parks property is the "Nassau County Department of Parks, Recreation, and Museums." *See* Nassau County, Departments, Parks, Recreation and Museums, About Parks, https://www.nassaucountyny.gov/1768/About-Parks (last visited Apr. 2, 2024). According to Nassau County's website, there are "more than 70 parks, preserves, museums, historic properties, and athletic facilities comprising 6,000 acres throughout the county." *Id.* The Court need not resolve whether the Executive Order applies to all property under the purview of the Nassau County Department of Parks, Recreation and Museums or only a subset consisting of "Nassau County Parks property," as that term is used in the Executive Order, in order to resolve the County Plaintiffs' TRO Motion.

5 This Opinion and Order uses the terms "biological males" and "biological females" only when quoting from the Executive Order. These terms are scientifically "imprecise" and are viewed as derogatory to transgender women and girls. *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34 at 83 n.8 (2d Cir. 2023) (Judges Chin, Carney, Kahn, Lee, Pérez, dissenting) (referring to intervening parties as "transgender females" and transgender girls" rather than "biological males" (the term used by appellants) to "afford them the respect and dignity they are due" because "calling attention to a transgender person's biological sex by referring to them as a 'biological male' is harmful and invalidating" and because such terms are scientifically "imprecise") (citing Wylie C. Hembree, Peggy T. Cohen-Kettenis, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. Clinical Endocrinology & Metabolism, 3869, 3875 tbl. 1 (2017)); Glossary of Terms: Transgender, GLADD Media Reference Guide: 11th Edition, GLADD, https://glaad.org/reference/trans-terms/ (last visited Apr. 22, 2024); *see also Hecox v. Little*, 79 F.4th 1009, 1023–24 (9th Cir. 2023) ("[T]he [challenged] Act's definition of 'biological sex' is likely an oversimplification of the complicated biological reality of sex and gender.").

6 This Opinion and Order uses the term "transgender" to refer to individuals whose gender identity does not correspond to their sex assigned at birth. The term "gender identity" refers to a person's sense of being male, female, neither, or some combination of both, which may or may not correspond to an individual's sex assigned at birth. *See* N.Y. Exec. Law § 292(35) ("The term 'gender identity or expression' means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.").

7 Although the March 1, 2024 letter set forth the OAG's position that the Executive Order violates both the New York Human Rights Law and the New York Civil Rights Law, Plaintiffs' requested declaratory relief concerns only the alleged unconstitutionality of the New York Human Rights Law as applied to the Executive Order. (*See* Compl. at 12.)

8 Although this requested declaration is part of the ultimate relief sought in the Complaint (Compl. at 12), it is not identified as a part of the preliminary relief requested in the Order to Show Cause or proposed TRO. (*See* ECF Nos. 10, 17.)

9 Defendants do not argue that Eleventh Amendment sovereign immunity bars any claim for injunctive relief by Plaintiffs against James for conduct taken in her official capacity. (Defs' Br. at 8–9). As discussed below, Plaintiffs' equal protection

claim for injunctive relief against James for conduct taken in her official capacity is permissible under the exception to Eleventh Amendment sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908).

10 The Second Circuit has recognized that both arm-of-the-state tests "have much in common" and that "the choice of test is rarely outcome-determinative." *Leitner*, 779 F.3d at 137. The first arm-of-the-state test requires courts to consider (1) "the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity," and (2) "the degree of supervision exercised by the state over the defendant entity." *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (quotation marks omitted). The second arm-of-the state test requires consideration of six factors:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Mancuso v. New York State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). If the factors from the second test do not lean in a clear direction, a court must consider "the twin reasons for the Eleventh Amendment: (1) protecting the dignity of the state, and (2) preserving the state treasury." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006) (citing *Mancuso*, 86 F.3d at 293). If consideration of these two reasons does not clarify the determination, the court then focuses on "whether a judgment against the governmental entity would be paid out of the state treasury." *Id.* at 241.

11 Given the weight of this authority, the Court does not address all of the factors of the *Mancuso* arm-of-the-state test, but recognizes that the first four *Mancuso* factors weigh in favor of finding the OAG to be an arm of the state. The OAG is referenced in the New York Constitution and its duties and powers are established in New York statutes (the first *Mancuso* factor). *See* N.Y. Const. art. V, §§ 1, 4; N.Y. Exec Law § 60 *et seq.* The NY Attorney General is elected in "the same general election as the governor" (the second *Mancuso* factor). N.Y. Const. art. V, § 1. The budget for the office comes from the New York Legislature (the third *Mancuso* factor). *See* N.Y. Exec. Law § 60. The powers and duties of the NY Attorney General are traditionally those of state government (the fourth *Mancuso* factor). *See e.g.*, N.Y. Exec. Law § 63 ("The attorney-general shall ... [p]rosecute and defend all actions and proceedings in which the state is interested ... and have charge and control of all the legal business of the departments and bureaus of the state ... in order to protect the interest of the state ....").

12 The Complaint does not cite 42 U.S.C. § 1983, which established a cause of action for bringing constitutional claims against people acting under color of state law. (*See* Compl. ¶ 14; *id.* at 9.) The only statute Defendants' cite—the Declaratory Judgment Act, 28 U.S.C. § 2201—"does not create an independent cause of action." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244-45 (2d Cir. 2012). In their reply brief, the County Plaintiffs state that the claim "was in fact asserted under the Equal Protection Clause" (Cnty. Pls.' Reply at 1), but point to no authority for the proposition that there is an implied cause of action against state governments under the Fourteenth Amendment. *Cf. Pauk v. Bd. of Trs. of City Univ. of New York*, 654 F.2d 856, 864 (2d Cir. 1981) (collecting cases where courts have found implied causes of action for certain constitutional violations, but not in the Equal Protection Clause context); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979) (abrogating prior Second Circuit decision finding an implied cause of action under the Fourteenth Amendment for suits against municipalities). Even if Plaintiffs could bring an implied cause of action under the Fourteenth Amendment, the Supreme Court has held that Congress did not express an intent to abrogate states' Eleventh Amendment immunity by ratifying the Fourteenth Amendment itself. *See Santiago v. New York State Dept. of Corr. Servs.*, 945 F.2d 25, 30–32 (2d Cir. 1991) ("[W]e are unpersuaded that the states, in ratifying the Fourteenth Amendment, waived their Eleventh Amendment immunity ....").

13 As discussed, the Complaint requests a permanent injunction barring Defendants from "taking any action" against implementation and enforcement of the Executive Order. (Compl. at 12). Plaintiffs also seek a temporary restraining order and preliminary injunction barring Defendants from "taking further legal action" and "from initiating any legal proceedings and/or actions against" the County Plaintiffs, and enjoining Defendants "from obtaining any and all documents produced or maintained by" the County Plaintiffs. (Proposed TRO at 1.)

14 As discussed later in this Opinion and Order, *see* Section I.C n.18, the Second Circuit has employed a similar rationale in finding that political subdivisions lack "standing" to sue their state creators in a challenge to a state statute under the Fourteenth Amendment. *See* *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019); *Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).

15 In arguing that the first exception to New York's capacity-to-sue rule does not apply to this case, Defendants contend that county and county officials generally lack capacity to assert a Fourteenth Amendment claim against a state because "they are not 'persons' within the meaning" of the Due Process Clause. (Defs.' Br. at 11) (citing *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 1321 (4th Dep't 2015), *aff'd sub nom* *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016)). The Court does not need to reach this question because the County Plaintiffs point to no express statutory language or legislative history demonstrating the New York Legislature's intent to grant them capacity to sue Defendants under the Fourteenth Amendment.

16 In *Town of Babylon, NY v. James*, No. 22-CV-1681(KAM)(AYS), 2023 WL 8734201 (E.D.N.Y. Dec. 19, 2023), *appeal docketed*, No. 24-177 (2d Cir. Jan. 22, 2024), however, the parties brought claims against the NY Attorney General challenging a state statute under the Fourteenth Amendment and article IX of the New York Constitution. The Court held that the home rule exception did not apply to the case and did not explicitly distinguish whether it was invoked with respect to both claims, or just the home rule claim. *Id.*

17 By contrast, the Second Circuit held in *Tweed* that a political subdivision "may sue its state under the Supremacy Clause" because that clause "raises unique federalism concerns." 930 F.3d at 73. *Tweed* did not abrogate the Second Circuit's previous decisions in *Richardson* and *Aguayo* as to a political subdivision's lack of standing to sue the state under the Fourteenth Amendment, finding that those cases "present[ed] considerations different from those we consider here." *Tweed*, 930 F.3d at 73 n.7. Accordingly, this Court is bound to follow the holdings of *Richardson* and *Aguayo*. *See, e.g.*, *Town of Babylon*, 2023 WL 8734201, at *9 (finding that under the *Tweed-Richardson-Aguayo* line of cases, a New York municipality is barred from bringing due process and equal protection claims against a New York statute).

18 The Second Circuit has characterized its analysis in the *Tweed-Richardson-Aguayo* line of cases as concerning a political subdivision's "standing" to sue. *See* *Tweed*, 930 F.3d at 73 n.7; *Aguayo*, 473 F.2d at 1100; *but see* *Richardson*, 473 F.2d at 929 (describing the rule as one where the state lacks "privileges or immunities ... [to] invoke in opposition to the will of its creator" (citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933))). This concept of standing is distinct from New York law on the capacity to sue. *Sonterra*, 403 F. Supp. 3d at 267 ("Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.").

19 *See also* *New York v. Heckler*, 742 F.2d 729, 736 (2d Cir. 1984) (plaintiffs established irreparable harm where they suffered from mental illnesses and presented "ample evidence" that they would likely suffer "a severe medical setback" as a result of the challenged requirement), *aff'd sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986); *New York v. Sullivan*, 906 F.2d 910, 918 (S.D.N.Y. 1990) (plaintiffs, who had cardiovascular disease, established that irreparable harm would result if they did not receive disability benefits needed to ensure treatment).

New York
Official Reports

94 N.Y.2d 1, 720 N.E.2d 850, 698
N.Y.S.2d 574, 1999 N.Y. Slip Op. 08345

Michael Cohen et al., as Members of the New York State Legislature, Respondents,

v.

State of New York, Appellant.

Court of Appeals of New York
145
Argued August 24, 1999;

Decided October 14, 1999

CITE TITLE AS: Cohen v State of New York

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Supreme Court (Richard D. Huttner, J.), entered May 24, 1999 in Kings County, declaring chapter 635 of the Laws of 1998 unconstitutional as violative of the separation of powers doctrine and article III, § 6 of the New York State Constitution.

Cohen v State of New York, 180 Misc 2d 643, reversed.

HEADNOTES

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Prospective Alteration of Salaries

(1) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, is not facially unconstitutional, does not violate article III, § 6 of the State Constitution, and does not breach the governmental separation of powers doctrine. In seeking facial nullification, plaintiffs, legislators who were in office and voted against chapter 635 and others who were not yet in office, bear the burden of demonstrating that in any degree and in every conceivable application, the challenged law suffers ***2** wholesale constitutional impairment; however, the Constitution lays no constraint on the authority of one Legislature by enactment of general law to make provision prospectively for allowances to be received by the officers and members of the two houses during a succeeding legislative term, and the withholding-of-salary protocol is general, purely prospective, and does not suffer from the potentiality that legislators' votes might be manipulated by promises of reward or threats of punishment effectuated through changes in salaries or allowances. Moreover, the statutorily authorized temporary withholding of net payments of legislative salaries operates by force of law and off a neutral pivot.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Fixing of Salaries by Law

(2) By chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, the Legislature prospectively "fixed by law" an annual salary for its members (*see,* NY Const, art III, § 6). The law imposes a discipline within the Legislative branch itself regarding the timing and method of only its own net compensation, and does not interject an all-or-nothing infirmity, because the "contingent" nature of its adopted timing-of-payment formula does not "un-fix" the salary, in constitutional terms. The Legislature holds the constitutional key prospectively to authorize that legislators' salaries be paid in one final lump sum at the end of a legislative session--after the work of that branch has concluded and all its responsibilities discharged. Since it may do that, it surely could do what chapter 635 prescribes, which is a lesser of the greater power. This is particularly so since the release of net checks and realization of payment is accomplished simply by passage of an annual State budget, a principal constitutional duty prescribed for each legislative session. Thus, chapter 635 can in no way be viewed as a facial abridgement of the protections and specifications of article III, § 6 of the State Constitution; on the contrary, it satisfies the constitutional payment mandate, and serves as an

incentive to complete constitutional budget obligations in a timely fashion.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Separation of Powers

(3) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not violate the principle of separation of powers; rather, it adds procedural oil to the delicately calibrated mechanism by which a budget is enacted. The Legislature, as a branch of government, must have "finally acted on" the appropriations submitted by the Governor before individual legislators may be paid, and that inducement does not require that the Legislature pass the Governor's budget; only that it pass some budget. The plaintiffs in this case, legislators who were in office and voted against chapter 635 and others who were not yet in office, sue as individuals, not as the Legislative branch of government; however, it is the correlative oversight of each lawmaking branch over one another--in essence a dependency, rather than a separation--that balances the overall ***3** power to protect the public's interests, not those individuals who occupy the offices of those branches at varying times. Although chapter 635 pinpoints a particular interdependence of the Legislature and Executive with respect to the budget-making process, it does not impermissibly merge or shift the powers between those two branches. In the end, the Legislature always does the legislating. It is institutional interdependence, rather than functional independence that best summarizes the idea of protecting liberty by fragmenting power.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Separation of Powers

(4) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not violate the principle of separation of powers, and even assuming that the law does recalibrate some of the negotiating leverage between the Legislative and Executive branches of government, that shift has occurred as a direct result of the Legislature's own bicameral action. Its official work was done qua branch of the government, and the Legislature has decided to restrict itself and discipline its own work and power in this fashion; that is not a cognizable separation of powers problem. Without a State budget or without messages of necessity and interim authorizations or continuing concurrent resolutions, no State expenditures could be made to anyone, including legislators. Thus, after a fiscal year concludes, and until a new budget is passed for the following year, the payment of compensation to legislators is inescapably contingent and dependent upon the extant Executive's discretionary powers. Chapter 635 does not create or result in "extortionate economic pressure," since there is no substantially different economic duress created by chapter 635 than that which is inherent in the ordinary lawmaking process, budget-related and otherwise. When the plaintiffs, legislators who were in office and voted against chapter 635 and others who were not yet in office, object to "economic pressure," they are essentially attacking the fundamental, albeit rambunctious, realities of the political structure and process, including how public monies shall be allocated; however, no basis within the judicial review function supports the extraordinary superintendence and judicial nullification of chapter 635 that plaintiffs facially seek.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Role of State Comptroller

(5) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not inject an unconstitutional delegation of power to the State Comptroller, who is authorized to determine if the budget is "sufficient for the ongoing operation and support of state government and local assistance," since the Comptroller's

defined involvement fits within and fulfills his independent fiscal role as a vital part of the constitutional machinery for assuring accountability in the expenditure of State funds. By chapter 635, the Legislature has plainly confirmed the Comptroller's customary responsibility for ensuring the availability of ***4** revenues that would be expended through the enacted appropriations bills, and this reinforcement in no way authorizes the Comptroller to "determine" when legislators shall be paid. Rather, that determination remains exclusively within the control, timing and power of the bicameral Legislature itself, acting as a branch of government when it enacts a timely budget, as is its constitutional duty.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Constitutional Law, §§ 109, 112, 113, 123, 246, 250, 258-260, 264-266, 270, 275, 288, 289, 293; States, Territories, and Dependencies, §§ 62, 64.

McKinney's, NY Const, art III, § 6.

NY Jur 2d, Constitutional Law, §§ 42, 43, 151, 155, 160, 162-164, 175, 176, 186; State of New York, §§ 19, 21, 22, 131.

ANNOTATION REFERENCES

See ALR Index under Legislature; Separation of Powers; States.

POINTS OF COUNSEL

Eliot Spitzer, Attorney General, Albany (*Preeta D. Bansal, Peter H. Schiff, Victor Paladino* and *Julie M. Sheridan* of counsel), for appellant.

I. Chapter 635 of the Laws of 1998 complies with article III, § 6 of the State Constitution. (*Dunlea v Anderson,* 66 NY2d 265; *New York Pub. Interest Research Group v Steingut,* 40 NY2d 250; *Finn v City of New York,* 282 NY 153; *Civil Serv. Empls. Assn. v Regan,* 71 NY2d 653; *United Cerebral Palsy Assns. v Cuomo,* 966 F2d 743, 506 US 999; *McGowan v Burstein,* 71 NY2d 729; *Caplin & Drysdale v United States,* 491 US 617; *Matter of Altamore v Barrios-Paoli,* 90 NY2d 378; *Matter of Roske v Keyes,* 46 AD2d 366; *National Assn. of Ind. Insurers v State of New York,* 89 NY2d 950.) II. Chapter 635 is consistent with the doctrine of separation of powers and does not interfere with the Legislature's deliberative process. (*Bourquin v Cuomo,* 85 NY2d 781; *Matter of Nicholas v Kahn,* 47 NY2d 24; *Rapp v Carey,* 44 NY2d 157; *People ex rel. Burby v Howland,* 155 NY 270; *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo,* 64 NY2d 233; *Loving v United States,* 517 US 748; *Boreali v Axelrod,* 71 NY2d 1; *Matter of County of Oneida v Berle,* 49 NY2d 515; *Saxton v Carey,* 44 NY2d 545; *Matter of Broidrick v Lindsay,* 39 NY2d 641.) III. Chapter 635 does not interfere ***5** with respondents' First Amendment rights. (*Clarke v United States,* 886 F2d 404, 915 F2d 699; *Bond v Floyd,* 385 US 116; *Miller v Town of Hull,* 878 F2d 523, 493 US 976.) IV. Chapter 635 does not impair any contractual right to be paid in violation of article I, § 10 of the United States Constitution. (*Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 940 F2d 766, 502 US 1058; *Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 79 NY2d 39; *Dodge v Board of Educ.,* 302 US 74; *Cook v City of Binghamton,* 48 NY2d 323; *Matter of Handy v County of Schoharie,* 244 AD2d 842; *Pennsylvania R. R. Co. v State of New York,* 11 NY2d 504; *People ex rel. City of New York v Nixon,* 229 NY 356; *Levy Leasing Co. v Siegel,* 258 US 242; *Kinney v Connecticut Judicial Dept.,* 974 F2d 313; *Condell v Bress,* 983 F2d 415, 507 US 1032.) V. The Comptroller's limited role under chapter 635 does not violate the State Constitution or the separation of powers of doctrine. (*Matter of McCall v Barrios-Paoli,* 93 NY2d 99; *Blue Cross & Blue Shield v McCall,* 89 NY2d 160; *Matter of Crosson v Regan,* 192 AD2d 109; *Matter of New York Cent. R. R. Co. v Tremaine,* 243 App Div 181; *City of New York v State of New York,* 40 NY2d 659; *People ex rel. Grannis v Roberts,* 163 NY 70; *County of Rensselaer v Regan,* 151 Misc 2d 552, 173 AD2d 37, 80 NY2d 988; *Wein v State of New York,* 39 NY2d 136; *Wein v Carey,* 41 NY2d 498; *Matter of Altamore v Barrios-Paoli,* 90 NY2d 378.) VI. Respondents are not denied property without due process. (*Alliance of Am. Insurers v Chu,* 77 NY2d 573; *Board of Regents of State Colls. v Roth,* 408 US 564.)

Kaye, Scholer, Fierman, Hays & Handler, L. L. P., New York City (*James D. Herschlein* and *Phillip A. Geraci* of counsel), and *Wolfson & Carroll (John W. Carroll* of counsel), for respondents.

I. Chapter 635 of the Laws of 1998 violates article III, § 6 of the State Constitution. (*New York Pub. Interest Research Group v Steingut,* 40 NY2d 250.) II. Chapter 635 violates the separation of powers doctrine. (*Matter of County of Oneida v Berle,* 49 NY2d 515; *Matter of King v Cuomo,* 81 NY2d 247.) III. Chapter 635 unconstitutionally delegates authority to the Comptroller. (*County of Rensselaer v Regan,* 151 Misc 2d 552, 173 AD2d 37, 80 NY2d 988; *Matter of Big Apple Food Vendors' Assn. v Street Vendor Review Panel,* 90 NY2d 402; *Matter of Levine v Whalen,* 39 NY2d 510; *Matter*

of Chemical Specialties Mfrs. Assn. v Jorling, 85 NY2d 382.) IV. Chapter 635 punishes the legislators for expression protected by the First Amendment. (*Bond v Floyd,* 385 US 116; *Clarke v United* ***6** *States,* 886 F2d 404, 915 F2d 699.) V. Chapter 635 violates the legislators' rights against impairment of contracts under article I, § 10 of the United States Constitution. (*Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 79 NY2d 39; *United States Trust Co. v New Jersey,* 431 US 1; *Fisk v Jefferson Police Jury,* 116 US 131; *People ex rel. City of New York v Nixon,* 229 NY 356; *Haley v Pataki,* 883 F Supp 816; *Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 940 F2d 766, 502 US 1058.) VI. Chapter 635 deprives the legislators of their property in violation of the Due Process Clauses of the Federal and State Constitutions. (*Board of Regents of State Colls. v Roth,* 408 US 564; *Sniadach v Family Fin. Corp.,* 395 US 337; *Toney v Burris,* 829 F2d 622; *Lynch v United States,* 292 US 571.)

OPINION OF THE COURT

Bellacosa, J.

(1) This appeal by the State comes directly to this Court (CPLR 5601 [b] [2]) from a Supreme Court judgment of unconstitutionality of chapter 635 of the Laws of 1998. The Act is challenged solely on a facial basis. We reverse and declare the statute constitutional. It does not violate article III, § 6 of the State Constitution, nor does it breach the governmental separation of powers doctrine. Also, it does not impinge on other constitutional protections asserted by plaintiffs.

I.

On December 18, 1998, the Legislature passed and the Governor approved chapter 635. It states in pertinent part:

"1. ... if legislative passage of the budget as defined in subdivision three of this section has not occurred prior to the first day of any fiscal year, the net amount of any such bi-weekly *salary installment payments to be paid on or after such day shall be withheld and not paid until such legislative passage of the budget has occurred ....*

"3. 'Legislative passage of the budget', solely for the purposes of this section ... shall mean that the appropriation bill or bills submitted by the governor ... have been finally acted on by both houses of the legislature in accordance with article seven of the state constitution and the state comptroller has ***7** determined that such appropriation bill or bills that have been finally acted on by the legislature are sufficient for the ongoing operation and support of state government and local assistance for the ensuing fiscal year" (L 1998, ch 635, §§ 1, 2, amending Legislative Law § 5 [emphasis added]).

Plaintiffs include individuals who were in office and voted against passage of chapter 635, and others who were not yet in office at the time of its passage. These 14 individuals started a hybrid CPLR article 78/declaratory judgment lawsuit in April 1999 seeking: (1) a declaration of unconstitutionality of chapter 635; (2) a declaration of the unconstitutional nature of certain of the Governor's actions; and (3) a permanent injunction against the withholding of legislative salaries. During the course of the litigation in the nisi prius court, plaintiffs limited their case to a pure declaratory judgment action, with requested relief directed solely at the constitutionality of the statute. The submissions of the respective parties were treated accordingly as cross motions for summary judgment.

Supreme Court held that chapter 635 violated the separation of powers doctrine and article III, § 6 of the New York State Constitution, but did not identify any particular constitutional provision as the flaw in its separation of powers conclusion.

The State defendants answer with six appellate arguments. They demonstrate cogently that: (1) chapter 635 complies with article III, § 6 of the New York State Constitution; (2) it conforms to separation of powers principles; (3) the specified role given to the Comptroller does not constitute an unconstitutional delegation of responsibility; (4) the statute does not interfere with plaintiffs' First Amendment rights; (5) it does not impair their Federal Contracts Clause rights; and (6) it does not violate plaintiffs' due process rights.

At this appeal stage of the controversy, we take judicial notice that the 1999-2000 budget negotiations concluded in early August 1999 with Legislative concordance and Gubernatorial acquiescence; Comptroller certification that the appropriations bills were sufficient to cover the State's approved expenditures followed, within hours after enactment.

II.

This Court's well-established review power with respect to matters of this kind marks the boundaries of the analysis required to decide this appeal. Because the plaintiffs seek facial ***8** invalidation of chapter 635, they must initially

overcome the presumption of constitutionality accorded to all enactments of a co-equal Branch of government (*see, Dunlea v Anderson,* 66 NY2d 265, 267-268; *see generally, City of New York v State of New York,* 76 NY2d 479; *Hotel Dorset Co. v Trust for Cultural Resources,* 46 NY2d 358; *see also, National Assn. of Ind. Insurers v State of New York,* 89 NY2d 950, 952 [quoting *Alliance of Am. Insurers v Chu,* 77 NY2d 573, 585]). In seeking facial nullification, plaintiffs bear the burden to demonstrate that "in any degree and in every conceivable application," the law suffers wholesale constitutional impairment (*McGowan v Burstein,* 71 NY2d 729, 733).

Statutes are quintessentially the product of the democratic lawmaking process. These threshold hurdles are, therefore, erected in the public interest to provide a prudent set of procedural safeguards for enactors and defenders of statutes. They are set in place doctrinally and precedentially because of a fundamental premise that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature ..., the elective representatives of the people" (*Matter of Wolpoff v Cuomo,* 80 NY2d 70, 79).

This Court's application of these principles, within standard constitutional review perspectives, convinces us that Supreme Court's decision fails to adhere to these rigorous considerations.

III.

Our analysis examines first a threshold component affecting this case-- article III, § 6 of the State Constitution. It provides in pertinent part:

"Each member of the legislature shall receive for his services a like annual salary, to be fixed by law ... Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation."

This Court has examined the constitutionality of earlier legislative salary arrangements in relation to this fixed star. In *New York Pub. Interest Research Group v Steingut* (40 NY2d 250), the Court invalidated the system of awarding allowances to legislators for varied services in a particular fiscal year, as part of the budget process in that same year. This Court recognized that: ***9**

"the *prohibition against increases and decreases* in legislators' compensation and emoluments *during their terms of office* would serve two salutary purposes-- (1) to avoid a conflict of interest by removing from legislators the authority to vote themselves financial benefits at the expense of the public treasury, and (2) to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances" (*New York Pub. Interest Research Group v Steingut, supra,* at 258 [emphasis added]).

Significantly, the Court held that "the Constitution lays no constraint on the authority of one Legislature by enactment of general law to make provision *prospectively* for allowances to be received by the officers and members of the two houses during a succeeding legislative term or terms" (*New York Pub. Interest Research Group v Steingut, supra,* at 261 [emphasis added]).

Later, in *Dunlea v Anderson* (66 NY2d 265, *supra*), this Court upheld the salary increase for legislators in the 1985-1986 fiscal year, authorized by the Laws of 1984. The Court reaffirmed that article III, § 6 "does not prohibit one Legislature ... from increasing the salaries of the next term's members. Neither its language nor the intention of its drafters compel a contrary interpretation" (*Dunlea v Anderson, supra,* at 268). Indeed, the Court noted that when the current article III, § 6 was approved, the Constitution was specifically amended to provide the flexibility of allowing a salary to be fixed by legislators themselves:

"The purpose of empowering the Legislature to determine its own compensation ... was to avoid 'repeat[ing] the error of inflexibility' that had resulted from 'fixing the compensation of legislators and legislative leaders in the Constitution, and thus fail[ing] to provide for changing conditions and circumstances' " (*Dunlea v Anderson, supra,* at 268; *see also, Finn v City of New York,* 282 NY 153, 157).

Dunlea built on *Steingut*'s holding that constitutional constraints do not generally prohibit prospective adjustments. It then distinguished *Steingut* by emphasizing that the judicially stricken allowances in the latter case were effective ***10** during the *same* fiscal year in which they were appropriated. The Court also observed that the selective awards could be directly tied to votes on particular bills and were within the unilateral control of one legislative house leader, not the Legislature itself as a bicameral Branch of the government (*see, Dunlea v Anderson, supra,* at 268; *see also,*

New York Pub. Interest Research Group v Steingut, supra, at 260).

We likewise adhere to *Steingut's* definitive holding and guidance, while acknowledging its key distinguishing features. Demonstrably, the "manipulation" potentiality cautioned against in *Steingut* is not present at all in this case. Here, the withholding-of-salary protocol is general and purely prospective (*see, New York Pub. Interest Research Group v Steingut, supra,* at 258). Moreover, the statutorily authorized temporary withholding of net payments of legislative salaries operates by force of law and off a neutral pivot. The statutory consequence does not occur by selective whim, or as a constitutionally questionable *quid pro quo* within the enactment year.

(2) By chapter 635 of the Laws of 1998, the Legislature prospectively "fixed by law" an annual salary for its members (NY Const, art III, § 6). The law imposes a discipline within the Legislative Branch itself regarding the timing and method of only its own net compensation (*see, Finn v City of New York, supra,* at 157). This mechanism does not interject an all-or-nothing infirmity because the "contingent" nature of its adopted timing-of-payment formula does not "un-fix" the salary, in constitutional terms.

Until 1948, legislative salaries were primarily "fixed" on a constitutionally permissible per diem basis, conditioned upon service; payment was made from time to time during the legislative session and the balance paid on final adjournment (*see, Dunlea v Anderson, supra,* at 268; *see also,* "The Compensation of Public Officials: Judges and Legislators", Report of Temporary State Commn to Review the Compensation Received by Members of the Legislature and Judiciary [1972]).

The Legislature, even now, holds the constitutional key prospectively to authorize that legislators' salaries be paid in one final lump sum at the end of a legislative session--after the work of that Branch has concluded and all its responsibilities discharged. Since it may do that, it surely could do what chapter 635 prescribes which is a lesser of the greater power. This is particularly so since the release of net checks and realization of payment is accomplished simply by passage of an ***11** annual State budget, a principal constitutional duty prescribed for each legislative session (NY Const, art VII, § 4).

Thus, chapter 635 of the Laws of 1998 can in no way be viewed as a facial abridgement of the protections and specifications of article III, § 6 of the State Constitution. On the contrary, it satisfies the constitutional payment mandate, as delineated by this Court's controlling precedents and guideposts, and serves as an incentive to complete constitutional budget obligations in a timely fashion.

IV.

The separation of powers question asserted by plaintiffs and adopted by the Supreme Court must next be considered. The trial court reached its conclusion that chapter 635 breached this principle with daunting words and images:

"The law impermissibly tips the fragile balance of powers that is the keystone of our system of government by threatening to impose on the Legislature a budget that is not the product of thoughtful deliberation and debate. To place any legislator or anyone in any branch of government under undue economic pressure in exercising his or her judgment, while expecting that person to act in accordance with his or her oath of office is illogical, unsound, and unconstitutional" (180 Misc 2d 643, 647-648).

These flourishes are no substitute for an analytically justified basis to invalidate chapter 635 of the Laws of 1998.

The doctrine has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government (*see,* NY Const, art III, § 1; art IV, § 1; art VI, § 1; *Clark v Cuomo,* 66 NY2d 185, 189). Article III, § 1, plainly declares: "The legislative power of this state shall be vested in the senate and assembly," which traditionally requires "that the Legislature make the critical policy decisions" (*Bourquin v Cuomo,* 85 NY2d 781, 784; *see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 776).

The courts are vested with a unique role and review power over the constitutionality of legislation (*see, Marbury v Madison,* 1 Cranch [5 US] 137 [1803]) which includes being the final arbiter of true separation of powers disputes (*compare, Matter of King v Cuomo,* 81 NY2d 247; *Matter of Wolpoff v Cuomo, supra; Clark v Cuomo, supra; Bourquin v Cuomo, supra*). But, ***12** as our precedents demonstrate, the courts have their limitations, too, either doctrinally imposed or self-imposed. The restraints have evolved for prudential reasons, from an appreciation of the prescribed and proportioned role of the Judiciary, and out of an

acknowledged interdependency in the fulfillment of plenary governmental responsibility.

Here, the process affected by chapter 635 is " '[l]egislative passage of the [annual] budget' " in a timely fashion (L 1998, ch 635, § 2, adding Legislative Law § 5 [3]), a paramount State interest and goal (NY Const, art VII, § 4). The give-and-take compromises between the two essential lawmaking bodies over public revenues and their expenditures, by virtue of respective constitutional mandates to them, inextricably intertwines the Legislative and Executive Branches in a system of checks and balances. The objective of this specific constitutional investiture of power in those two Branches clearly contemplates a dynamic process and, ultimately, a joint venture designed to serve the common good.

The Governor proposes a budget, recommending appropriations (NY Const, art VII, § 3), and the Legislature may strike out or reduce items, as well as propose its own additions (NY Const, art VII, § 4). The Governor's proposals, if enacted by the Legislature (both Houses acting in harmony), shall become law without further Executive action; appropriations for the Legislature and Judiciary and any proposed additional appropriations, however, are subject to the Governor's further action (NY Const, art VII, § 4).

(3) Chapter 635 of the Laws of 1998 adds procedural oil to this delicately calibrated mechanism. The Legislature, as a Branch of government, must have "finally acted on" the appropriations submitted by the Governor before individual legislators may be paid. The inducement does not require that the Legislature pass the Governor's budget; only that it pass *a* budget (*see,* Senate Debate Transcripts, at 6622-6629, 6625-6626, Bill Jacket, L 1998, ch 635).

We further examine and now apply these principles to this lawsuit. The plaintiffs sue in this case as individuals, *not* as *the* Legislative Branch of government. They object to chapter 635 because, they say, it "permits the Governor to maximize his constitutional powers at the expense of the Legislature's." They hypothesize a situation where the Governor could submit a budget as late as possible and thus minimize debate and deliberation on the Executive proposals, in view of the ***13** potentiality that legislators' paychecks might be withheld should the debate continue, as occurred this year, without timely resolution by a legislative budget enactment. The plaintiffs complain that such a strategic initiative or thrust might hurry or dictate acquiescence by some legislators, and thus might constitute a violation of the separation of powers principle. They view this potentiality as a legally cognizable and constitutionally impermissible transfer of power from the Legislature to the Executive. We disagree and conclude that their arguments fail for various reasons.

First, all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with and fulfillment of their oaths of office. We fully accord them that presumption and respect. Next, one of the plain purposes of the separation of powers theory is to guard against one Branch seeking to maximize power (*see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 798). It is the correlative oversight of each lawmaking Branch over one another--in essence a dependency, rather than a separation--that balances the overall power to protect the *public's* interests, not those individuals who occupy the offices of those Branches at varying times (*see, e.g., Matter of King v Cuomo,* 81 NY2d 247, 254, *supra; see generally,* The Federalist, Nos. 47, 48 [Madison]).

Although chapter 635 of the Laws of 1998 pinpoints a particular interdependence of the Legislature and Executive with respect to the budget-making process, it does not impermissibly merge or shift the powers between those two Branches. The leverage of negotiating positions is not the theoretical or functional equivalent of lawfully allocated governmental authority. In the end, the Legislature always does the legislating (*see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 779). This enduring role is highlighted by the fact that, despite the purported "sledgehammer" of chapter 635 (*see,* Senate Debate Transcripts, at 6622-6629, 6626, Bill Jacket, *op. cit.*), the 1999-2000 budget negotiations were concluded only after the second longest budget delay in the State's history.

The balance wheels of the system are delicate, since the ultimate goal is to avoid the "*whole* power of one department [being] exercised by the same hands which possess the *whole* power of another" (The Federalist, No. 47 [Madison] [emphasis in original]; *see also, Plaut v Spendthrift Farm,* 514 US 211). Yet, "it is *institutional interdependence* rather than *functional* ***14** *independence* that best summarizes the American idea of protecting liberty by fragmenting power" (Tribe, American Constitutional Law, at 20 [2d ed] [emphasis in original]; *see also,* 4 Lincoln, The Constitutional History of New York, at 494, 497). The genius of the system is synergy and not "separation," in the common connotation of that latter word.

(4) Furthermore, assuming that the law does recalibrate some of the negotiating leverage, that shift has occurred as a direct result of the Legislature's own bicameral action. Its official work was done qua Branch of the government, and the approved Act enjoys the ordinarily presumed validity of law, especially against a facial attack. The Legislature has decided to restrict itself and discipline its own work and power in this fashion. That is not a cognizable separation of powers problem in these circumstances, contrary to the novel restriction that the dissent would place on the Legislative Branch prospectively regulating its own affairs and proceedings. Rather, we view the adopted control mechanism as a credit to the Legislative Branch's internal management practices, not a mark of some ultra vires surrender of power to any other Branch. Moreover, it should not be overlooked that, by this statutory change, both Houses came together with an identical bill in an effort and as an incentive to fulfill in a timely fashion their prescribed budget-related duties to the People of the State.

Another aspect of the motive behind the legislation is noteworthy. The self-imposed prod to attain the paramount State interest in achieving a timely budget is highly significant because achievement of that goal would guarantee salaries of all public employees being paid on time. Other entities, such as school districts, would also receive their State funds on time, thus avoiding the heavy interim borrowing burdens that are otherwise incurred. The argument of those who attack the statute does not come to grips with the unassailable fact that without a State budget or without messages of necessity and interim authorizations or continuing concurrent resolutions, *no* State expenditures could be made to anyone, including legislators. Thus, after a fiscal year concludes, and until a new budget is passed for the following year, the payment of compensation to legislators is inescapably contingent and dependent upon the extant Executive's discretionary powers (*see,* NY Const, art VII, § 5).

We have elsewhere declared that it is unwise for the courts "to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on ***15** our own," for it "is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard" (*Matter of Wolpoff v Cuomo,* 80 NY2d 70, 79, *supra*). That wisdom remains a compelling injunction for this Court to honor and be guided by in this instance. There should be no misunderstanding, however, that when and where the Constitution requires the courts to act within prescribed authority, we do not hesitate to decide even the most sensitive governmental disputes (*see, e.g., New York Pub. Interest Research Group v Steingut, supra; Matter of King v Cuomo, supra*).

Just as the plaintiffs theorize about scenarios where the Governor may "force" legislators into budgetary submission, competing hypotheses may be composed. For example, the Legislature could simply have stricken some of the Governor's proposed appropriations and offered no additions of its own. The State would then have had an instant budget over which the Governor would have had no subsequent, separate, constitutionally assigned role. The mere potentiality of this--and other--alternative hypotheses defeats the plaintiffs' facial challenge, and answers the dissent's conclusory assertion in this regard. We note that plaintiffs have adverted emphatically to *Matter of King v Cuomo* (*supra*), as a justification for the courts to intervene in this dispute. They miss a critical distinction, however, in the analysis and application of that case. The instant case is about whether the challenged statute is intrinsically a constitutional affront to the separation of powers doctrine. *Matter of King v Cuomo,* on the other hand, was a dispute about the very process itself of how enactments become law. There, the explicitly prescribed method of making law was at issue and at stake, and this Court found a fundamental deviation from the constitutional prescriptions. That decision is not at all apt here.

Finally, contrary to the assertion of those who would invalidate chapter 635 of the Laws of 1998, the Act does not create or result in "extortionate economic pressure." We discern no substantially different economic duress created by chapter 635 than that which is inherent in the ordinary lawmaking process, budget-related and otherwise. Indeed, "the legislative process is *deliberately* exposed to the buffeting and the pressures of outside interests. This lends a responsiveness to the needs of the community as expressed by those interested" (Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 777 [emphasis added]). A fortiori, the adoption of ***16** a regimen and incentive predicated upon one Branch's own resonance to a more efficacious discharge of its allocated and collective constitutional duties should not be disturbed by this Court.

Neither external nor internal pressures carry an inherent constitutional virus. We are satisfied that this rhetorical argument cannot justify this Court's substitution of its preferences for how the Legislature should handle efforts that

seek to affect its work (*see, Matter of Wolpoff v Cuomo, supra,* at 79). When the plaintiffs object to "economic pressure," they are essentially attacking the fundamental, albeit rambunctious, realities of the political structure and process, including how public monies shall be allocated.

In the end, this issue and aspect of the lawsuit boil down to a debate about the constitutional calibration and allocation of lawmaking powers that underpin the prevailing system of governance in this State. No basis within the judicial review function supports the extraordinary superintendence and judicial nullification of chapter 635 that plaintiffs facially seek. This is not a case where a losing faction of legislators can secure from the courts the very result they failed to achieve in their one House of the Legislature, through legitimate debate and political persuasion (*see generally,* The Federalist No. 10 [Madison]).

V.

(5) The plaintiffs further complain that chapter 635's provision for the Comptroller to determine whether the budget is "sufficient for the ongoing operation and support of state government and local assistance" injects an unconstitutional delegation or power into the lawmaking process. We view this aspect of the case with the requisite "commonsense perspective" (*Bourquin v Cuomo, supra,* at 785; *see also, National Assn. of Ind. Insurers v State of New York, supra,* 89 NY2d, at 952 [quoting *Alliance of Am. Insurers v Chu,* 77 NY2d 573, 585]). That approach supports the conclusion that the Comptroller's defined involvement fits within and fulfills his independent fiscal role as "a vital part of the constitutional machinery for assuring accountability in the expenditure of [State] funds" (*Matter of McCall v Barrios-Paoli,* 93 NY2d 99, 104).

Indeed, the State Constitution requires that the Comptroller "audit all vouchers before payment and all official accounts" (art V, § 1). "The payment of any money of the state, or of any money under its control ... except upon audit by the ***17** comptroller, shall be void" (*id.*), and the Legislature may assign duties "incidental to the performance of these functions" (*id.*). Thus, the Comptroller is required to "[s]uperintend the fiscal concerns of the state" (State Finance Law § 8 [1]) and "[k]eep, audit and state all accounts in which the state is interested" (State Finance Law § 8 [2]). By chapter 635 of the Laws of 1998, the Legislature has plainly confirmed the Comptroller's customary responsibility for ensuring the availability of revenues that would be expended through the enacted appropriations bills. This reinforcement in no way authorizes the Comptroller to "determine" when legislators shall be paid. That determination remains exclusively within the control, timing and power of the bicameral Legislature itself, acting as a Branch of Government when it enacts a timely budget, as is its constitutional duty.

Realistically, the Comptroller's virtually immediate certification following the legislatively enacted budget in August refutes, in any event, plaintiffs' theoretical and facially invoked constitutional concerns. His actions demonstrate the non-substantive nature--in the lawmaking sense--of the formal pre-audit imprimatur by that independent State officer.

VI.

Additional arguments from all sides have been considered, and we find them to be without constitutional import in this case. The manner of enactment and the content and effect of chapter 635 of the Laws of 1998 neither violate nor implicate plaintiffs' First Amendment, Contracts Clause, or due process rights.

Accordingly, the judgment of Supreme Court should be reversed, without costs, and chapter 635 of the Laws of 1998 should be declared constitutional.

Smith, J.

(Dissenting). Because I believe that chapter 635 of the Laws of 1998 violates the State constitutional guarantee that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law" (NY Const, art III, § 6), I dissent and vote to affirm the order of the Supreme Court (180 Misc 2d 643).

On December 1, 1998, the New York State Assembly passed legislation (Assembly Bill A 11464) to amend ***18** Legislative Law § 5 to raise the salaries of the members of the Legislature.[1] The bill raised the annual legislative salary by 38%, from $57,500 to $79,500. It passed the State Senate the following day. Although passed by the Legislature and delivered to the Governor, the Governor withheld signature of the bill until the Legislature also passed and delivered to him Senate Bill S 7880. This latter bill provided that if the State's budget was not enacted and approved by the State Comptroller by the start of each fiscal year (April 1), the net salaries of the Legislature would be withheld by the Comptroller until a budget was enacted.

On December 18, 1998, the Legislature passed Senate Bill S 7880, and, on that same day, the Governor signed both bills into law (L 1998, ch 630; L 1998, ch 635 [hereinafter collectively referred to as "Chapter 635"]). The 38% legislative salary increase went into effect on January 1, 1999, the first day of the succeeding legislative term.

Prior to the enactment of Chapter 635, Legislative Law § 5 (1) made Legislators' salaries unconditionally payable in 26 bi-weekly installments. Chapter 635 amended Legislative Law § 5 (1) to currently provide that Legislators' salaries:

"shall be payable in twenty-six bi-weekly installments provided, however, that if legislative passage of the budget as defined in [Legislative Law § 5 (3)] has not occurred prior to the first day of any fiscal year, the net amount of any such bi-weekly salary installment payments to be paid on or after such day shall be withheld and not paid until such legislative passage of the budget has occurred whereupon bi-weekly salary installment payments shall resume and an amount equal to the accrued, withheld and unpaid installments shall be promptly paid to each member" (L 1998, ch 635, § 1).

Chapter 635 similarly provides for the withholding of legislative allowances (L 1998, ch 635, § 3).

To avoid dispute in the event that Chapter 635's withholding provision is triggered, Chapter 635 (2) defines "legislative passage of the budget" as the point in time when the appropriation bill(s) submitted by the Governor:

"have been finally acted on by both houses of the ***19** legislature in accordance with article seven of the state constitution and the state comptroller has determined that such appropriation bill or bills that have been finally acted on by the legislature are sufficient for the ongoing operation and support of state government and local assistance for the ensuing fiscal year. In addition, legislation submitted by the governor pursuant to section three of article seven of the state constitution determined necessary by the legislature for the effective implementation of such appropriation bill or bills shall have been acted on" (L 1998, ch 635, § 2, adding Legislative Law § 5 [3]).

In January 1999, the Governor, as required by article VII of the Constitution, presented for legislative approval his proposed budget for fiscal year 1999-2000. Because the Legislature was unable to reach a consensus on the Governor's budget bill by April 1, 1999, the withholding provision of Chapter 635 was triggered and the Legislature's pay withheld.[2]

On April 19, 1999, a group of 14 Legislators, 11 of whom had voted against the passage of Chapter 635 and three of whom were newly elected members, commenced this CPLR article 78 proceeding in Supreme Court, Kings County, naming as respondents the Governor, the State Comptroller and the State. In their petition, the Legislators set forth six causes of action challenging the constitutionality of Chapter 635 under the State and Federal Constitutions. The Legislators also moved for preliminary and permanent injunctive relief, as well as final judgment on the merits. In support, each submitted affidavits setting forth the personal financial hardships that they and their families had and would suffer from the State's continued withholding of their annual pay.

On May 21, 1999, Supreme Court agreed with the Legislators and declared Chapter 635 to be unconstitutional. The court concluded that Chapter 635' s intentional infliction of personal financial hardship upon some Legislators encroached upon the institutional independence of the Legislature as a whole. Because of Chapter 635's potential effect on the balance of governmental power, Supreme Court concluded that it violates the doctrine of separation of powers and the State constitutional ***20** guarantee that Legislators' salaries remain fixed (NY Const, art III, § 6; *see,* 180 Misc 2d 643, 647). The State respondents then brought the instant appeal directly to this Court (*see,* CPLR 5601 [b] [2]).

The 1777 Constitution, the State's first, made no provision for the salary of Legislators. Since the Constitution of 1821, however, the Constitution has provided for legislative compensation. The 1821 Constitution provided that Legislators should receive compensation, to be paid out of the public treasury, but with no increase to take effect during the year in which the compensation was made and with no increase beyond the sum of $3 per day.

The 1777 Constitution also required that Legislators meet property qualifications. An 1845 amendment eliminated all property qualifications for holding public office.

The Constitution of 1846 provided that Legislators receive a sum not exceeding $3 per day for their services and an aggregate compensation not exceeding $300, except in cases of impeachment. Until 1947, legislative salaries were

set by the People in the Constitution. Following 1947, the Legislature itself, with the approval of the Governor, set its own salary.

Throughout New York State's history, there has been a struggle over legislative compensation. Some have felt that members of the Legislature should serve with minimum or no compensation. Those favoring this view have felt that Legislators should have some other means of supporting themselves. Other persons have felt that without adequate compensation, those without independent resources could not stand for election or become members of the Legislature, thus excluding a great number of people from public service.[3]

In 1946, the Final Report of the New York State Joint Legislative Committee on Legislative Methods, Practices, Procedures and Expenditures recommended that the salaries of the Legislators be increased from $2,500 to a figure more ***21** commensurate with the work required.[4] The report also recommended that the inflexibility of setting legislative salaries in the Constitution be eliminated and that, instead, the authority to raise legislative salaries be placed with the Legislature, and checked by gubernatorial consent.[5] The report concluded, "In revising legislative salaries the Legislature and the Governor would necessarily always be guided by public opinion."[6] When, in 1947, the People authorized the Legislature to set its own salary with the approval of the Governor, it was with the recognition that the Legislature needed to be able to adequately compensate itself and that this right would not be abused in view of the force of public opinion.

The individual Legislators represent the People of the State of New York. In return, the State Constitution provides that each member of the Legislature shall be compensated for his or her services (NY Const, art III, § 6). By placing legislative compensation beyond the political fray, the People of this State have expressed their interest in achieving legislative pay stability. To that end, article III, § 6 of the New York State Constitution provides, in pertinent part, "Each member of the legislature shall receive for his services a like annual salary, to be fixed by law."[7]

By its plain and unambiguous terms, article III, § 6 mandates that legislative salaries be "fixed by law" in like amount (NY Const, art III, § 6). This same provision also provides, in equally unambiguous terms, that once fixed, legislative salaries be "receive[d]" (*id.*).

Like its counterpart in the Federal Constitution (US Const, art I, § 6), article III, § 6 of the State Constitution provides a critical element of governmental stability by prescribing stability ***22** in legislative salaries and emoluments. Just as the Federal Constitution places receipt of congressional compensation beyond the reach of the political fray (*see,* US Const, art I, § 6 ["The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law"]), article III, § 6 requires that the legislative salary be received (*see, Dunlea v Anderson,* 66 NY2d 265, 268, citing NY Const, art III, § 6 ["With the amendment of section 6, a legislator now 'receive(s) for his services a like annual salary, to be fixed by law' "]). When triggered, Chapter 635, on its face, violates this State constitutional prescription by rendering the receipt of the legislative salary conditional upon the passage of an April 1 budget.

Since 1928, the Constitution has given to the Governor primary authority in preparing a budget. Thus, article VII, § 1 requires the Governor to obtain from the Executive Branch an estimate of expenses. The Governor then prepares a budget which he submits to the Legislature (NY Const, art VII, § 2). That budget must contain "a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year" (NY Const, art VII, § 2). In addition to this plan, the Governor must submit appropriation bills and proposed legislation (NY Const, art VII, § 3). The Legislature may not consider any other appropriation bill until all of the Governor's bills have been disposed (NY Const, art VII, § 5). While the Legislature may add to, strike out, or reduce items in the Governor's appropriation bills, the revisions are subject to the Governor's veto (NY Const, art VII, §§ 3, 6).

The budgetary process mandated by the Constitution requires that the Governor submit appropriation bills and proposed legislation for an entire fiscal year. The budgetary process itself requires the making of political choices. To the extent that a Legislator's salary depends on agreement regarding what monies should be spent and for what purposes, Chapter 635 introduces an improper mixture of legislative salaries with the merits of un-passed legislation.

Moreover, when one Legislature increases the salary of the next, but then withholds it after a term begins because of the failure to pass legislation, it, in effect, decreases that salary. This also renders Chapter 635 unconstitutional on its face. In my view, no Legislature can exercise this type of control over another. The Constitution permits one Legislature to

increase the salary given to the next, but not to make that salary dependent on any passage of legislation, including the State's budget. ***23**

This Court has previously described two salutary purposes underlying article III, § 6. In *New York Pub. Interest Research Group v Steingut* (40 NY2d 250, 258), this Court stated:

"Here, it may be assumed that the prohibition against increases and decreases in legislators' compensation and emoluments during their terms of office would serve two salutary purposes--(1) to avoid a conflict of interest by removing from legislators the authority to vote themselves financial benefits at the expense of the public treasury, and (2) to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances."

In The Federalist, No. 73, Alexander Hamilton argued that the President of the United States should receive a salary that could neither be increased nor diminished during his term of office, thus freeing him to perform his duties without regard to financial considerations. He stated:

"The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. ... There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will. ...

"The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."

The reasoning applied by Alexander Hamilton to the President's compensation applies with equal force to legislative salaries here.

Article III, § 6 is violated by this non-constitutional enactment that thwarts its purpose of removing personal financial ***24** considerations from legislative proposals. It is not an answer to say that the Legislature can determine the time when to pay salaries to its members. That is not the issue before us. The issue is whether the receipt of salaries may be tied to the passage of specific legislation. In my view, it cannot. To that end, article III, § 6 requires both that legislative salaries be fixed and received.

As for the argument that this Court should refrain from deciding this issue that involves a dispute between the executive and legislative branches of government and between elements within the legislative branch, it is precisely the constitutional role of the judiciary to resolve such disputes.[8] The Court of Appeals has in the past been called upon to resolve conflicts between the Governor and the Legislature. One such conflict occurred in 1928 between Governor Franklin D. Roosevelt and the Legislature over the budget. In 1928, the executive budget had become a part of the State Constitution. In 1929, however, the Legislature adopted an amended budget which required the spending of certain lump sums that could not be changed without the consent of the Chairmen of the Senate Finance and Assembly Ways and Means Committees. When the bill was passed again over the Governor's veto, the Governor sued. This Court upheld the position of the Governor and concluded that the legislative action was unconstitutional.[9]

In sum, Chapter 635, on its face, is unconstitutional because it authorizes one Legislature to decrease the salary paid to another Legislature during its term of office by first giving and then withholding compensation. It also reverses the historical will of the People, expressed by constitutional amendments in 1845 and 1947, that there be neither property qualifications nor financial incentives provided to the members of the Legislature when deciding issues on the merits in accordance with the democratic process.

For these reasons, I dissent and vote to affirm the order of the Supreme Court.

Chief Judge Kaye and Judges Levine, Ciparick, Wesley ***25** and Rosenblatt concur with Judge Bellacosa; Judge Smith dissents and votes to affirm in a separate opinion.

Judgment reversed, without costs, and judgment granted declaring chapter 635 of the Laws of 1998 constitutional. ***26**

Footnotes

1 Chapter 630 of the Laws of 1998.

2 Passage of the New York State budget did not occur until August 4, 1999, whereupon, in accordance with Chapter 635's formula, the net salaries of the Legislators were finally received.

3 Reports of the Proceedings and Debates of the Constitutional Convention of 1821, Assembled for the Purpose of Amending the Constitution, at 419-424.

Proceedings and Debates of New York State Constitutional Convention held in 1867 and 1868, vol I, at 761; vol V, at 3456-3457, 3591-3593.

Revised Record of New York State Constitutional Convention of 1915, vol II, at 1203-1245; vol III, at 2353-2366 (Apr. 6 to Sept. 10, 1915).

Final Report of New York State Joint Legislative Committee on Legislative Methods, Practices, Procedures and Expenditures, 1946 NY Legis Doc No. 31, at 169-171.

4 1946 NY Legis Doc No. 31, at 169-170.

5 *Id.,* at 169-170.

6 *Id.,* at 171.

7 The relevant portion of article III, § 6 states: “Each member of the legislature shall receive for his services a like annual salary, to be fixed by law. He shall also be reimbursed for his actual traveling expenses in going to and returning from the place in which the legislature meets, not more than once each week while the legislature is in session. ... Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation. The provisions of this section and laws enacted in compliance therewith shall govern and be exclusively controlling, according to their terms. Members shall continue to receive such salary and additional allowance as heretofore fixed and provided in this section, until changed by law pursuant to this section.”

8 *See generally,* The Federalist, No. 78; *Marbury v Madison,* 1 Cranch [5 US] 137.

9 *See, People v Tremaine,* 252 NY 27, 45.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Alexander v. South Carolina State Conference of the NAACP, U.S.S.C., May 23, 2024

137 S.Ct. 1455
Supreme Court of the United States

Roy COOPER, Governor of North Carolina, et al., appellants
v.
David HARRIS, et al.

No. 15–1262
|
Argued Dec. 5, 2016.
|
Decided May 22, 2017.

Synopsis
Background: Registered voters brought action challenging the redistricting of two North Carolina congressional districts as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. After a bench trial, a three-judge panel of the United States District Court for the Middle District of North Carolina, Roger L. Gregory, Circuit Judge, 159 F.Supp.3d 600, ruled in favor of voters. Probable jurisdiction was noted.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] deference to District Court's findings, under clearly erroneous standard of review, was warranted;

[2] finding that race was predominant factor in drawing one district as majority-minority district was not clearly erroneous;

[3] State lacked strong basis in evidence for believing that it needed a majority-minority district in order to avoid liability under § 2 of Voting Rights Act (VRA) for vote dilution; and

[4] finding that racial gerrymandering rather than political gerrymandering was predominant factor in drawing the other district as majority-minority district was not clearly erroneous.

Affirmed.

Justice Thomas filed a concurring opinion.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Roberts and Justice Kennedy joined.

Justice Gorsuch took no part in the consideration or decision of the case.

West Headnotes (22)

[1] **Constitutional Law** Electoral districts and gerrymandering

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans, preventing a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race. U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

[2] **Constitutional Law** Equal protection
Constitutional Law Electoral districts and gerrymandering

When a voter sues state officials, alleging the race-based drawing of lines in legislative districting plans, in violation of equal protection, a two-step analysis is called for: (1) the voter must prove that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district, and (2) if racial considerations predominated over others, the design of the district must withstand strict scrutiny, and the burden thus shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end. U.S.C.A. Const.Amend. 14.

62 Cases that cite this headnote

[3] **Constitutional Law** Electoral districts and gerrymandering

Election Law Weight and sufficiency

To show that race was the predominant factor in legislative redistricting, as first step of analysis for equal protection violation, the plaintiff must demonstrate that the legislature subordinated other factors, such as compactness, respect for political subdivisions, and partisan advantage, to racial considerations, and the plaintiff may make the required showing through direct evidence of legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both. U.S.C.A. Const.Amend. 14.

31 Cases that cite this headnote

[4] **Constitutional Law** Electoral districts and gerrymandering

A plaintiff succeeds in showing that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district, as first step of analysis for an equal protection, even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. U.S.C.A. Const.Amend. 14.

36 Cases that cite this headnote

[5] **Election Law** Vote Dilution

The prohibition, in § 2 of the VRA, of any standard, practice, or procedure that results in a denial or abridgement of the right to vote on account of race, extends to vote dilution brought about by the dispersal of a group's members into legislative districts in which they constitute an ineffective minority of voters. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

17 Cases that cite this headnote

[6] **Constitutional Law** Electoral districts and gerrymandering

When a State invokes the VRA to justify a race-based legislative districting plan, it must show, to meet the narrow tailoring requirement for surviving strict scrutiny for an equal protection violation, that it had a strong basis in evidence for concluding that the VRA required its action, or said otherwise, the State must establish that it had good reasons to think that it would transgress the VRA if it did not draw race-based district lines; that strong basis or good reasons standard gives States breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, §§ 2(a), 5, 52 U.S.C.A. §§ 10301(a), 10304.

19 Cases that cite this headnote

[7] **Federal Courts** Review of federal district courts

A three-judge District Court's assessment of a State's legislative districting plan, which is challenged as a racial gerrymander that violates equal protection, warrants significant deference on direct appeal to the Supreme Court, and the Supreme Court retains full power to correct the District Court's errors of law, but the District Court's findings of fact, most notably, as to whether racial considerations predominated in drawing district lines, are subject to review only for clear error. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

12 Cases that cite this headnote

[8] **Federal Courts** "Clearly erroneous" standard of review in general

Under the clearly erroneous standard of review for a trial court's findings of fact, the reviewing court cannot reverse just because it would have decided the matter differently, and a finding that is plausible in light of the full record, even if another is equally or more so, must govern. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

46 Cases that cite this headnote

[9] **Judgment** Persons Concluded

Three-judge District Court reasonably determined, in action brought by registered voters asserting that State's congressional redistricting for two districts constituted racial gerrymandering in violation of equal protection, that two voters were not members of civil rights organizations that were plaintiffs in a state court action that challenged the same two districts as racial gerrymanders, so that state court's judgment did not have claim preclusion or issue preclusion effect, assuming that voters' membership in the organizations, if proven, could give rise to preclusive effect; dueling contentions of the two voters and the State turned on intricate issues about organizations' membership policies, and nothing in State's evidence clearly rebutted voters' testimony that they never joined any of the organizations. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[10] **Res Judicata** Persons not parties or privies

Res Judicata Particular Interests of and Relations Between Persons

One person's lawsuit generally does not bar another's based on claim preclusion or issue preclusion, no matter how similar they are in substance, but when plaintiffs in two cases have a special relationship, a judgment against one can indeed bind both.

1 Case that cites this headnote

[11] **Federal Courts** "Clearly erroneous" standard of review in general

The rule that a trial court's factual findings are reviewed for clear error contains no exception for findings that diverge from those made in another court, and whatever findings are under review receive the benefit of deference, without regard to whether a court in a separate suit has seen the matter differently. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

6 Cases that cite this headnote

[12] **Federal Courts** Review of federal district courts

Factual findings of three-judge District Court, which ruled after bench trial that State's congressional redistricting plan for two districts constituted racial gerrymandering in violation of equal protection, would receive deference from Supreme Court under clearly erroneous standard of review, rather than the searching review sought by State as appellant, even if a state court had seen the matter differently in a separate action challenging the same districts; however, state court's decision was not wholly irrelevant, since it was common sense that, all else equal, a finding was more likely to be plainly wrong if some judges disagreed with it. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

7 Cases that cite this headnote

[13] **Federal Courts** Conflicting or undisputed evidence

The very premise of clear error review is that there are often two permissible or plausible views of the evidence. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

14 Cases that cite this headnote

[14] **Constitutional Law** Electoral districts and gerrymandering

United States Equality of representation and discrimination; Voting Rights Act

Finding of three-judge District Court that race was predominant factor motivating state legislature's decision to place a significant number of African-American voters within a particular district, for congressional redistricting, was not clearly erroneous, and thus, strict scrutiny for equal protection violation was required; State's mapmakers purposefully established a racial target that African-Americans should make up no less than a majority of district's voting-age population so as to comply with VRA's

prohibition of vote dilution, and the announced racial target subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

8 Cases that cite this headnote

[15] **Constitutional Law** Electoral districts and gerrymandering

When race furnishes the overriding reason for choosing one map over others during legislative redistricting, a further showing of inconsistency between the enacted plan and traditional redistricting criteria is unnecessary to a finding of racial predominance, so that strict scrutiny for an equal protection violation is required. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[16] **Constitutional Law** Electoral districts and gerrymandering

United States Equality of representation and discrimination; Voting Rights Act

Assuming that complying with the VRA was a compelling interest for racial gerrymandering in legislative redistricting, State did not have a strong basis in evidence for believing that it needed to draw a congressional district as an African-American majority-minority district in order to avoid liability under § 2 of VRA for vote dilution, and thus, there was an equal protection violation under strict scrutiny because such racial gerrymandering was not narrowly tailored to State's objective; electoral history provided no evidence that a § 2 plaintiff could demonstrate effective white block-voting that usually would be sufficient to defeat the preferred candidate of African-Americans, as one of the prerequisites for vote dilution claim, and there was no meaningful legislative inquiry into whether a new district with an enlarged population, that was created without a focus on race, could lead to § 2 liability. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

19 Cases that cite this headnote

[17] **Election Law** Compactness and cohesiveness of minority group

Election Law Racially polarized or bloc voting

There are three threshold conditions for proving vote dilution under § 2 of the VRA: (1) a minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district; (2) the minority group must be politically cohesive; and (3) a district's white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

52 Cases that cite this headnote

[18] **Election Law** Compactness and cohesiveness of minority group

The ability of a legislature to draw a majority-minority electoral district does not mean that the legislature is required to do so, in order to avoid liability for vote dilution under § 2 of the VRA, where a crossover district would also allow the minority group to elect its favored candidates. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

30 Cases that cite this headnote

[19] **Election Law** Vote Dilution

A state legislature, when redistricting, need not determine precisely what percent minority population § 2 of the VRA demands in order to avoid vote dilution. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[20] **Constitutional Law** Electoral districts and gerrymandering

United States Equality of representation and discrimination; Voting Rights Act

Finding of three-judge District Court that racial gerrymandering rather than political gerrymandering was predominant factor motivating state legislature's decision to place a significant number of African-American voters within a particular district, for congressional redistricting, was not clearly erroneous, and thus, strict scrutiny for equal protection violation was required; district was approximately the right size before redistricting, racial lines were followed in further slimming down district and adding a couple of knobs to its snakelike body, addition of 35,000 African-American voters and subtraction of 50,000 white voters produced sizeable jump in black voting-age population (BVAP) from 43.8% to 50.7%, and architects of redistricting plan repeatedly described the influx of African-American voters into the district as a measure to ensure preclearance under § 5 of VRA, not a side-effect of political gerrymandering. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Voting Rights Act of 1965, § 5, 52 U.S.C.A. § 10304.

15 Cases that cite this headnote

[21] **Federal Courts** Credibility and impeachment

It is a proper for a reviewing court, in applying the clearly erroneous standard of review, to give singular deference to a trial court's judgments about the credibility of witnesses, because the various cues that bear so heavily on the listener's understanding of and belief in what is said are lost on an appellate court later sifting through a paper record. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

27 Cases that cite this headnote

[22] **Constitutional Law** Electoral districts and gerrymandering

Election Law Weight and sufficiency

To establish that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular electoral district, so that strict scrutiny for an equal protection violation is required, the plaintiffs are not required to offer an alternative districting plan that achieves the legislature's claimed political considerations; rather, an alternative map is merely an evidentiary tool to show that an equal protection violation has occurred, and neither its presence nor its absence can itself resolve a racial gerrymandering claim. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

**1459 *Syllabus* [*]

*285 The Equal Protection Clause of the Fourteenth Amendment prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 797, 197 L.Ed.2d 85. When a voter sues state officials for drawing such race-based lines, this Court's decisions call for a two-step analysis. First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762. Second, if racial considerations did predominate, the State must prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end, *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 (VRA or Act). When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "good reasons" for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314. A district court's factual findings made in the course of this two-step inquiry are reviewed only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (*Cromartie II*).

This case concerns North Carolina's redrawing of two congressional districts, District 1 and District 12, after the 2010 census. Prior to that redistricting, neither district

had a majority black voting-age population (BVAP), but both consistently elected the candidates preferred by most African–American voters. The new map significantly altered both District 1 and District 12. The State needed to add almost 100,000 people to District 1 to comply with the one-person-one-vote principle, and it chose to take most of those people from heavily black areas of Durham—increasing the district's BVAP from 48.6% to 52.7%. The State also reconfigured District 12, increasing its BVAP from 43.8% to 50.7%. Registered voters in those districts (here called "the plaintiffs") filed suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. ***286** A three-judge District Court held both districts unconstitutional. It found that racial considerations predominated in the drawing of District 1's lines and rejected the State's claim that this action was justified by the VRA. As for District 12, the court again found that race predominated, and it explained that the State made no attempt to justify its attention to race in designing that district.

Held:

1. North Carolina's victory in a similar state-court lawsuit does not dictate the disposition of this case or alter the applicable standard of review. Before this case was filed, a state trial court rejected a claim by several civil rights groups that ****1460** Districts 1 and 12 were unlawful racial gerrymanders. The North Carolina Supreme Court affirmed that decision under the state-court equivalent of clear error review. The State claims that the plaintiffs are members of the same organizations that brought the earlier case, and thus precluded from raising the same questions anew. But the State never satisfied the District Court that the alleged affiliation really existed. And because the District Court's factual finding was reasonable, it defeats North Carolina's attempt to argue for claim or issue preclusion here.

The State's backup argument about the proper standard of review also falls short. The rule that a trial court's factual findings are reviewed only for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6). Although the state court's decision is certainly relevant, the premise of clear error review is that there are often "two permissible views of the evidence." *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518. Even assuming that the state court's findings capture one such view, the only question here is whether the District Court's assessment represents another. Pp. 1467 – 1468.

2. The District Court did not err in concluding that race furnished the predominant rationale for District 1's redesign and that the State's interest in complying with the VRA could not justify that consideration of race. Pp. 1468 – 1472.

(a) The record shows that the State purposefully established a racial target for the district and that the target "had a direct and significant impact" on the district's configuration, *Alabama,* 575 U.S., at ——, 135 S.Ct. at 1271 subordinating other districting criteria. Faced with this body of evidence, the District Court did not clearly err in finding that race predominated in drawing District 1; indeed, it could hardly have concluded anything but. Pp. 1468 – 1469.

(b) North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. The State argues ***287** that it had good reasons to believe that it had to draw a majority-minority district to avoid liability for vote dilution under § 2 of the VRA. *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, identifies three threshold conditions for proving such a vote-dilution claim: (1) A "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district, *id.,* at 50, 106 S.Ct. 2752; (2) the minority group must be "politically cohesive," *id.,* at 51, 106 S.Ct. 2752; and (3) a district's white majority must "vote[ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate," *ibid*. If a State has good reason to think that all three of these conditions are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite. For nearly 20 years before the new plan's adoption, African–Americans made up less than a majority of District 1's voters, but their preferred candidates scored consistent victories. District 1 thus functioned as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion). So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that because it needed to substantially increase District ****1461** 1's population, the question facing

the state mapmakers was not whether the *then-existing* District 1 violated § 2, but whether the *future* District 1 would do so if drawn without regard to race. But that reasoning, taken alone, cannot justify the State's race-based redesign of the district. Most important, the State points to no meaningful legislative inquiry into the key issue it identifies: whether a new, enlarged District 1, created without a focus on race, could lead to § 2 liability. To have a strong basis to conclude that § 2 demands race-based measures to augment a district's BVAP, the State must evaluate whether a plaintiff could establish the *Gingles* preconditions in a new district created without those measures. Nothing in the legislative record here fits that description. And that is no accident: The redistricters believed that this Court's decision in *Strickland* mandated a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups meeting *Gingles* ' size condition). But, as this Court's § 2 jurisprudence makes clear, unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388. North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a ***288** majority-minority district thus rested on a pure error of law. Accordingly, the Court upholds the District Court's conclusion that the State's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. Pp. 1469 – 1472.

3. The District Court also did not clearly err by finding that race predominated in the redrawing of District 12. Pp. 1472 – 1481.

(a) The district's legality turns solely on which of two possible reasons predominantly explains its reconfiguration. The plaintiffs contended at trial that North Carolina intentionally increased District 12's BVAP in the name of ensuring preclearance under § 5 of the VRA. According to the State, by contrast, the mapmakers moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.

Getting to the bottom of a dispute like this one poses special challenges for a trial court, which must make " 'a sensitive inquiry' " into all " 'circumstantial and direct evidence of intent' " to assess whether the plaintiffs have proved that race, not politics, drove a district's lines. *Hunt v. Cromartie,* 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (*Cromartie I*). This Court's job is different—and generally easier. It affirms a trial court's factual finding as to racial predominance so long as the finding is "plausible"; it reverses only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504. In assessing a finding's plausibility, moreover, the Court gives singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). Applying those principles here, the evidence at trial—including live witness testimony subject to credibility determinations—adequately supports the District Court's conclusion that race, not politics, accounted for District 12's reconfiguration. And contrary to the State's view, the court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12. Pp. 1472 – 1474.

(b) By slimming the district and adding a couple of knobs to its snakelike body, ****1462** North Carolina added 35,000 African–Americans and subtracted 50,000 whites, turning District 12 into a majority-minority district. State Senator Robert Rucho and State Representative David Lewis—the chairs of the two committees responsible for preparing the revamped plan—publicly stated that racial considerations lay behind District 12's augmented BVAP. Specifically, Rucho and Lewis explained that because part of Guilford County, a jurisdiction covered by § 5 of the VRA, lay in the district, they had increased the district's BVAP to ensure preclearance of the plan. Dr. Thomas Hofeller, their hired mapmaker, confirmed that intent. The State's preclearance submission ***289** to the Justice Department indicated a similar determination to concentrate black voters in District 12. And, in testimony that the District Court found credible, Congressman Mel Watt testified that Rucho disclosed a majority-minority target to him in 2011. Hofeller testified that he had drawn District 12's lines based on political data, and that he checked the racial data only *after* he drew a politics-based line between adjacent areas in Guilford County. But the District Court disbelieved Hofeller's asserted indifference to the new district's racial composition, pointing to his contrary deposition testimony and a significant contradiction in his trial testimony. Finally, an expert report lent circumstantial support to the plaintiffs' case, showing that, regardless of party, a black voter in the region was three to four times more likely than a white voter to cast a ballot within District 12's borders.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review.

Maybe this Court would have evaluated the testimony differently had it presided over the trial; or then again, maybe it would not have. Either way, the Court is far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design. Pp. 1474 – 1478.

(c) Finally, North Carolina argues that when race and politics are competing explanations of a district's lines, plaintiffs must introduce an alternative map that achieves a State's asserted political goals while improving racial balance. Such a map can serve as key evidence in a race-versus-politics dispute, but it is hardly the *only* means to disprove a State's contention that politics drove a district's lines. In this case, the plaintiffs' introduction of mostly direct and some circumstantial evidence gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question. Although a plaintiff will sometimes need an alternative map, as a practical matter, to make his case, such a map is merely an evidentiary tool to show that an equal protection violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.

North Carolina claims that a passage of this Court's opinion in *Cromartie II* makes an alternative map essential in cases like this one, but the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there, and the entire thrust of the opinion runs counter to an inflexible counter-map requirement. Rightly understood, the passage on which the State relies had a different and narrower point: Given the weak evidence of a racial gerrymander offered in *Cromartie II,* only maps that would *actually* show what the plaintiffs' had not could carry the day. This case, in contrast, turned not on the possibility ***290** of creating more optimally constructed districts, but on direct evidence ****1463** of the General Assembly's intent in creating the actual District 12—including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's politics defense. Pp. 1478 – 1481.

159 F.Supp.3d 600, affirmed.

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ROBERTS, C.J., and KENNEDY, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

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Justice KAGAN delivered the opinion of the Court.

***291** The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm.

I

A

[1] **[2]** The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct.

788, 797, 197 L.Ed.2d 85 (2017) (internal quotation marks and alteration omitted). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

[3] **[4]** First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). That entails demonstrating ****1464** that the legislature "subordinated" other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to "racial considerations." *Ibid.* The plaintiff may make the required showing through "direct evidence" of legislative intent, "circumstantial evidence of a district's shape and demographics," or a mix of both. *Ibid.*[1]

***292** Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. The burden thus shifts to the State to prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end. *Ibid.* This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act), 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

[5] Two provisions of the VRA—§ 2 and § 5—are involved in this case. §§ 10301, 10304. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race." § 10301(a). We have construed that ban to extend to "vote dilution"—brought about, most relevantly here, by the "dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters." *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder,* 570 U.S. ——, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall "retrogression" in the ability of racial minorities to elect their preferred candidates, *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

[6] When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. ***293** *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314 (2015). Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. *Ibid.* That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 802.

[7] **[8]** A district court's assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court.[2] We of course retain full power to ****1465** correct a court's errors of law, at either stage of the analysis. But the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*); *id.,* at 259, 121 S.Ct. 1452 (THOMAS, J., dissenting). Under that standard, we may not reverse just because we "would have decided the [matter] differently." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). A finding that is "plausible" in light of the full record—even if another is equally or more so—must govern. *Id.,* at 574, 105 S.Ct. 1504.

B

This case concerns North Carolina's most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much ***294** of the way to the State's northern border. (Maps showing the districts are included in an appendix to this opinion.) Both have quite the history before this Court.

We first encountered the two districts, in their 1992 versions, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d

511 (1993). There, we held that voters stated an equal protection claim by alleging that Districts 1 and 12 were unwarranted racial gerrymanders. See *id.,* at 642, 649, 113 S.Ct. 2816. After a remand to the District Court, the case arrived back at our door. See *Shaw II,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207. That time, we dismissed the challenge to District 1 for lack of standing, but struck down District 12. The design of that "serpentine" district, we held, was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA. *Id.,* at 906, 116 S.Ct. 1894; see *id.,* at 911–918, 116 S.Ct. 1894.

The next year, the State responded with a new districting plan, including a new District 12—and residents of that district brought another lawsuit alleging an impermissible racial gerrymander. A District Court sustained the claim twice, but both times this Court reversed. See *Hunt v. Cromartie,* 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*); *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430. Racial considerations, we held, did not predominate in designing the revised District 12. Rather, that district was the result of a *political* gerrymander—an effort to engineer, mostly "without regard to race," a safe Democratic seat. *Id.,* at 245, 121 S.Ct. 1452.

The State redrew its congressional districts again in 2001, to account for population changes revealed in the prior year's census. Under the 2001 map, which went unchallenged in court, neither District 1 nor District 12 had a black voting-age population (called a "BVAP") that was a majority of the whole: The former had a BVAP of around 48%, the latter a BVAP of around 43%. See App. 312, 503. Nonetheless, in five successive general elections conducted in those reconfigured districts, all the candidates preferred by most African–American voters won their contests—and by some handy margins. In District 1, black voters' candidates of ***295** choice garnered ****1466** as much as 70% of the total vote, and never less than 59%. See 5 Record 636, 638, 641, 645, 647 (Pls. Exh. 112). And in District 12, those candidates won with 72% of the vote at the high end and 64% at the low. See *id.,* at 637, 640, 643, 646, 650.

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in redrawing district lines. Several hearings, drafts, and revisions later, both chambers of the State's General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. See App. 2690; *Evenwel v. Abbott,* 578 U.S. ——, ——, 136 S.Ct. 1120, 1124, 194 L.Ed.2d 291 (2016) (explaining that "[s]tates must draw congressional districts with populations as close to perfect equality as possible"). Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. See Appendix, *infra*. With that addition, District 1's BVAP rose from 48.6% to 52.7%. See App. 312–313. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. See *id.*, at 1150. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end —most relevantly here, in Guilford County. See Appendix, *infra* ; App. 1164. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African–Americans of voting ***296** age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%. See 2 Record 349 (Fourth Affidavit of Dan Frey, Exh. 5); *id.,* at 416 (Exh. 11).

Registered voters in the two districts (David Harris and Christine Bowser, here called "the plaintiffs") brought this suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. See *Harris v. McCrory,* 159 F.Supp.3d 600, 611 (M.D.N.C.2016). And in then applying strict scrutiny, all rejected the State's argument that it had a "strong basis" for thinking that the VRA compelled such a race-based drawing of District 1's lines. *Id.,* at 623. As for District 12, a majority of the panel held that "race predominated" over all other factors, including partisanship. *Id.,* at 622. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. See *ibid.* Judge Osteen dissented from the conclusion that race, rather than politics, drove

District 12's lines—yet still characterized the majority's view as "[e]minently reasonable." *Id.,* at 640.

The State filed a notice of appeal, and we noted probable jurisdiction. *McCrory v. Harris,* 579 U.S. ——, 136 S.Ct. 2512, 195 L.Ed.2d 838 (2016).

****1467** II

[9] We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case. As the State explains, the North Carolina NAACP and several other civil rights groups challenged Districts 1 and 12 in state court immediately after their enactment, charging that they were unlawful racial gerrymanders. See Brief for Appellants 19–20. By the time the plaintiffs before us filed this action, the state trial court, in *Dickson v. Rucho,* had rejected ***297** those claims—finding that in District 1 the VRA justified the General Assembly's use of race and that in District 12 race was not a factor at all. See App. 1969. The North Carolina Supreme Court then affirmed that decision by a 4–3 vote, applying the state-court equivalent of clear error review. See *Dickson v. Rucho,* 368 N.C. 481, 500, 781 S.E.2d 404, 419 (2015), modified on denial of reh'g, 368 N.C. 673, 789 S.E.2d 436 (2016), cert. pending, No. 16–24. In this Court, North Carolina makes two related arguments based on the *Dickson* litigation: first, that the state trial court's judgment should have barred this case altogether, under familiar principles of claim and issue preclusion; and second, that the state court's conclusions should cause us to conduct a "searching review" of the decision below, rather than deferring (as usual) to its factual findings. Reply Brief 6.

[10] The State's preclusion theory rests on an assertion about how the plaintiffs in the two cases are affiliated. As the State acknowledges, one person's lawsuit generally does not bar another's, no matter how similar they are in substance. See *Taylor v. Sturgell,* 553 U.S. 880, 892–893, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court"). But when plaintiffs in two cases have a special relationship, a judgment against one can indeed bind both. See *id.,* at 893–895, 128 S.Ct. 2161 (describing six categories of qualifying relationships). The State contends that Harris and Bowser, the plaintiffs here, are members of organizations that were plaintiffs in *Dickson*. And according to North Carolina, that connection prevents the pair from raising anew the questions that the state court previously resolved against those groups. See Brief for Appellants 20–21.

But North Carolina never satisfied the District Court that the alleged affiliation really existed. When the State argued that its preclusion theory entitled it to summary judgment, Harris and Bowser responded that they were not members of any of the organizations that had brought the ***298** *Dickson* suit. See 3 Record 1577–1582 (Defs. Motion for Summary Judgment); 4 Record 101–106 (Pls. Opposition to Motion for Summary Judgment). The parties' dueling contentions turned on intricate issues about those groups' membership policies (*e.g.,* could Harris's payment of dues to the national NAACP, or Bowser's financial contribution to the Mecklenburg County NAACP, have made either a member of the state branch?). Because of those unresolved "factual disputes," the District Court denied North Carolina's motion for summary judgment. 4 Record 238 (July 29, 2014 Order). And nothing in the subsequent trial supported the State's assertion about Harris's and Bowser's organizational ties: Indeed, the State chose not to present any further evidence relating to the membership issue. Based on the resulting record, the District Court summarily rejected the State's claim that Harris and Bowser were something other than independent plaintiffs. See 159 F.Supp.3d, at 609.

****1468** That conclusion defeats North Carolina's attempt to argue for claim or issue preclusion here. We have no basis for assessing the factual assertions underlying the State's argument any differently than the District Court did. Nothing in the State's evidence clearly rebuts Harris's and Bowser's testimony that they never joined any of the *Dickson* groups. We need not decide whether the alleged memberships would have supported preclusion if they had been proved. It is enough that the District Court reasonably thought they had not.

[11] **[12]** **[13]** The State's back-up argument about our standard of review also falls short. The rule that we review a trial court's factual findings for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6) ("Findings of fact ... must not be set aside unless clearly erroneous"); see also *Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (applying the same standard to a state court's findings). Whatever findings are under review receive the benefit of ***299** deference, without regard to whether a court in a separate suit has seen the matter differently. So here, we must ask not which

court considering Districts 1 and 12 had the better view of the facts, but simply whether the court below's view is clearly wrong. That does not mean the state court's decision is wholly irrelevant: It is common sense that, all else equal, a finding is more likely to be plainly wrong if some judges disagree with it. Cf. *Glossip v. Gross,* 576 U.S. ——, ——, 135 S.Ct. 2726, 2740, 192 L.Ed.2d 761 (2015) (noting that we are even less likely to disturb a factual determination when "multiple trial courts have reached the same finding"). But the very premise of clear error review is that there are often "two permissible"—because two "plausible"—"views of the evidence." *Anderson,* 470 U.S., at 574, 105 S.Ct. 1504; see *supra,* at 1465. Even assuming the state court's findings capture one such view, the District Court's assessment may yet represent another. And the permissibility of the District Court's account is the only question before us.

III

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district's redesign. See *supra,* at 1466 – 1467. And it held that the State's interest in complying with the VRA could not justify that consideration of race. See *supra,* at 1466 – 1467. We uphold both conclusions.

A

[14] Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. See 159 F.Supp.3d, at 611–614. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate ***300** debate, for example, Rucho explained that District 1 "must include a sufficient number of African–Americans" to make it "a majority black district." App. 689–690. Similarly, Lewis informed the House and Senate redistricting committees that the district must have "a majority black voting age population." *Id.*, at 606. And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. Hofeller testified multiple times at trial that ****1469** Rucho and Lewis instructed him "to draw [District 1] with a [BVAP] in excess of 50 percent." 159 F.Supp.3d, at 613; see, *e.g., ibid.* ("Once again, my instructions [were] that the district had to be drawn at above 50 percent").

Hofeller followed those directions to the letter, such that the 50%-plus racial target "had a direct and significant impact" on District 1's configuration. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1271. In particular, Hofeller moved the district's borders to encompass the heavily black parts of Durham (and only those parts), thus taking in tens of thousands of additional African–American voters. That change and similar ones, made (in his words) to ensure that the district's racial composition would "add[ ] up correctly," deviated from the districting practices he otherwise would have followed. App. 2802. Hofeller candidly admitted that point: For example, he testified, he sometimes could not respect county or precinct lines as he wished because "the more important thing" was to create a majority-minority district. *Id.*, at 2807; see *id.*, at 2809. The result is a district with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts. See Brief for United States as *Amicus Curiae* 19; cf. *Alabama,* 575 U.S., at —— – ——, 135 S.Ct., at 1271–1272 (relying on similar evidence to find racial predominance).

[15] Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks ***301** and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but. See 159 F.Supp.3d, at 611 (calling District 1 a "textbook example" of race-based districting).[3]

B

[16] The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. See *supra,* at 1463 – 1464. And we have held that race-based districting is narrowly tailored to that objective if a State had "good reasons" for thinking that the Act demanded such steps. See *supra,* at 1464. North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had "good reasons to believe it needed to draw [District 1] as a majority-

minority district to avoid Section 2 liability" for vote dilution. Brief for Appellants 52. We now turn to that defense.

****1470** **[17]** This Court identified, in *Thornburg v. Gingles,* three threshold conditions for proving vote dilution under § 2 of the VRA. See 478 U.S., at 50–51, 106 S.Ct. 2752. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id.,* at 50, 106 S.Ct. 2752. Second, the minority ***302** group must be "politically cohesive." *Id.,* at 51, 106 S.Ct. 2752. And third, a district's white majority must "vote [ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid*. Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. See *Bush v. Vera,* 517 U.S. 952, 978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting.[4] For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. See 159 F.Supp.3d, at 606; App. 312. Yet throughout those two decades, as the District Court noted, District 1 was "an extraordinarily safe district for African–American preferred candidates." 159 F.Supp.3d, at 626. In the *closest* election during that period, African–Americans' candidate of choice ***303** received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. See *supra,* at 1465 – 1466. Those victories (indeed, landslides) occurred because the district's white population did *not* "vote [ ] sufficiently as a bloc" to thwart black voters' preference, *Gingles,* 478 U.S., at 51, 106 S.Ct. 2752; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). When voters act in that way, "[i]t is difficult to see how the majority-bloc-voting requirement could be met"—and hence how § 2 liability could be established. *Id.,* at 16, 129 S.Ct. 1231. So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that, in this context, past performance is no guarantee of future results. See Brief for Appellants 57–58; Reply Brief 19–20. Recall here that the State had to redraw its whole congressional map following the 2010 census. See *supra,* at 1465 – 1466. And in particular, ****1471** the State had to add nearly 100,000 new people to District 1 to meet the one-person-one-vote standard. See *supra,* at 1466. That meant about 13% of the voters in the new district would never have voted there before. See App. 2690; Reply Brief 20. So, North Carolina contends, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2. Rather, the question was whether the *future* District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by "focusing myopically on past elections." *Id.,* at 19.

But that reasoning, taken alone, cannot justify North Carolina's race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether ***304** the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles,* 478 U.S., at 57, 106 S.Ct. 2752 (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer—the question whether § 2 requires deliberate measures to augment the district's BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully

evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.[5]

[18] ***305** And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. *Strickland* involved a geographic area in which African–Americans could not form a majority of a reasonably compact district. See 556 U.S., at 8, 129 S.Ct. 1231 (plurality opinion). The African–American ****1472** community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. See *supra,* at 1470 – 1471. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. See 556 U.S., at 18–20, 129 S.Ct. 1231. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. See App. 355–356, 363–364, 472–474, 609–610, 619, 1044. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups in fact meeting *Gingles* ' size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates. See 1 Tr. 21–22 (counsel's explanation that "the [S]tate interpreted" *Strickland* to say that, in order to protect African–Americans' electoral ***306** strength and thus avoid § 2 liability, the BVAP in District 1 "need [ed] to be above 50 percent").

That idea, though, is at war with our § 2 jurisprudence —*Strickland* included. Under the State's view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under–50% BVAP. But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe,* 507 U.S., at 41, 113 S.Ct. 1075. And *Strickland,* far from supporting North Carolina's view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that "[i]n areas with substantial crossover voting," § 2 plaintiffs would not "be able to establish the third *Gingles* precondition" and so "majority-minority districts would not be required." 556 U.S., at 24, 129 S.Ct. 1231; see also *ibid.* (noting that States can "defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts"). Thus, North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a "strong basis in evidence," but instead on a pure error of law. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1274.

[19] In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means "insist that a state legislature, when redistricting, determine *precisely* what percent minority population [§ 2 of the VRA] demands." *Ibid*. But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake. Accordingly, we uphold the District Court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

***307** IV

[20] We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General ****1473** Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5's requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so, see n. 10, *infra*. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. 6 Record 1011. The mapmakers drew their lines, in other words, to "pack" District

12 with Democrats, not African–Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.[6]

***308** Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II,* for example, this Court emphasized the "highly irregular" shape of then-District 12 in concluding that race predominated in its design. 517 U.S., at 905, 116 S.Ct. 1894 (internal quotation marks omitted). But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a "political motivation" as well as a racial one. *Cromartie I,* 526 U.S., at 547, n. 3, 119 S.Ct. 1545. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452. As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I,* 526 U.S., at 546, 119 S.Ct. 1545 (internal quotation marks omitted).[7]

****1474** ***309** **[21]** Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. See *supra,* at 1464 – 1465. Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504; see *supra,* at 1465. And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). That is proper, we have explained, because the various cues that "bear so heavily on the listener's understanding of and belief in what is said" are lost on an appellate court later sifting through a paper record. *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504.[8]

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports ***310** the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent.

A

Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. See *supra,* at 1466. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) See ****1475** *ibid.* Those voter exchanges produced a sizable jump in the district's BVAP, from 43.8% to 50.7%. See *ibid.* The Assembly thus turned District 12 (as it did District 1, see *supra,* at 1468 – 1469) into a majority-minority district.

As the plaintiffs pointed out at trial, Rucho and Lewis had publicly stated that racial considerations lay behind District 12's augmented BVAP. In a release issued along with their draft districting plan, the two legislators ascribed that change to the need to achieve preclearance of the plan under § 5 of the VRA. See App. 358. At that time, § 5 covered Guilford County and thus prohibited any "retrogression in the [electoral] position of racial minorities" there. *Beer,* 425 U.S., at 141, 96 S.Ct. 1357; see 31 Fed.Reg. 5081 (1966). And part of Guilford County lay within District 12, which meant that the Department of Justice would closely scrutinize that district's ***311** new lines. In light of those facts, Rucho and Lewis wrote: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a [BVAP] level that is above the percentage of [BVAP] found in the current Twelfth District." App. 358. According to the two legislators, that race-based "measure w[ould] ensure preclearance of the plan." *Ibid.*

Thus, the District Court found, Rucho's and Lewis's own account "evince[d] intentionality" as to District 12's racial composition: *Because of* the VRA, they increased the number of African–Americans. 159 F.Supp.3d, at 617.

Hofeller confirmed that intent in both deposition testimony and an expert report. Before the redistricting, Hofeller testified, some black residents of Guilford County fell within District 12 while others fell within neighboring District 13. The legislators, he continued, "decided to reunite the black community in Guilford County into the Twelfth." App. 558; see *id.,* at 530–531. Why? Hofeller responded, in language the District Court emphasized: "[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act." *Id.,* at 558; see 159 F.Supp.3d, at 619. Likewise, Hofeller's expert report highlighted the role of the VRA in altering District 12's lines. "[M]indful that Guilford County was covered" by § 5, Hofeller explained, the legislature "determined that it was prudent to reunify [the county's] African–American community" into District 12. App. 1103. That change caused the district's compactness to decrease (in expert-speak, it "lowered the Reock Score"), but that was a sacrifice well worth making: It would "avoid the possibility of a[VRA] charge" that would "inhibit [ ] preclearance." *Ibid.*

The State's preclearance submission to the Justice Department indicated a similar determination to concentrate black voters in District 12. "One of the concerns of the Redistricting Chairs," North Carolina there noted, had to do with the Justice Department's years-old objection to "a failure by ***312** the State to create a second majority minority district" (that is, in addition to District 1). *Id.*, at 478. The submission then went on to explain that after considering alternatives, the redistricters had designed a version of District 12 that would raise its BVAP to 50.7%. Thus, concluded the State, the new District 12 "increases[ ] the African–American community's ability to elect their candidate of choice." *Id.*, at 479. In the District Court's view, that passage once again indicated that making District 12 majority-minority was no "mere coincidence," but a deliberate attempt to avoid perceived obstacles to preclearance. 159 F.Supp.3d, at 617.[9]

****1476** And still there was more: Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district's future make-up. According to Watt, Rucho said that "his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law." App. 2369; see *id.*, at 2393. And further, that it would then be Rucho's "job to go and convince the African–American community" that such a racial target "made sense" under the Act. *Ibid.*; see *id.*, at 2369.[10] The District Court credited Watt's testimony about ***313** the conversation, citing his courtroom demeanor and "consistent recollection" under "probing cross-examination." 159 F.Supp.3d, at 617–618.[11] In the court's view, Watt's account was of a piece with all the other evidence—including the redistricters' on-the-nose attainment of a 50% BVAP—indicating that the General Assembly, in the name of VRA compliance, deliberately redrew District 12 as a majority-minority district. See *id.,* at 618.[12]

The State's contrary story—that politics alone drove decisionmaking—came into the trial mostly through Hofeller's testimony. Hofeller explained that Rucho and Lewis instructed him, first and foremost, to make the map as a whole "more favorable to Republican candidates." App. 2682. One agreed-on stratagem in that effort was to pack the historically Democratic District 12 with even more Democratic voters, thus leaving surrounding districts more reliably Republican. See *id.*, at 2682–2683, 2696–2697. To that end, Hofeller recounted, he drew District 12's new boundaries based on political data—specifically, the voting behavior of precincts in the 2008 Presidential election between Barack Obama and John McCain. See *id.*, at 2701–2702. Indeed, he claimed, he displayed only this data, and no racial data, ***314** on his computer screen while mapping the district. See *id.*, at 2721. In part of his testimony, Hofeller further stated that the Obama–McCain election data explained ****1477** (among other things) his incorporation of the black, but not the white, parts of Guilford County then located in District 13. See *id.*, at 2824. Only *after* he drew a politics-based line between those adjacent areas, Hofeller testified, did he "check[ ]" the racial data and "f[ind] out" that the resulting configuration of District 12 "did not have a[§ 5] issue." *Id.*, at 2822.

The District Court, however, disbelieved Hofeller's asserted indifference to the new district's racial composition. The court recalled Hofeller's contrary deposition testimony—his statement (repeated in only slightly different words in his expert report) that Rucho and Lewis "decided" to shift African–American voters into District 12 "in order to" ensure preclearance under § 5. See 159 F.Supp.3d, at 619–620; App. 558. And the court explained that even at trial, Hofeller had given testimony that undermined his "blame it on politics" claim. Right after asserting that Rucho and Lewis had told

him "[not] to use race" in designing District 12, Hofeller added a qualification: "except perhaps with regard to Guilford County." *Id*., at 2791; see *id*., at 2790. As the District Court understood, that is the kind of "exception" that goes pretty far toward swallowing the rule. District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%. See *id*., at 384, 500–502.[13] The District ***315** Court came away from Hofeller's self-contradictory testimony unpersuaded that this decisive influx of black voters was an accident. Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head, the court thought, Hofeller's denial of race-based districting "r[ang] hollow." 159 F.Supp.3d, at 620, n. 8.

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. See App. 321–322. Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. See *id.,* at 332. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. See *ibid.* Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design. *Id*., at 337.[14] His report, ****1478** as the District Court held, thus tended to ***316** confirm the plaintiffs' direct evidence of racial predominance. See 159 F.Supp.3d, at 620–621.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review. The court emphasized that the districting plan's own architects had repeatedly described the influx of African–Americans into District 12 as a § 5 compliance measure, not a side-effect of political gerrymandering. And those contemporaneous descriptions comported with the court's credibility determinations about the trial testimony—that Watt told the truth when he recounted Rucho's resolve to hit a majority-BVAP target; and conversely that Hofeller skirted the truth (especially as to Guilford County) when he claimed to have followed only race-blind criteria in drawing district lines. We cannot disrespect such credibility judgments. See *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504 (A choice to believe "one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence," can "virtually never be clear error"). And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it. See *id.,* at 573, 105 S.Ct. 1504 (A "reviewing court oversteps" under Rule 52(a) "if it undertakes to duplicate the role of the lower court"). No doubt other interpretations of that evidence were permissible. Maybe we would have evaluated the testimony differently ***317** had we presided over the trial; or then again, maybe we would not have. Either way—and it is only *this* which matters—we are far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design.

B

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." Brief for Appellants 31 (emphasis deleted). That is true, the State says, irrespective of what other evidence is in the case—so even if the plaintiff offers powerful direct proof that the legislature adopted the map it did for racial reasons. See Tr. of Oral Arg. 8. Because the plaintiffs here (as all agree) did not present such a counter-map, ****1479** North Carolina concludes that they cannot prevail. The dissent echoes that argument. See *post,* at 1488 – 1491.

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—*this*. Such would-have, could-

have, and (to round out the set) should-have arguments are a familiar means of undermining a claim that an action was based on a permissible, rather than a prohibited, ground. ***318** See, *e.g., Miller–El v. Dretke,* 545 U.S. 231, 249, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("If that were the [real] explanation for striking [juror] Warren[,] the prosecutors should have struck [juror] Jenkins" too).

But they are hardly the *only* means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. In *Bush v. Vera,* for example, this Court upheld a finding of racial predominance based on "substantial direct evidence of the legislature's racial motivations"—including credible testimony from political figures and statements made in a § 5 preclearance submission—plus circumstantial evidence that redistricters had access to racial, but not political, data at the "block-by-block level" needed to explain their "intricate" designs. See 517 U.S., at 960–963, 116 S.Ct. 1941 (plurality opinion). Not a single Member of the Court thought that the absence of a counter-map made any difference. Similarly, it does not matter in this case, where the plaintiffs' introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.

[22] A plaintiff's task, in other words, is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the "predominant consideration in deciding to place a significant number of voters within or without a particular district." *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1265 (internal quotation marks omitted); cf. *Bethune–Hill,* 580 U.S., at ——, ——, 137 S.Ct., at 798, 799 (rejecting a similar effort to elevate one form of "persuasive circumstantial evidence" in a dispute respecting ***319** racial predominance to a "mandatory precondition" or "threshold requirement" of proof). That burden of proof, we have often held, is "demanding." *E.g., Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452. And because that is so, a plaintiff will sometimes need an alternative map, as a practical matter, to make his case. But in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. See *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266–268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (offering a varied and non-exhaustive list of "subjects ****1480** of proper inquiry in determining whether racially discriminatory intent existed"). Nor would it make sense to do so here. The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.[15]

***320** North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Cromartie II* imposed a non-negotiable "alternative-map requirement." Brief for Appellants 31. As the State observes, *Cromartie II* reversed as clearly erroneous a trial court's finding that race, rather than politics, predominated in the assignment of voters to an earlier incarnation of District 12. See 532 U.S., at 241, 121 S.Ct. 1452; *supra,* at 1465 – 1466. And as the State emphasizes, a part of our opinion faulted the *Cromartie* plaintiffs for failing to offer a convincing account of how the legislature could have accomplished its political goals other than through the map it chose. See 532 U.S., at 257–258, 121 S.Ct. 1452. We there stated:

> "In a case such as this one where majority-minority districts ... are at issue and where racial identification correlates highly with political affiliation, ***333** the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

According to North Carolina, that passage alone settles this case, because it makes an alternative map "essential" to a finding that District 12 (a majority-minority district in which race and partisanship are correlated) was a racial gerrymander. Reply Brief 11. Once again, the dissent says the same. See *post,* at 1489.

***321** But the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere ****1481** attempts to explicate or justify the categorical rule that the State claims to find there. (Certainly the dissent's current defense of that rule, see *post,* at 1489 – 1491, was nowhere in evidence.) And

given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim, see *supra,* at 1478 – 1480—we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were "adequate" to show "the predominance of race in the legislature's line-drawing process." 532 U.S., at 243–244, 121 S.Ct. 1452. But that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail. Item by item, the Court discussed and dismantled the supposed proof, both direct and circumstantial, of race-based redistricting. All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim.

Rightly understood, the passage from *Cromartie II* had a different and narrower point, arising from and reflecting the evidence offered in that case. The direct evidence of a racial gerrymander, we thought, was extremely weak: We said of one piece that it "says little or nothing about whether race played a predominant role" in drawing district lines; we said of another that it "is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.,* at 253–254, 121 S.Ct. 1452 (emphasis deleted). Nor did the report of the plaintiffs' expert impress us overmuch: In our view, it "offer[ed] little insight into the legislature's true motive." *Id.,* at 248, 121 S.Ct. 1452. That left a set of arguments of the would-have-could-have variety. For example, the plaintiffs ***322** offered several maps purporting to "show how the legislature might have swapped" some mostly black and mostly white precincts to obtain greater racial balance "without harming [the legislature's] political objective." *Id.,* at 255, 121 S.Ct. 1452 (internal quotation marks omitted). But the Court determined that none of those proposed exchanges would have worked as advertised—essentially, that the plaintiffs' "you could have redistricted differently" arguments failed on their own terms. See *id.,* at 254–257, 121 S.Ct. 1452. Hence emerged the demand quoted above, for maps that would *actually* show what the plaintiffs' had not. In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day. *Id.,* at 258, 121 S.Ct. 1452.

But this case is most unlike *Cromartie II,* even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly's intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's "it was really politics" defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed.

V

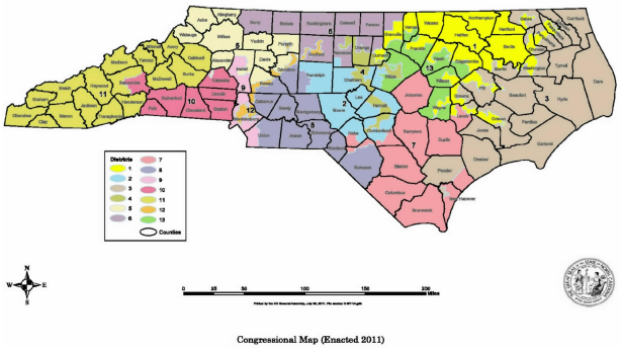
Applying a clear error standard, we uphold the District Court's conclusions that ****1482** racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Carolina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court's decision that § 2 of the VRA gave North Carolina no good reason to reshuffle ***323** voters because of their race. We accordingly affirm the judgment of the District Court.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

APPENDIX

APPENDIX TO OPINION OF THE COURT



Congressional Map (Enacted 2011)

***325**

Congressional District 1 (Enacted 2011)

***326**

Congressional District 12 (Enacted 2011)

****1485** Justice THOMAS, concurring.

***327** I join the opinion of the Court because it correctly applies our precedents under the Constitution and the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301 *et seq*. I write briefly to explain the additional grounds on which I would affirm the three-judge District Court and to note my agreement, in particular, with the Court's clear-error analysis.

As to District 1, I think North Carolina's concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny. See Brief for Appellants 44; see also, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, —— – ——, 137 S.Ct. 788, 803–804, 197 L.Ed.2d 85 (2017) (THOMAS, J., concurring in judgment in part and dissenting in part). I also think that North Carolina cannot satisfy strict scrutiny based on its efforts to comply with § 2 of the VRA. See *ante,* at 1469. In my view, § 2 does not apply to redistricting and therefore cannot justify a racial gerrymander. See ****1486** *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment).

As to District 12, I agree with the Court that the District Court did not clearly err when it determined that race was North Carolina's predominant motive in drawing the district. See *ante,* at 1474. This is the same conclusion I reached when we last reviewed District 12. *Easley v. Cromartie,* 532 U.S. 234, 267, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*) (dissenting opinion). The Court reached the contrary conclusion in *Cromartie II* only by misapplying our deferential standard for reviewing factual findings. See *id.,* at 259–262, 121 S.Ct. 1452. Today's decision does not repeat *Cromartie II* 's error, and indeed it confines that case to its particular facts. It thus represents a welcome course correction to this Court's application of the clear-error standard.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice KENNEDY join, concurring in the judgment in part and dissenting in part.

A precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be ***328** used once and then tossed in the trash. But that is what the Court does today in its decision regarding North Carolina's 12th Congressional District: The Court junks a rule adopted in a prior, remarkably similar challenge to this very same congressional district.

In *Easley v. Cromartie,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*), the Court considered the constitutionality of the version of District 12 that was adopted in 1997. *Id.,* at 238, 121 S.Ct. 1452. That district had the same basic shape as the district now before us, and the challengers argued that the legislature's predominant reason for adopting this configuration was race. *Ibid.* The State responded that its motive was not race but politics. *Id.,* at 241, 121 S.Ct. 1452. Its objective, the State insisted, was to create a district in which the Democratic candidate would win. See *ibid.*; Brief for State Appellants in *Easley v. Cromartie,* O.T. 2000, Nos. 99–1864, 99–1865, p. 25. Rejecting that explanation, a three-judge court found that the legislature's predominant motive was racial, specifically to pack African–Americans into District 12. See *Cromartie v. Hunt,* 133 F.Supp.2d 407, 420 (E.D.N.C.2000). But this Court held that this finding of fact was clearly erroneous. *Cromartie II,* 532 U.S., at 256, 121 S.Ct. 1452.

A critical factor in our analysis was the failure of those challenging the district to come forward with an alternative redistricting map that served the legislature's political objective as well as the challenged version without producing the same racial effects. Noting that race and party affiliation in North Carolina were "highly correlated," *id.,* at 243, 121 S.Ct. 1452 we laid down this rule:

> "In a case such as this one ..., the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. ***329** That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here." *Id.,* at 258, 121 S.Ct. 1452.

Now, District 12 is back before us. After the 2010 census, the North Carolina Legislature, with the Republicans in the majority, drew the present version of District 12. The challengers contend that this version violates equal protection because the predominant motive of the legislature ****1487** was racial: to pack the district with African–American voters. The legislature responds that its objective was political: to pack the district with Democrats and thus to increase the chances of Republican candidates in neighboring districts.

You might think that the *Cromartie II* rule would be equally applicable in this case, which does not differ in any relevant particular, but the majority executes a stunning about-face. Now, the challengers' failure to produce an alternative map that meets the *Cromartie II* test is inconsequential. It simply "does not matter." *Ante,* at 1479.

This is not the treatment of precedent that state legislatures have the right to expect from this Court. The failure to produce an alternative map doomed the challengers in *Cromartie II,* and the same should be true now. Partisan gerrymandering is always unsavory, but that is not the issue here. The issue is whether District 12 was drawn predominantly because of race. The record shows that it was not.[1]

I

Under the Constitution, state legislatures have "the initial power to draw districts for federal elections." ***330** *Vieth v. Jubelirer,* 541 U.S. 267, 275, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion).[2] This power, of course, must be exercised in conformity with the Fourteenth Amendment's Equal Protection Clause. And because the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking," *Miller v. Johnson,* 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), "effort[s] to separate voters into different districts on the basis of race" must satisfy the rigors of strict scrutiny. *Shaw v. Reno,* 509 U.S. 630, 649, 653, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

We have stressed, however, that courts are obligated to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and "the good faith of a state legislature must be presumed." *Id.,* at 915, 115 S.Ct. 2475. A legislature will "almost always be aware of racial demographics" during redistricting, but evidence of such awareness does not show that the legislature violated equal protection. *Id.,* at 916, 115 S.Ct. 2475. Instead, the Court has held, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452 (citation and internal quotation marks omitted; emphasis in original).

This evidentiary burden "is a demanding one." *Ibid.* (internal quotation marks omitted). Thus, although "[t]he legislature's motivation is ... a factual question," *Hunt v. Cromartie,* 526

U.S. 541, 549, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*), an appellate court conducting clear-error review must always keep in mind the heavy evidentiary obligation **1488 borne by those challenging a districting plan. See *Cromartie II,* *331 *supra,* at 241, 257, 121 S.Ct. 1452. Recognizing "the intrusive potential of judicial intervention into the legislative realm," *Miller, supra,* at 916, 115 S.Ct. 2475 we have warned that courts must be very cautious about imputing a racial motive to a State's redistricting plan.

II

That caution "is especially appropriate ... where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. See *id.,* at 242, 257–258, 121 S.Ct. 1452; *Cromartie I, supra,* at 551–552, 119 S.Ct. 1545; *Bush v. Vera,* 517 U.S. 952, 967–968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

The problem arises from the confluence of two factors. The first is the status under the Constitution of partisan gerrymandering. As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. See *Davis v. Bandemer,* 478 U.S. 109, 129, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Partisan gerrymandering dates back to the founding, see *Vieth, supra,* at 274–276, 124 S.Ct. 1769 (plurality opinion), and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Cromartie I, supra,* at 551, 119 S.Ct. 1545 (emphasis in original); *Vera, supra,* at 964, 116 S.Ct. 1941 (plurality opinion).

The second factor is that "racial identification is highly correlated with political affiliation" in many jurisdictions. *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452 (describing correlation in North Carolina). This phenomenon makes it difficult to distinguish *332 between political and race-based decisionmaking. If around 90% of African–American voters cast their ballots for the Democratic candidate, as they have in recent elections,[3] a plan that packs Democratic voters will look very much like a plans that packs African–American voters. "[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial." *Id.,* at 245, 121 S.Ct. 1452.

A

We addressed this knotty problem in *Cromartie II,* which, as noted, came to us **1489 after the District Court had held a trial and found as a fact that the legislature's predominant reason for drawing District 12 was race, not politics. *Id.*, at 239–241, 121 S.Ct. 1452. Our review for clear error in that case did not exhibit the same diffidence as today's decision. We carefully examined each piece of direct and circumstantial evidence on which the District Court had relied and conceded that this evidence provided support for the court's finding. *Id.,* at 257, 121 S.Ct. 1452. Then, at the end of our opinion, we stated:

> "We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

Because the plaintiffs had "failed to make any such showing," we held that the District Court had clearly erred in finding that race predominated in drawing District 12. *Ibid.*

Cromartie II plainly meant to establish a rule for use in a broad class of cases and not a rule to be employed one time only. We stated that we were "put [ting] the matter more generally" and were describing what must be shown in cases "where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation." *Ibid.* We identified who would carry the burden of the new rule ("the party attacking the legislatively drawn boundaries") and what that party

must show (that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" while achieving "significantly greater racial balance"). *Ibid.* And we reversed the finding of racial predominance due to the plaintiffs' failure to carry the burden established by this evidentiary rule. *Ibid.*

Here, too, the plaintiffs failed to carry that burden. In this case, as in *Cromartie II,* the plaintiffs allege a racial gerrymander, and the State's defense is that political motives explain District 12's boundaries. In such a case, *Cromartie II* instructed, plaintiffs must submit an alternative redistricting map demonstrating that the legislature could have achieved its political goals without the racial effects giving rise to the racial gerrymandering allegation. But in spite of this instruction, plaintiffs in this case failed to submit such a ***334** map.[4] See Brief for Appellees 31–36. Based on what we said in *Cromartie II* about *the same type of claim* involving *the same congressional district,* reversal should be a foregone conclusion. It turns out, however, that the *Cromartie II* rule was good for one use only. Even in a case involving the very same district, it is tossed aside.

B

The alternative-map requirement deserves better. It is a logical response to ****1490** the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate.

This is a problem with serious institutional and federalism implications. When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of "offensive and demeaning" conduct. *Miller,* 515 U.S., at 912, 115 S.Ct. 2475. Indeed, we have said that racial gerrymanders "bea[r] an uncomfortable resemblance to political apartheid." *Shaw I,* 509 U.S., at 647, 113 S.Ct. 2816. That is a grave accusation to level against a state legislature.

In addition, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" because "[i]t is well settled that reapportionment is primarily the duty and responsibility of the State." *Miller, supra,* at 915, 115 S.Ct. 2475 (internal quotation marks omitted); see also *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, ***335** usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.

There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts "exercise extraordinary caution" in distinguishing race-based redistricting from politics-based redistricting, *Miller, supra,* at 916, 115 S.Ct. 2475 they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

Although I do not imply that this is what occurred here, this case *does* reflect what litigation of this sort can look like. This is the *fifth time* that North Carolina's 12th Congressional District has come before this Court since 1993, and we have almost reached a new redistricting cycle without any certainty as to the constitutionality of North Carolina's *current* redistricting map. Given these dangers, *Cromartie II* was justified in crafting an evidentiary rule to prevent false positives.[5]

C

The majority nevertheless absolves the challengers of their failure to submit an alternative map. It argues that an alternative map cannot be "the *only* means" of proving ***336** racial predominance, and it concludes from this that an alternative map "does not matter in this case." *Ante,* at 1479 (emphasis in original). But even if ****1491** there are cases in which a plaintiff could prove a racial gerrymandering claim without an alternative map, they would be exceptional ones in which the evidence of racial predominance is overwhelming. This most definitely is not one of those cases, see Part III–C, *infra,* and the plaintiffs' failure to produce an alternative map mandates reversal. Moreover, even in an exceptional case, the

absence of such a map would still be strong evidence that a district's boundaries were determined by politics rather than race.[6] The absence of a map would "matter." Cf. *ante,* at 1479.

The majority questions the legitimacy of the alternative-map requirement, *ante,* at 1478 – 1480, and n. 15, but the rule is a sound one. It rests on familiar principles regarding the allocation of the burdens of production and persuasion and the assessment of evidence. First, in accordance with the general rule in civil cases, plaintiffs in a case like this bear the burden of proving that the legislature's motive was unconstitutional. Second, what must be shown is not simply that race played a part in the districting process but that it played the predominant role. Third, a party challenging a districting plan must overcome the strong presumption that the plan was drawn for constitutionally permissible reasons. *Miller, supra,* at 915, 115 S.Ct. 2475. Fourth, when those responsible for adopting a challenged plan contend that the plan was devised for partisan political ends, they are making an admission that may not sit well with voters, so the explanation should not be lightly dismissed. Cf. Fed. Rule Evid. 804(b)(3). And finally, the *Cromartie II* rule takes into account the difficulty of proving a negative.

***337** For challengers like those in the present case, producing a map that meets the *Cromartie II* test should not be hard if the predominant reason for a challenged plan really was race and not politics. Plaintiffs mounting a challenge to a districting plan are almost always sophisticated litigants who have the assistance of experts, and that is certainly true in the present case. Today, an expert with a computer can easily churn out redistricting maps that control for any number of specified criteria, including prior voting patterns and political party registration. Therefore, if it is indeed possible to find a map that meets the *Cromartie II* test, it should not be too hard for the challengers to do so. The State, on the other hand, cannot prove that no map meeting the *Cromartie II* test can be drawn. Even if a State submits, say, 100 alternative maps that fail the test, that would not prove that no such map could pass it. The relative ease with which the opposing parties can gather evidence is a familiar consideration in allocating the burden of production. See 1 C. Mueller & L. Kirkpatrick, Federal Evidence § 63, p. 316 (2d ed. 1994); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122, pp. 556–557 (1977).

III

Even if we set aside the challengers' failure to submit an alternative map, the District Court's finding that race predominated in the drawing of District 12 is clearly erroneous. The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high ****1492** evidentiary standard that our cases require challengers to meet in order to prove racial predominance.[7]

***338** My analysis will proceed in three steps. First, I will discuss what the legislature's mapmaker did and why this approach is entirely consistent with his stated political objectives. Then, I will explain why this approach inevitably had the racial effect to which the challengers object. Finally, I will address the evidence of racial predominance on which the majority relies and show why it is inadequate to sustain the District Court's judgment.

A

In order to understand the mapmaker's approach, the first element to be kept in mind is that the basic shape of District 12 was legitimately taken as a given. When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned. And that is the approach taken by the veteran mapmaker in the present case, Dr. Thomas Hofeller. App. 523 ("the normal starting point is always from the existing districts").

Dr. Hofeller began with the prior version of District 12 even though that version had a strange, serpentine shape. ***339** *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545; App. 1163. That design has a long history. It was first adopted in 1992, and subsequent redistricting plans have built on the 1992 plan. *Ibid.* In *Cromartie II,* we sustained the constitutionality of the 1997 version of District 12, which featured the same basic shape. See 532 U.S., at 258, 121 S.Ct. 1452. And retention of this same basic shape is not challenged in this case.[8]

Using the prior design as his starting point, Dr. Hofeller assumed that District 12 would remain a "strong Democratic distric[t]." App. 521. He stated that he drew "the [overall

redistricting] plan to ... have an increased number of competitive districts for GOP candidates," *id*., at 520, and that he therefore moved more Democratic voters into District 12 in order to "increase Republican opportunities in the surrounding districts," *id*., at 1606.

****1493** Under the map now before us, District 12 is bordered by four districts.[9] Running counterclockwise, they are: District 5 to the northwest; District 9 to the southwest; District 8 to the southeast; and District 6 to the northeast. See Appendix, *ante*. According to Dr. Hofeller, the aim was to make these four districts—considered as a whole—more secure for Republicans. App. 1606, 2696.

To do this, Dr. Hofeller set out in search of pockets of Democratic voters that could be moved into District 12 from areas adjoining or very close to District 12's prior boundaries. Of the six counties through which District 12 passes, the three most heavily Democratic (and also the most populous) are Forsyth, Guilford, and Mecklenburg, which contain the major population centers of Winston–Salem, Greensboro, and Charlotte, respectively. See 7 Record 480–482; App. 1141. As a measure of voting preferences, Dr. Hofeller used ***340** the results of the then-most recent Presidential election, *i.e.,* the election of 2008. *Id.,* at 1149, 2697, 2721–2722. In that election, these three counties voted strongly for the Democratic candidate, then-Senator Barack Obama, while the other three counties, Cabarrus, Davidson, and Rowan, all voted for the Republican candidate, Senator John McCain. See 4 Record 1341–1342.

Two of the three Democratic counties, Forsyth and Guilford, are located at the northern end of District 12, while the other Democratic county, Mecklenburg, is on the southern end. See Appendix, *ante.* The middle of the district (often called the "corridor") passes through the three more Republican-friendly counties—Cabarrus, Davidson, and Rowan. *Ibid.* Thus, if a mapmaker sat down to increase the proportion of Democrats in District 12 and to reduce the proportion in neighboring districts, the most obvious way to do that was to pull additional Democrats into the district from the north and south (the most populous and heavily Democratic counties) while shifting Republican voters out of the corridor.

That, in essence, is what Dr. Hofeller did—as the majority acknowledges. *Ante,* at 1466 (Dr. Hofeller "narrow[ed District 12's] already snakelike body while adding areas at either end"); App. 1150 (Table 1), 1163. Dr. Hofeller testified that he sought to shift parts of Mecklenburg County out of Districts 8 and 9 (in order to reduce the percentage of Democrats in these two districts) and that this required him to increase the coverage of Mecklenburg County in District 12. *Id*., at 1142–1143, 1607, 2753.

Dr. Hofeller testified that he also had political plans for the current map's District 6, which differed substantially from the version in the prior map. Dr. Hofeller wanted to improve the Republicans' prospects in this new district by minimizing its coverage of Guilford County's Democratic population. *Id.,* at 1143, 1607, 2693, 2697, 2752. That also meant increasing the population of Guilford County Democrats in District 12. *Id*., at 1143, 1607, 2697.

***341** This influx of Democratic voters from the two most populous counties in District 12 required shedding voters elsewhere in order to comply with this Court's mandate of one-person, one-vote, see *Kirkpatrick v. Preisler,* 394 U.S. 526, 530–531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969),[10] and the population removed had to be added to a bordering district. App. 523. Parts of ****1494** Davidson and Rowan Counties were therefore shifted to District 5, *id*., at 1143, 1150 (Table 1), but Dr. Hofeller testified that this would not have been sufficient to satisfy the one-person, one-vote standard, so he also had to move voters from heavily Democratic Forsyth County into District 5, *id*., at 1143, 2697, 2752–2753. Doing so did not undermine his political objective, he explained, because District 5 "was stronger [for Republicans] to begin with and could take those [Forsyth] Democratic precincts" without endangering Republican chances in the district. *Id*., at 2753; see also *id*., at 2697. The end result was that, under the new map now at issue, the three major counties in the north and south constitute a larger percentage of District 12's total population, while the corridor lost population. See *id*., at 1150 (Table 1), 2149 (Finding 187).

A comparison of the 2008 Presidential election vote under the old and new versions of the districts shows the effect of Dr. Hofeller's map. District 8 (which, of the four districts bordering District 12 under the 2011 map, was the most Democratic district) saw a drop of almost 11% in the Democratic vote under the new map. See 2 Record 354, 421. District 9 saw a drop in the percentage of registered Democrats, *id.,* at 350, 417, although the vote percentage for the Democratic Presidential candidate remained essentially the same (increasing by 0.39%). *Id.,* at 354, 421. District 5, which was heavily Republican under the prior map and was redrawn to absorb Democrats from Forsyth County, saw about a 7–point swing in favor of the Democratic candidate,

***342** but it remained a strong Republican district. *Ibid.* New District 6 is less susceptible to comparison because its boundaries are completely different from the district bearing that number under the old plan, but the new District 6 was solidly Republican, with a Republican Presidential vote percentage of nearly 56%. *Ibid.* As stated by the state court that considered and rejected the same constitutional challenge now before us:

> "By increasing the number of Democratic voters in the 2011 Twelfth Congressional District located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts...." App. 2150 (Finding 191).

The results of subsequent congressional elections show that Dr. Hofeller's plan achieved its goal. In 2010, prior to the adoption of the current plan, Democrats won 7 of the 13 districts, including District 8.[11] But by 2016, Republicans controlled 10 of the 13 districts, including District 8, and all the Republican candidates for the House of Representatives won their races with at least 56% of the vote.[12] In accordance with the map's design, the only Democratic seats remaining after 2016 were in Districts 1, 4, and 12. *Id.,* at 521.

In sum, there is strong evidence in the record to support Dr. Hofeller's testimony that the changes made to the 2001 map were designed to maximize Republican opportunities.

***343** B

I now turn to the connection between the mapmaker's strategy and the effect on ****1495** the percentage of African–Americans in District 12.

As we recognized in *Cromartie II,* political party preference and race are highly correlated in North Carolina generally and in the area of Congressional District 12 in particular. App. 2022 (state trial court finding that "racial identification correlates highly with political affiliation" in North Carolina). The challenger's expert, Dr. Stephen Ansolabehere, corroborated this important point. Dr. Ansolabehere calculated the statewide correlation between race and voting in 2008[13] and found a correlation of 0.8, which is "very high." *Id.,* at 342, 352 (Table 1). See also J. Levin, J. Fox, & D. Forde, Elementary Statistics in Social Research 370 (12th ed. 2014); R. Witte & J. Witte, Statistics 138 (10th ed. 2015).

In the area of District 12, the correlation is even higher. There, Dr. Ansolabehere found that the correlation "approach[ed] 1," App. 342, that is, almost complete overlap. These black Democrats also constitute a supermajority of Democrats in the area covered by the district. Under the 2001 version of District 12—which was drawn by Democrats and was never challenged as a racial gerrymander—black registered voters constituted 71.44% of Democrats in the district. 2 Record 350; see also App. 2145 (Finding 173).[14] ***344** What this means is that a mapmaker seeking to pull Democrats into District 12 would unavoidably pull in a very large percentage of African–Americans.

The distribution of Democratic voters magnified this effect. Dr. Hofeller's plan required the identification of areas of Democratic strength that were near District 12's prior boundaries. Dr. Hofeller prepared maps showing the distribution of Democratic voters by precinct,[15] see *id.*, at 1148–1149, 1176–1177, 1181, and those maps show that these voters were highly concentrated around the major urban areas of Winston–Salem (in Forsyth County), Greensboro (in Guilford County), and Charlotte (in Mecklenburg County). Dr. Ansolabehere, the challengers' expert, prepared maps showing the distribution of black registered voters in these same counties, see *id.*, at 322–328; 1 Record 128–133, and a comparison of these two sets of maps reveals that the clusters of Democratic voters generally overlap with those of registered black voters. In other words, the population of nearby Democrats who could be moved into District 12 was heavily black.

****1496** The upshot is that, so long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately black.

None of this should come as a surprise. After all, when the basic shape of District 12 was created after the 1990 census, the express goal of the North Carolina Legislature was to create a majority-minority district. See *Shaw I,* 509 U.S., at 633–636, 113 S.Ct. 2816. It has its unusual shape *because* it was ***345** originally designed to capture pockets of black voters. See *Shaw v. Hunt,* 517 U.S. 899, 905–906, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*). Although the legislature has modified the district since then, see *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545 (describing changes from

the 1991 version to the 1997 version), "it retains its basic 'snakelike' shape and continues to track Interstate 85." *Ibid.*; 1 Record 35 (Appellees' Complaint) ("Congressional District 12 has existed in roughly its current form since 1992, when it was drawn as a majority African–American district ..."); see also App. 1163 (showing the 1997, 2001, and 2011 versions of District 12). The original design of the district was devised to ensure a high concentration of black voters, and as long as the basic design is retained (as it has been), one would expect that to continue.

While plaintiffs failed to offer any alternative map, Dr. Hofeller produced a map showing what District 12 would have looked like if his computer was programmed simply to maximize the Democratic vote percentage in the district, while still abiding by the requirement of one-person, one-vote. *Id.,* at 1148. The result was a version of District 12 that is very similar to the version approved by the North Carolina Legislature. See *id*., at 1175; *id*., at 1615–1618. Indeed, this maximum-Democratic plan had a black voting age population of 50.73%, which is actually *higher* than District 12's black voting age population of 50.66%. *Id.,* at 1154 (Table 5).

Thus, the increase in the black voting age population of District 12 is easily explained by a coherent (and generally successful) political strategy. *Cromartie II,* 532 U.S., at 245, 121 S.Ct. 1452 ("[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial").

Amazingly, a reader of the majority opinion (and the opinion of the District Court) would remain almost entirely ignorant of the legislature's political strategy and the relationship between that strategy and the racial composition of ***346** District 12.[16] The majority's analysis is like Hamlet without the prince.[17]

****1497** C

The majority focuses almost all its attention on a few references to race by those responsible for the drafting and adoption of the redistricting plan. But the majority reads far too much into these references. First, what the plaintiffs had to prove was not simply that race played *some* role in the districting process but that it was the legislature's *predominant* consideration. Second, as I have explained, a court must exercise "extraordinary caution" before finding that a state legislature's predominant reason for a districting plan was racial. *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. This means that comments should not be taken out of context and given the most sinister possible meaning. Third, the findings of the state courts in a virtually identical challenge to District 12 are entitled to respectful consideration. A North Carolina trial court, after hearing much the same evidence as the court below, found that the legislature's predominant motive was political, not racial. That decision was affirmed by the North Carolina Supreme Court. *Dickson v. Rucho,* 367 N.C. 542, 766 S.E.2d 238 (2014), vacated and remanded, ***347** 575 U.S. ——, 135 S.Ct. 1843, 191 L.Ed.2d 719 aff'd on remand, 368 N.C. 481, 781 S.E.2d 404 (2015), cert. pending, No. 16–24. Even if the judgment in the state case does not bar the present case under the doctrine of res judicata, see *ante,* at 1466 – 1468, the state-court finding illustrates the thinness of the plaintiffs' proof.

Finally, it must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons. Under our precedents, it is unconstitutional for the government to consider race in almost any context, and therefore any mention of race by the decisionmakers may be cause for suspicion. We have said, however, that that is not so in the redistricting context. For one thing, a State like North Carolina that was either wholly or partially within the coverage of § 5 of the Voting Rights Act of 1965 could not redistrict without heeding that provision's prohibition against racial retrogression, see 52 U.S.C. § 10304(b); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——– ——, 135 S.Ct. 1257, 1263–1263, 191 L.Ed.2d 314 (2015), and therefore race had to be kept in mind. In addition, all legislatures must also take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community. See *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). If a State ultimately concludes that it must take race into account in order to comply with the Voting Rights Act, it must show that it had a " 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus, supra,* at ——, 135 S.Ct., at 1274. But those involved in the redistricting process may legitimately make statements about Voting Rights Act compliance before deciding that the Act does not provide a need for race-based districting. And it is understandable for such individuals to explain that a race-

neutral plan happens to satisfy the criteria on which Voting Rights Act challengers might insist. In ***348** short, because of the Voting Rights Act, consideration and discussion of the racial effects of a plan may be expected.

1

The June 17, 2011, Statement

I begin with a piece of evidence that the majority does *not* mention, namely, the very first item cited by the District Court in support of its racial-predominance finding. ****1498** This evidence consisted of a June 17, 2001, statement by Senator Rucho and Representative Lewis, the state legislators who took the lead in the adoption of the current map. In that statement, Rucho and Lewis referred to "constructing [Voting Rights Act] majority black districts." App. 1025. Seizing upon the use of the plural term "districts," the court below seemed to think that it had found a smoking gun. *Harris v. McCrory,* 159 F.Supp.3d 600, 616 (M.D.N.C.2016). The State had insisted that its plan drew only one majority-minority congressional district, District 1, but since the June 17 statement "clearly refers to multiple districts that are now majority minority," *ibid.,* the court below viewed the statement as telling evidence that an additional congressional district, presumably District 12, had been intentionally designed to be a majority-minority district and was thus based on race.

There is a glaring problem with this analysis: The June 17 statement was about *state legislative districts,* not *federal congressional districts*. See App. 1024–1033. The United States, as *amicus curiae* in support of plaintiffs, concedes that the District Court made a mistake by relying on the June 17 statement. Brief for United States 27, n. 13. The majority, by contrast, tries to ignore this error. But the District Court gave the June 17 statement pride-of-place in its opinion, mentioning it first in its analysis, and the District Court seemed to think that this evidence was particularly significant, stating that the reference to multiple districts was not "the result of happenstance, a mere slip of the ***349** pen." 159 F.Supp.3d, at 616. The District Court's error shows a troubling lack of precision.

2

The § 5 Preclearance Request

Under § 5 of the Voting Rights Act, North Carolina requested preclearance from the Department of Justice shortly after the Legislature approved the new congressional plan. *Id.,* at 608. In its preclearance application, the State noted that "[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the State to create a second majority minority district." App. 478. The application says that the Redistricting Chairs "sought input from Congressman [Mel] Watt[, the African–American incumbent who represented District 12,] regarding options for re-drawing his district," and that after this consultation, "the Chairs had the impression that Congressman Watt would oppose any redrawing of the Twelfth District ... as originally contemplated by the 1992 Justice Department objection." *Ibid.* The Chairs drew District 12 "[b]ased in part on this input from Congressman Watt." *Id.*, at 478–479. Two sentences later in the same paragraph, the application observed that the black voting age population for District 12 went up from 43.77% to 50.66% and that therefore the district "maintains, and in fact increases, the African–American community's ability to elect their candidate of choice in District 12." *Id.*, at 479.

According to the majority, this statement shows a "determination to concentrate black voters in District 12." *Ante,* at 1462. In fact, it shows no such thing. The statement explains that Senator Rucho and Representative Lewis decided *not* to construct District 12 as a majority-minority district—as the 1992 Justice Department had demanded—"[b]ased in part on" the input they received from Congressman Watt, ***350** whom they thought "would oppose" drawing the district "as originally contemplated by the 1992 Justice Department objection." App. 478–479. If anything, ****1499** this document cuts *against* a finding of racial predominance.

The statement's matter-of-fact reference to the increase in District 12's black voting age population hardly shows that the legislature altered District 12 *for the purpose* of causing this increase. An entirely natural interpretation is that the Redistricting Chairs simply reported this fact so that it would be before the Justice Department in the event that the Department had renewed Voting Rights Act concerns. Only by reading a great deal between the lines and adopting

the most sinister possible interpretation can the statement be viewed as pointed evidence of a predominantly racial motive.

3

The Mel Watt Testimony

In both the District Court and the state trial court, Congressman Watt testified that, while the redistricting plan was being developed, Senator Rucho invited him to his home to discuss the new boundaries of District 12. *Id.,* at 2368–2369, 1343–1344. According to Congressman Watt, Senator Rucho said that the Republican leadership wanted him to "ramp the 12th Congressional District up to over 50 percent black" because "they believed it was required ... by the Voting Rights Act." *Id.,* at 1344, 2369, 2393. In the state proceedings, Senator Rucho denied making any such statement, *id.,* at 1703, and another state legislator present at the meeting, Representative Ruth Samuelson, gave similar testimony, *id.,* at 1698. Neither Senator Rucho nor Representative Samuelson testified in federal court (although their state court testimony was made part of the federal record). See *id.,* at 2847. But the District Court credited Congressman Watt's testimony based on its assessment of his demeanor ***351** and the consistency of his recollection, 159 F.Supp.3d, at 617–618, and I accept that credibility finding for purposes of our review.[18]

But even assuming that Congressman Watt's recollection was completely accurate, all that his testimony shows is that legislative leaders *at one point in the process* thought that they had to draw District 12 as a majority-minority district in order to comply with the Voting Rights Act; it does *not* show that they actually *did* draw District 12 with the goal of creating a majority-minority district. And as explained in the discussion of the preclearance request above, Senator Rucho and Representative Lewis stated that they ultimately turned away from the creation of a majority-minority district after consulting with Congressman Watt. "Based in part on this input from Congressman Watt," they said they decided *not* to draw the district as the 1992 Department of Justice had suggested—that is, as a majority-minority district. App. 478–479.

This account is fully consistent with Congressman Watt's testimony about his ****1500** meeting with Senator Rucho. Congressman Watt noted that Senator Rucho was uncomfortable with the notion of increasing the black voting age population, *id.,* at 2369, 2393, and Congressman Watt testified that he told Senator Rucho that he was opposed to the idea, ***352** *id.,* at 1345, 2369, 2393. So it makes sense that Senator Rucho was dissuaded from taking that course by Congressman Watt's reaction. And Dr. Hofeller consistently testified that he was never asked to meet a particular black voting age population target, see Part III–C–5, *infra,* and that the only data displayed on his screen when he drew District 12 was political data. See *infra,* at 1500, n. 19. Thus, Congressman Watt's testimony, even if taken at face value, is entirely consistent with what the preclearance request recounts: After initially contemplating the possibility of drawing District 12 as a majority-minority district, the legislative leadership met with Congressman Watt, who convinced them not to do so.

4

Dr. Hofeller's Statements About Guilford County

Under the prior map, both Guilford County and the Greensboro African–American community were divided between the 12th and 13th Districts. This had been done, Dr. Hofeller explained, "to make both the Old 12th and 13th Districts strongly Democratic." App. 1103; see also *id.,* at 555, 2821; 1 Record 132–133 (showing racial demographics of Guilford precincts under 2001 and 2011 maps). But the Republican legislature wanted to make the area surrounding District 12 more Republican. The new map eliminated the old 13th District and created a new district bearing that number farther to the east. The territory to the north of Greensboro that had previously been in the 13th District was placed in a new district, District 6, which was constructed to be a Republican-friendly district, and the new map moved more of the Greensboro area into the new District 12. This move was entirely consistent with the legislature's stated goal of concentrating Democrats in the 12th District and making the surrounding districts hospitable to Republican candidates.

Dr. Hofeller testified that the placement of the Greensboro African–American community in the 12th District was the result of this political strategy. He stated that the portion ***353** of Guilford County absorbed by District 12 "wasn't moved into CD 12 because it had a substantial black population. It was moved into CD 12 because it had a substantial Democratic political voting record...." App. 2824. And Dr. Hofeller maintained that he was never instructed

to draw District 12 as a majority-minority district or to increase the district's black voting age population. See, *e.g., id.,* at 520, 556–558, 1099, 1603–1604, 2682–2683, 2789. Instead, he testified that political considerations determined the boundaries of District 12 and that the only data displayed on his computer screen when he drew the challenged map was voting data from the 2008 Presidential election.[19] *Id.,* at 1149, 2697, 2721–2722.

Dr. Hofeller acknowledged, however, that there had been concern about the possibility of a Voting Rights Act challenge ****1501** to this treatment of the Greensboro African–American community. Guilford County was covered by § 5 of the Voting Rights Act, and as noted, § 5 prohibits retrogression. Under the old map, the Guilford County African–American community was split between the old District 13 and District 12, and in both of those districts, black voters were able to elect the candidates of their choice by allying with white Democratic voters. Under the new map, however, if the Greensboro black community had been split between District 12 and the new Republican-friendly District 6, the black voters in the latter district would be unlikely to elect the candidate of their choice. Placing the African–American community in District 12 avoided this consequence. Even Congressman Watt conceded that there were potential § 5 ***354** concerns relating to the black community in Guilford County. *Id.,* at 2387–2388.

The thrust of many of Dr. Hofeller's statements about the treatment of Guilford County was that the reuniting of the Greensboro black community in District 12 was nothing more than a welcome byproduct of his political strategy. He testified that he *first* drew the district based on political considerations and *then* checked to ensure that Guilford County's black population was not fractured. *Id.,* at 2822 ("[W]hen we checked it, we found that we did not have an issue in Guilford County with fracturing the black ... community"); see also *id.,* at 556, 2821, 2823. This testimony is entirely innocuous.

There is no doubt, however, that Dr. Hofeller also made a few statements that may be read to imply that concern about Voting Rights Act litigation was part of the motivation for the treatment of Guilford County. He testified at trial that he "was instructed [not] to use race in any form *except perhaps with regard to Guilford County*." *Id.,* at 2791 (emphasis added). See *id.,* at 1103 (the legislature "determined that it was prudent to reunify the African–American community in Guilford County"); *id.,* at 558 ("[I]t was decided to reunite the black community in Guilford County into the Twelfth").

These statements by Dr. Hofeller convinced the District Court that the drawing of District 12 was not a "purely ... politically driven affair." 159 F.Supp.3d, at 619. But in order to prevail, the plaintiffs had to show much more—that race was the *predominant* reason for the drawing of District 12, and these few bits of testimony fall far short of that showing.

Our decision in *Cromartie II* illustrates this point. In that case, the legislature's mapmaker made a statement that is remarkably similar to Dr. Hofeller's. Gerry Cohen, the "legislative staff member responsible for drafting districting plans," reported: " 'I have moved Greensboro Black community ***355** into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this.' " 532 U.S., at 254, 121 S.Ct. 1452. This admission did not persuade the Court that the legislature's predominant motive was racial. The majority ignores this obvious parallel with *Cromartie II*.

Moreover, in an attempt to magnify the importance of the treatment of Guilford County, the majority plays games with statistics. It states that "District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%." *Ante,* at 1477.

This is highly misleading. First, since the black voting age population of District 12 is just barely over 50%—specifically, 50.66%—almost *any* decision that increased the number of voting age blacks in District 12 could be said to have "played a ****1502** major role in pushing the district's BVAP over 50%."

Second, the majority provides the total number of voting age blacks added to District 12 from Guilford County (approximately 25,000) alongside the total number of voting age blacks added to the district (approximately 35,000), and this has the effect of making Guilford County look like it is the overwhelming contributor to the district's net increase in black voting age population. In truth, Mecklenburg County was by far the greatest contributor of voting age blacks to District 12 in both absolute terms (approximately 147,000) and in terms of new voting age blacks (approximately 37,000). See App. 384, 500–502. Indeed, if what matters to the majority is how much individual counties increased District 12's black voting age population

percentage, Davidson County deserves attention as well, since the portion of the county within District 12 lost over 26,000 more voting age whites than blacks. *Ibid.* That is greater than the net number of voting age blacks added to the district by Guilford County or Mecklenburg County. *Ibid.* As with so much in ***356** the majority opinion, the issue here is more nuanced—and much more favorable to the State—than the majority would have it seem.

5

The July 1, 2011, Statement

For reasons similar to those just explained, the majority makes far too much of a statement issued by Senator Rucho and Representative Lewis on July 1, 2011, when the new districting plan was proposed. Particularly in light of Dr. Hofeller's later testimony about the legislature's partisan objectives, it is apparent that this statement does not paint an entirely reliable picture of the legislature's aims. The statement begins with this proclamation: "From the beginning, our goal has remained the same: the development of fair and legal congressional and legislative districts," *id.,* at 353, and the statement seriously downplays the role of politics in the map-drawing process, acknowledging only that "we have not been ignorant of the partisan impacts of the districts we have created," *id.,* at 361.

The statement discusses the treatment of Guilford County in a section with the heading "Compliance with the Voting Rights Act." *Id.,* at 355–358. In that section, Rucho and Lewis state: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." *Id.,* at 358.

The majority and the District Court interpret this passage to say that Rucho and Lewis decided to move black voters from Guilford County into District 12 in order to ward off Voting Rights Act liability. *Ante,* at 1475 ("*Because of* the VRA, [Rucho and Lewis] increased the number of African–Americans" in District 12 (citing 159 F.Supp.3d, at 617; emphasis ***357** in original)). But that is hardly the only plausible interpretation. The statement could just as easily be understood as "an explanation by [the] legislature that *because* they chose to add Guilford County back into CD 12, the district ended up with an increased ability to elect African–American candidates, rather than the legislature explaining that they chose to add Guilford County back into CD 12 because of the [racial] results that addition created." *Id.,* at 635 (Osteen, J., concurring in part and dissenting in part) (emphasis in original). And because we are obligated to presume the good faith of the North Carolina Legislature, this latter interpretation is the appropriate one.

****1503** But even if one adopts the majority's interpretation, it adds little to the analysis. The majority's close and incriminating reading of a statement issued to win public support for the new plan may represent poetic justice: Having attempted to blur the partisan aim of the new District 12, the legislature is hoisted on its own petard. But poetic justice is not the type of justice that we are supposed to dispense. This statement is *some* evidence that race played a role in the drawing of District 12, but it is a mistake to give this political statement too much weight.

Again, we made precisely this point in *Cromartie II*. There, the "legislative redistricting leader," then-Senator Roy Cooper, testified before a legislative committee that the proposed plan " 'provides for ... *racial* and partisan *balance*.' " 532 U.S., at 253, 121 S.Ct. 1452 (emphasis added). The District Court read the statement literally and concluded that the district had been drawn with a racial objective. *Ibid.* But this Court dismissed the statement, reasoning that although "the phrase shows that the legislature considered race, along with other partisan and geographic considerations; ... it says little or nothing about whether race played a *predominant* role comparatively speaking." *Ibid.*

What was good in *Cromartie II* should also be good here.

***358** 6

Dr. Ansolabehere's Testimony

Finally, the majority cites Dr. Ansolabehere's testimony that black registered voters in the counties covered by District 12 were more likely to be drawn into District 12 than white registered voters and that black registered Democrats were more likely to be pulled in than white registered Democrats. *Ante,* at 1477 – 1478.

There is an obvious flaw in Dr. Ansolabehere's analysis. He assumed that, if race was not the driving force behind the

drawing of District 12, "white and black registered voters would have approximately the same likelihood of inclusion in a given Congressional District." App. 2597 (internal quotation marks omitted). But that would be true only if black and white voters were *evenly distributed* throughout the region, and his own maps showed that this was not so. See *id.,* at 322–328; 1 Record 128–133. Black voters were concentrated in the cities located at the north and south ends of the district and constituted a supermajority of Democrats in the area covered by District 12. See Part III–B, *supra*. As long as the basic shape of the district was retained, moving Democrats from areas outside but close to the old district boundaries naturally picked up far more black Democrats than white Democrats.

This explanation eluded Dr. Ansolabehere because he refused to consider either the implications of the political strategy that the legislature claimed to have pursued or the effects of the changes to District 12 on the surrounding districts. App. 2578–2582. The result was a distorted—and largely useless—analysis.

IV

Reviewing the evidence outlined above,[20] two themes emerge. First, District 12's borders and racial composition ***359** are readily explained by political considerations and the effects of the legislature's political strategy on the demographics of District 12. Second, the majority largely ignores ****1504** this explanation, as did the court below, and instead adopts the most damning interpretation of all available evidence.

Both of these analytical maneuvers violate our clearly established precedent. Our cases say that we must " 'exercise extraordinary caution' " " 'where the State has articulated a legitimate political explanation for its districting decision,' " *Cromartie II, supra,* at 242, 121 S.Ct. 1452 (emphasis deleted); the majority ignores that political explanation. Our cases say that "the good faith of a state legislature must be presumed," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475; the majority presumes the opposite. And *Cromartie II* held that plaintiffs in a case like this are obligated to produce a map showing that the legislature could have achieved its political objectives without the racial effect seen in the challenged plan; here, the majority junks that rule and says that the plaintiffs' failure to produce such a map simply "does not matter." *Ante,* at 1479.

The judgment below regarding District 12 should be reversed, and I therefore respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera,* 517 U.S. 952, 968–970, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) (holding that race predominated when a legislature deliberately "spread[ ] the Black population" among several districts in an effort to "protect[ ] Democratic incumbents"); *Miller v. Johnson,* 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (stating that the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]").

2 Challenges to the constitutionality of congressional districts are heard by three-judge district courts, with a right of direct appeal to this Court. See 28 U.S.C. §§ 2284(a), 1253.

3 The State's argument to the contrary rests on a legal proposition that was foreclosed almost as soon as it was raised in this Court. According to the State, racial considerations cannot predominate in drawing district lines unless there is an "actual conflict" between those lines and "traditional districting principles." Brief for Appellants 45. But we rejected that view earlier this Term, holding that when (as here) race furnished "the overriding reason for choosing one map over others," a further showing of "inconsistency between the enacted plan and traditional redistricting criteria" is unnecessary

to a finding of racial predominance. *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 799, 197 L.Ed.2d 85 (2017). And in any event, the evidence recounted in the text indicates that District 1's boundaries *did* conflict with traditional districting principles—for example, by splitting numerous counties and precincts. See *supra,* at 1469. So we would uphold the District Court's finding of racial predominance even under the (incorrect) legal standard the State proposes.

4 In the District Court, the parties also presented arguments relating to the first *Gingles* prerequisite, contesting whether the African–American community in the region was sufficiently large and compact to form a majority of a reasonably shaped district. The court chose not to decide that fact-intensive question. And aside from the State's unelaborated assertion that "[t]here is no question that the first factor was satisfied," Brief for Appellants 52, the parties have not briefed or argued the issue before us. We therefore have no occasion to address it.

5 North Carolina calls our attention to two expert reports on voting patterns throughout the State, but neither casts light on the relevant issue. The first (by Dr. Thomas Brunell) showed that some elections in many of the State's counties exhibited "statistically significant" racially polarized voting. App. 1001. The second (by Dr. Ray Block) found that in various elections across the State, white voters were "noticeably" less likely than black voters to support black candidates. *Id*., at 959. From those far-flung data points—themselves based only on past elections—the experts opined (to no one's great surprise) that in North Carolina, as in most States, there are discernible, non-random relationships between race and voting. But as the District Court found, see *Harris v. McCrory,* 159 F.Supp.3d 600, 624 (M.D.N.C.2016), that generalized conclusion fails to meaningfully (or indeed, at all) address the relevant local question: whether, in a new version of District 1 created without a focus on race, black voters would encounter "sufficient [ ]" white bloc-voting to "cancel [their] ability to elect representatives of their choice," *Gingles,* 478 U.S., at 56, 106 S.Ct. 2752. And so the reports do not answer whether the legislature needed to boost District 1's BVAP to avoid potential § 2 liability.

6 Justice ALITO charges us with "ignor[ing]" the State's political-gerrymander defense, making our analysis "like Hamlet without the prince." *Post,* at 1496 (opinion concurring in judgment in part and dissenting in part) (hereinafter dissent); see *post,* at 1496, 1504. But we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds). By contrast, the dissent consistently treats the State's version of events (what it calls "the Legislature's political strategy and the relationship between that strategy and [District 12's] racial composition," *post,* at 1496) as if it were a simple "fact of the matter"—the premise of, rather than a contested claim in, this case. See *post,* at 1492 – 1493, 1494, 1496, 1499 – 1500, 1500 – 1501, 1503. The dissent's narrative thus tracks, top-to-bottom and point-for-point, the testimony of Dr. Hofeller, the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble. Compare *post,* at 1492 – 1496, with App. 2671–2755. Imagine (to update the dissent's theatrical reference) *Inherit the Wind* retold solely from the perspective of William Jennings Bryan, with nary a thought given to the competing viewpoint of Clarence Darrow.

7 As earlier noted, that inquiry is satisfied when legislators have "place[d] a significant number of voters within or without" a district predominantly because of their race, regardless of their ultimate objective in taking that step. See *supra,* at 1463 – 1464, and n. 1. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. See *Vera,* 517 U.S., at 968–970, 116 S.Ct. 1941 (plurality opinion). In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. See *Miller,* 515 U.S., at 914, 115 S.Ct. 2475.

8 Undeterred by these settled principles, the dissent undertakes to refind the facts of this case at every turn. See *post,* at 1491 – 1503. Indeed, the dissent repeatedly flips the appropriate standard of review—arguing, for example, that the District Court's is not "the only plausible interpretation" of one piece of contested evidence and that the State offered an "entirely natural" view of another. *Post,* at 1498 – 1499, 1502; see also *post,* at 1496, 1499 – 1500, 1500, 1503. Underlying that approach to the District Court's factfinding is an elemental error: The dissent mistakes the rule that a legislature's good faith should be presumed "until a claimant makes a showing sufficient to support th[e] allegation" of "race-based

decisionmaking," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475 for a kind of super-charged, pro-State presumption on appeal, trumping clear-error review. See *post,* at 1491 – 1492, n. 7.

9 The dissent's contrary reading of the preclearance submission—as reporting the redistricters' "decis[ion] *not* to construct District 12 as a majority-minority district," *post,* at 1498—is difficult to fathom. The language the dissent cites explains only why Rucho and Lewis rejected one particular way of creating such a district; the submission then relates their alternative (and, of course, successful) approach to attaining an over–50% BVAP. See App. 478–479.

10 Watt recalled that he laughed in response because the VRA required no such target. See *id*., at 2369. And he told Rucho that "the African–American community will laugh at you" too. *Ibid.* Watt explained to Rucho: "I'm getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I'll probably get 80 percent of the vote, and[ ] that's not what the Voting Rights Act was designed to do." *Ibid.*

11 The court acknowledged that, in the earlier state-court trial involving District 12, Rucho denied making the comments that Watt recalled. See 159 F.Supp.3d, at 617–618. But the court explained that it could not "assess [the] credibility" of Rucho's contrary account because even though he was listed as a defense witness and present in the courtroom throughout the trial, the State chose not to put him on the witness stand. *Id.,* at 618.

12 The dissent conjures a different way of explaining Watt's testimony. Perhaps, the dissent suggests, Rucho disclosed a majority-minority target to Watt, but Watt then *changed Rucho's mind*—and perhaps it was just a coincidence (or a mistake?) that Rucho still created a 50.7%- BVAP district. See *post,* at 1499 – 1500. But nothing in the record supports that hypothesis. See *ibid.* (relying exclusively on the State's preclearance submission to back up this story); *supra,* at 1475 – 1476, and n. 9 (correcting the dissent's misreading of that submission). And the State, lacking the dissent's creativity, did not think to present it at trial.

13 The dissent charges that this comparison is misleading, but offers no good reason why that is so. See *post,* at 1501 – 1502. It is quite true, as the dissent notes, that another part of District 12 (in Mecklenburg County) experienced a net increase in black voters even larger than the one in Guilford County. See *post,* at 1501 – 1502. (The net increases in the two counties thus totaled more than 35,000; they were then partially offset by net decreases in other counties in District 12.) But that is irrelevant to the point made here: Without the numerous black voters added to District 12 in Guilford County—where the evidence most clearly indicates voters were chosen based on race—the district would have fallen well shy of majority-minority status.

14 Hofeller did not dispute Ansolabehere's figures, but questioned his inference. Those striking patterns, the mapmaker claimed, were nothing more than the result of his own reliance on voting data from the 2008 Presidential election—because that information (*i.e.,* who voted for Obama and who for McCain) tracked race better than it did party registration. See App. 1101, 1111–1114; cf. *Cromartie II,* 532 U.S. 234, 245, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (recognizing that "party registration and party preference do not always correspond"). As we have just recounted, however, the District Court had other reasons to disbelieve Hofeller's testimony that he used solely that electoral data to draw District 12's lines. See *supra,* at 1476 – 1477. And Ansolabehere contended that even if Hofeller did so, that choice of data could itself suggest an intent to sort voters by race. Voting results from a "single [Presidential] election with a Black candidate," Ansolabehere explained, would be a "problematic and unusual" indicator of future party preference, because of the racial dynamics peculiar to such a match-up. App. 341; see *id*., at 342–343. That data would, indeed, be much more useful as a reflection of an area's racial composition: "The Obama vote," Ansolabehere found, is "an extremely strong positive indicator of the location of Black registered voters" and, conversely, an "extremely strong negative indicator of the location of White registered voters." *Id*., at 342; see *id*., at 2546–2550.

15 The dissent responds that an alternative-map requirement "should not be too hard" for plaintiffs (or at least "sophisticated" litigants "like those in the present case") to meet. *Post,* at 1491 – 1492. But if the plaintiffs have already proved by a preponderance of the evidence that race predominated in drawing district lines, then we have no warrant to demand that they jump through additional evidentiary hoops (whether the exercise would cost a hundred dollars or a million, a week's more time or a year's). Or at least that would be so if we followed the usual rules. Underlying the dissent's view that we should not—that we should instead create a special evidentiary burden—is its belief that "litigation of this sort" often seeks to "obtain in court what [a political party] could not achieve in the political arena," *post,* at 1490, and so that little is lost by making suits like this one as hard as possible. But whatever the possible motivations for bringing

such suits (and the dissent says it is *not* questioning "what occurred here," *ibid.*), they serve to prevent legislatures from taking unconstitutional districting action—which happens more often than the dissent must suppose. State lawmakers sometimes misunderstand the VRA's requirements (as may have occurred here with respect to § 5), leading them to employ race as a predominant districting criterion when they should not. See *supra,* at 1475 – 1476, and n. 10. Or they may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance their partisan interests. See nn. 1, 7, *supra*. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters. When plaintiffs meet their burden of showing that such conduct has occurred, there is no basis for subjecting them to additional—and unique—evidentiary hurdles, preventing them from receiving the remedy to which they are entitled.

1 I concur in the judgment of the Court regarding Congressional District 1. The State concedes that the district was intentionally created as a majority-minority district. See Brief for Appellants 44. And appellants have not satisfied strict scrutiny.

2 Article I, § 4, of the Constitution reserves to state legislatures the power to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's authority to "make or alter such Regulations, except as to the Places of chusing Senators."

3 According to polling data, around 90% of African–American voters have voted for the Democratic candidate for President in recent years. See https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/groups–voted–2016/ (all Internet materials as last visited May 19, 2017) (in 2016, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2012/ (in 2012, 93%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2008/ (in 2008, 95%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2004/ (in 2004, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2000/ (in 2000, 90%).

4 The challengers' failure to do so is especially glaring given that at least two alternative maps *were* introduced during the legislative debates over the 2011 map, see 2 Record 357–366, 402–411; App. 883–887, though neither party contends that those maps met the legislature's political goals

5 Ignoring all of these well-founded reasons supporting the alternative-map requirement, the majority mischaracterizes my argument as, at bottom, resting on the proposition that "little is lost by making suits like this one as hard as possible." *Ante,* at 1480, n. 15. That is not my view, and it is richly ironic for the Court that announced the alternative-map requirement to accuse those who defend the requirement of erecting illegitimate and unnecessary barriers to the vindication of constitutional rights.

6 The majority cites *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), as proof that the lack of an alternative-map requirement has not "made any difference" in our past cases. *Ante,* at 1479. *Vera* was decided before *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), announced the alternative-map requirement, so its failure to mention that requirement is hardly surprising.

7 The majority accuses me of failing to accord proper deference to the District Court's factual findings and of disregarding the clear-error standard of review, *ante,* at 1474, n. 8, but that is nonsense. Unlike the majority, I simply follow *Cromartie II* by evaluating the District Court's findings *in light of the plaintiffs' burden*. See 532 U.S., at 241, 257, 121 S.Ct. 1452. The heavier a plaintiffs' evidentiary burden, the harder it is to find that plaintiffs have carried their burden—and the more likely that it would be clearly erroneous to find that they have. In this context, we are supposed to presume that the North Carolina Legislature acted in good faith and exercise "extraordinary caution" before rejecting the legislature's political explanation. *Miller v. Johnson,* 515 U.S. 900, 915–916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Given that the State has offered a coherent and persuasive political explanation for District 12's boundaries, plaintiffs bear a "demanding" burden in attempting to prove racial predominance. *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452. Because the evidence they have put forward is so weak, see Part III–C, *infra,* they have failed to carry that burden, and it was clear error for the District Court to hold otherwise. See *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452 (applying the same clear-error analysis that I apply here).

8 This same basic shape was retained in the map proposed in the state legislature by the Democratic leadership and in the map submitted by the Southern Coalition for Social Justice. See 2 Record 402, 357.

9 A fifth district, District 2, appears to touch District 12 at the border of Guilford and Randolph Counties, but only to a *de minimis* extent.

10 District 12 was overpopulated by 2,847 people heading into the 2011 redistricting cycle. App. 1115; 2 Record 347.

11 North Carolina State Board of Elections, 11/02/2010 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/02/2010&county_id=0&office=FED&contest=0.

12 North Carolina State Board of Elections, 11/08/2016 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/08/2016&county_id=0&office=FED&contest=0.

13 As noted, Dr. Hofeller used the results of the 2008 Presidential election as a measure of party preference. In 2008, the Democratic candidate for President was then-Senator Barack Obama, the first black major party Presidential nominee, and it is true that President Obama won a higher percentage of the nationwide African–American vote in 2008 (95%) than did the Democratic Presidential candidates in 2000 (90%), 2004 (88%), and 2016 (88%). See *supra,* at 1488, n. 3. But as these figures show, the correlation between race and political party preference was very high in all these elections. Therefore, the use of 2008 statistics does not appear to have substantially affected the analysis.

14 Even two alternative redistricting plans offered prior to the enactment of the 2011 map—one submitted by the Southern Coalition for Social Justice and the other submitted by Democratic leaders in the state legislature—retained the basic shape of District 12 and resulted in black voters constituting 71.53% and 69.14% of registered Democrats, respectively. 2 Record 361 (Southern Coalition for Social Justice map), 406 (Congressional Fair and Legal map); see also App. 883–887, 2071 (Finding 34), 2145 (Finding 173).

15 To minimize jargon, I will use the term "precincts" to refer to vote tabulation districts (VTDs). See *id*., at 1609–1610, for an explanation of VTDs.

16 The District Court's description of the legislature's political strategy was cursory, and it spent no time analyzing the demographics of the region. See *Harris v. McCrory,* 159 F.Supp.3d 600, 618–619 (M.D.N.C.2016).

17 The majority concedes that this is a "thoroughly two-sided case," *ante,* at 1473, n. 6, yet the majority's opinion is thoroughly one sided. It offers no excuse for its failure to meaningfully describe—much less engage with—the State's political explanation for District 12's boundaries. Instead, it tries to change the subject, accusing me of treating the State's account as essentially uncontested. *Ante,* at 1473, n. 6. This is a hollow accusation. In this opinion, I lay out the evidence supporting the State's political explanation in Parts III–A and III–B, but I do not accept that account at face value. Instead, I go on to demonstrate that the plaintiffs' contrary arguments are exceedingly weak (Part III–C). Only after considering the evidence on both sides do I conclude that the State's explanation holds up.

18 That being said, Congressman Watt's testimony was double-hearsay: Congressman Watt testified about what Senator Rucho said *someone else* said. See App. 1345 (state trial court evidentiary ruling). For unknown reasons, Appellants failed to raise this objection below, but that only means that the testimony was *admitted*. The *weight* of that testimony is a different matter, and in general, hearsay should be viewed with great skepticism. *Ellicott v. Pearl,* 10 Pet. 412, 436, 9 L.Ed. 475 (1836) (majority opinion of Story, J.) (hearsay is "exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character"); *Queen v. Hepburn,* 7 Cranch 290, 296, 3 L.Ed. 348 (1813) (majority opinion of Marshall, C.J.) ("Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible"); see also *Chambers v. Mississippi,* 410 U.S. 284, 298, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

19 Significantly, while the District Court doubted Dr. Hofeller's contention that politics, not race, dictated the boundaries of District 12 and that Dr. Hofeller was unaware of the relevant racial demographics in the region, see 159 F.Supp.3d, at 619–620, and n. 8, it did not dispute that only political data was displayed on his screen when he drew the district. The state trial court expressly found that only political data was displayed on Dr. Hofeller's screen. See App. 2150 (Finding 188).

20 The District Court relied on other evidence as well, but its probative value is so weak that even the majority does not cite it.

End of Document

New York Official Reports

32 Misc.3d 709, 927 N.Y.S.2d 548, 2011 N.Y. Slip Op. 21223

**1 County of Nassau et al., Petitioners/Plaintiffs

v

State of New York et al., Respondents/Defendants.

Supreme Court, Albany County
June 20, 2011

CITE TITLE AS: County of Nassau v State of New York

HEADNOTE

Parties
Capacity to Sue
Municipalities Generally Lack Capacity to Challenge Acts of State

Plaintiffs, the County of Nassau and its election commissioners, lacked capacity to pursue a combined action and proceeding challenging the constitutionality of the Election Reform and Modernization Act of 2005 (L 2005, ch 181, as amended by L 2007, ch 506)—which, among other things, effectively prohibits the continued use of lever voting machines and provides for the use of electronic and optical scan machines—and a resolution of defendant Board of Elections. With few exceptions, municipalities and their officials lack capacity to challenge acts of the State and state legislation, either directly or in a representative capacity on behalf of their citizens. Here, plaintiffs' challenges failed to meet the only relevant exception, which applies where compliance with a state statute would force municipal officials to violate a constitutional proscription. The Constitution authorizes the Legislature to select methods of voting, including the use of electronic machines, and plaintiffs' concerns about disenfranchisement, bipartisan canvassing, secrecy and voter intent were meritless. Likewise, plaintiffs' objections to the particular machines certified by the Board did not confer capacity to challenge its resolution.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law § 136; Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 733, 746, 747; Am Jur 2d, Parties §§ 28, 392.

Carmody-Wait 2d, Parties §§ 19:3, 19:11.

NY Jur 2d, Constitutional Law § 54; NY Jur 2d, Counties, Towns, and Municipal Corporations § 224; NY Jur 2d, Parties § 16.

Siegel, NY Prac § 136.

ANNOTATION REFERENCE

See ALR Index under Counties; Elections and Voting; Parties.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: lack! /5 capacity standing /s county mun! & challenge /s state /4 legislation

APPEARANCES OF COUNSEL

John Ciampoli, *County Attorney*, Mineola, for petitioners/plaintiffs. *Paul M. Collins*, Albany, for New York State Board of *710 Elections and others, respondents/defendants. *Eric T. Schneiderman*, *Attorney General*, Albany (*Bruce J. Boivin* of counsel), for State of New York, respondent/defendant. **2

OPINION OF THE COURT

Michael C. Lynch, J.

In March, 2010, the County of Nassau and its two election commissioners (hereinafter the County plaintiffs), commenced this combined action/proceeding in the County of Nassau essentially challenging the constitutionality of the New York Election Reform and Modernization Act of 2005 (ERMA) (L 2005, ch 181, as amended by L 2007, ch 506) and the December 15, 2009 resolution of the New York State Board of Elections (hereinafter Board) certifying the use of electronic voting machines or systems pursuant to Election Law § 7-201.

By decision and order (Woodard, J.) dated October 13, 2010, the court granted the State of New York's (hereinafter State)

application changing the venue of the entire action from Nassau County to the County of Albany. In so finding, the court referred the respective motions of the State and the Board seeking to dismiss the petition/complaint to Albany County for resolution. Those motions to dismiss are addressed in this decision.

Following oral argument in Albany County on March 18, 2011, and at the court's invitation, the parties submitted supplemental memoranda, as listed below, intended to address certain developments since the motions were filed.

In *United States v New York State Bd. of Elections* (06 CV 0263 [ND NY]), the Federal District Court issued various remedial orders including a May 20, 2010 order (Sharpe, J.) directing the County to utilize optical scan voting machines compliant with the Help America Vote Act (42 USC §§ 15301-15545) (HAVA) for the fall 2010 elections (*see* exhibit Nassau 39 annexed to State's motion to dismiss). As a predicate to issuing the injunction, the District Court found that lever voting machines utilized in New York were not in compliance with HAVA. As such, the District Court directed the County to accept and utilize HAVA-compliant optical scan voting systems. The County complied and utilized the ES & S scanners in the fall 2010 elections.

Following the County's appeal from the May 20, 2010 injunction order, the United States Court of Appeals for the Second Circuit issued an order, dated September 7, 2010, affirming the injunction. Pertinent here, the Second Circuit recognized that ***711** the County had "commenced litigation in state court challenging ****3** the constitutionality of ERMA under the constitution of New York State. Nothing is preventing Nassau from pursuing that litigation." The quoted phrase confirms that the present action/proceeding is not preempted by the federal litigation. Nor, as the State and Board claim, is the United States Attorney a necessary party in this litigation, given the Second Circuit's recognition that even if the County is successful in state court, the County would not be precluded "from filing suit in federal district court to dispute whether its lever voting machines are HAVA-compliant." The point of distinction is that the County plaintiffs' challenge in this litigation pertains to ERMA, not HAVA.

It is also important to recognize that article 9 of the Election Law was amended during 2010 to provide for the canvassing of ballots when ballot scanners have been utilized (L 2010, ch 163 [eff July 7, 2010]). While this legislation was enacted after the subject motions were filed, the issues presented will be addressed in accord with the law as it exists today (*see Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475, 486-487 [1954], *appeal dismissed* 351 US 922 [1956]).

In 2007, ERMA was amended to require the replacement of the lever voting machines then utilized in New York elections with voting machines or systems compliant with Election Law § 7-202 and HAVA (L 2007, ch 506). Pursuant to Election Law § 7-202 (4), local boards of election are authorized to ""purchase direct recording electronic machines or optical scan machines." In effect, this legislation precludes the continued use of lever voting machines in New York. This mandate deflates the argument of the State and Board that the County plaintiffs failed to exhaust their administrative remedy by presenting lever voting machines as an alternative.

The Board is authorized to examine and certify the use of voting machines and systems pursuant to Election Law § 7-201. In so doing, the standard is to assure compliance with HAVA and Election Law § 7-202. The examination requires "a thorough review and testing of any electronic or computerized features of the machine or system" (Election Law § 7-201 [1]).

The County plaintiffs' core thesis is that the voting systems approved by the Board are not secure and thus compromise the voting process protected under the State Constitution (*see* preliminary statement in verified petition/complaint annexed as exhibit A to the County's notice of cross motion). During oral ***712** argument, the County expanded on this premise by asserting the approved systems fail to comply with Election Law § 7-202 (1) (t), which specifies that a voting machine or system "not include any device or functionality potentially capable of ****4** externally transmitting or receiving data via the internet or via radio waives or via other wireless means." The approved machines have both Ethernet ports and USB ports, features which the County plaintiffs contend are violative of Election Law § 7-202 (1) (t). The County plaintiffs have requested an evidentiary hearing to demonstrate that the approved systems do not comply with Election Law § 7-202. As explained during oral argument, the County plaintiffs maintain they do not object to the use of electronic voting machines per se, but challenge the approved machines as defective and subject to being compromised by electronic or computerized tampering.

As a threshold matter, the State and Board contend that the County plaintiffs lack the legal capacity to commence this lawsuit. The traditional rule, followed in New York, is that municipalities and their officials do not have legal capacity to challenge acts of the State and state legislation, either directly or in a representative capacity on behalf of their citizens (*City of New York v State of New York*, 86 NY2d 286, 289-290 [1995]; *County of Albany v Hooker*, 204 NY 1 [1912]). The only exception pertinent here is where compliance with a state statute would force municipal officials "to violate a constitutional proscription" (86 NY2d at 292 [citations omitted]). By compelling the County to utilize electronic voting machines, the County basically maintains that ERMA is forcing county officials to compromise the voting process protected under the State Constitution.

Specifically, the County plaintiffs allege six causes of action in their complaint: (1) that the use of unsecure electronic voting machines required by ERMA will disenfranchise voters in violation of article I, § 1 of the State Constitution; (2) that ERMA violates article II, § 8 of the State Constitution by preventing bipartisan canvassing of ballots; (3) that ERMA violates article II, § 8 because it requires local boards of election to delegate their canvassing authority to private vendors; (4) that the use of optical scan voting machines mandated by ERMA violates article II, § 7 by failing to preserve secrecy in voting; (5) that the electronic voting machines certified by the Board disregard voter intent by accepting ballots containing an overvote or undervote; and (6) that the Board's certification of voting systems ***713** in December 2009, including the ES & S system utilized by the County during the 2010 election cycle, was arbitrary and capricious.

"Legislative enactments enjoy a presumption of constitutionality, imposing a heavy burden on a party trying to overcome it" (*Matter of Griffiss Local Dev. Corp. v State of New York Auth. Budget Off.*, 85 AD3d 1402, 1403 [2011] [internal quotation marks and citations omitted]). ****5**

Article II, § 7 of the State Constitution specifies the manner of voting in elections "shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." This constitutional authorization empowers the State Legislature to define alternate methods of voting. It follows that the State Constitution does not prohibit the use of electronic voting machines or systems; or mandate the use of lever voting machines. That the State Legislature, through ERMA, has opted to require the use of electronic voting machines is within its constitutional authority. The County plaintiffs' thesis that they are being compelled to disenfranchise voters through the use of these machines is simply not persuasive. The claim is akin to that of the city officials in the *City of New York* case asserting that inadequate state funding compelled them to compromise the constitutional rights of students to a viable education. In response, Judge Levine reasoned, as follows:

> "Surely, it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control" (*City of New York* at 295).

The same holds true here.

With respect to the second and third causes of action, the 2010 amendments to Election Law article 9, implement a canvassing process to accommodate bipartisan board review. This is not a situation where the bipartisan requirements of article II, § 8 have been implicated (*compare Matter of Graziano v County of Albany*, 3 NY3d 475, 481 [2004]). Similarly unconvincing is the County's contention ERMA compromises a voters right to secrecy protected under article II, § 7. Indeed, the statute expressly requires that approved voting machines or ***714** systems "provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted" (Election Law § 7-202 [1] [e]); and "be provided with a screen and hood or curtain or privacy features with equivalent function which shall be so made and adjusted as to conceal the voter and his or her action while voting" (Election Law § 7-202 [1] [m]). As for disregarding a voter's intent in an instance of an undervote or overvote, the County plaintiffs acknowledge in their complaint that the electronic voting machines include a display screen alerting voters of an undervote or overvote (verified petition complaint para 183; Election Law § 7-202 [1] [d]).

In sum, the County plaintiffs have failed to bring their constitutional claims ****6** within any recognized exception and thus lack legal capacity to pursue these claims. The same holds true for their sixth cause of action pursuant to CPLR article 78 challenging the Board's certification as arbitrary and capricious. As noted above, the State Legislature has empowered the Board to examine and certify the propriety of the electronic voting machines (Election Law § 7-201). That

the County plaintiffs object to the machines certified by the Board does not translate into legal capacity to challenge the Board's decision. Insofar as the County plaintiffs emphasize the restrictions defined in Election Law § 7-202 (1) (t), which are designed to prevent external tampering with the recorded vote through the Internet or other wireless means, the Board necessarily must have the means to input ballot information into the electronic voting machines, and the ability to preserve such data. Under Election Law § 9-102 (2) (c), voting machines may be equipped with "a removable electronic or computerized device" for recording the vote. That the electronic voting machines approved by the Board include Ethernet ports and USB ports does not sustain the County plaintiffs' assertion that these machines are compromised under Election Law § 7-202 (1) (t).

Since the County plaintiffs lack the legal capacity to pursue this litigation, the motions to dismiss the petition/complaint are granted, without costs.

102 S.Ct. 3211
Supreme Court of the United States

Mary Ellen CRAWFORD, a Minor, etc., et al., Petitioners

v.

BOARD OF EDUCATION OF the CITY OF LOS ANGELES et al.

No. 81–38.
|
Argued March 22, 1982.
|
Decided June 30, 1982.

Synopsis

After California state court had ordered busing of students to remedy segregation in Los Angeles school district, voters of California adopted a constitutional amendment limiting state court-ordered busing for desegregation purposes to those instances in which a federal court would order busing to remedy a Fourteenth Amendment violation. The state trial court then ordered implementation of a revised desegregation plan and minority students appealed. The California Court of Appeal, 113 Cal.App.3d 633, 170 Cal.Rptr. 495, reversed and the California Supreme Court denied certiorari. The United States Supreme Court, Justice Powell, held that: (1) state constitutional amendment did not employ a racial classification; (2) repeal or modification of desegregation or antidiscrimination laws is not a presumptively invalid racial classification; (3) evidence sustained state court determination that the amendment was not an action with a discriminatory purpose; and (4) Fourteenth Amendment does not preclude a state, once it has chosen to do more than the Fourteenth Amendment requires, from later receding from that action.

Affirmed.

Justice Blackmun filed a concurring opinion in which Justice Brennan joined.

Justice Marshall filed a dissenting opinion.

West Headnotes (8)

[1] **Constitutional Law** Desegregation and integration in general

Fourteenth Amendment does not preclude a state, once it has chosen to do more in the area of desegregation than is required by the Fourteenth Amendment, from later receding from that position. U.S.C.A.Const.Amend. 14.

2 Cases that cite this headnote

[2] **Education** Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing of school students for desegregation to those cases in which a federal court would do so to remedy a violation of the Fourteenth Amendment only limits state courts when enforcing the State Constitution; the Amendment would not bar state court enforcement of state statutes requiring busing for desegregation or other purposes. West's Ann.Cal.Const.Art. 1, § 7.

10 Cases that cite this headnote

[3] **Constitutional Law** Busing

Education Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing to situations in which a federal court would order such a remedy to correct a Fourteenth Amendment violation is not unconstitutional on the theory that it employs a racial classification or that it creates a dual court system because other state created rights may be vindicated in the state courts without limitation on remedies. U.S.C.A.Const.Amend. 14; West's Ann.Cal.Const.Art. 1, § 7.

11 Cases that cite this headnote

[4] **Constitutional Law** School location

Neighborhood school policy does not offend the Fourteenth Amendment in itself. U.S.C.A.Const.Amend. 14.

6 Cases that cite this headnote

[5] **Constitutional Law** Intentional or purposeful action

The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification; if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional. U.S.C.A.Const.Amend. 14.

15 Cases that cite this headnote

[6] **Constitutional Law** Busing

Education Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing for desegregation purposes to those situations in which a federal court would employ such a remedy to correct a Fourteenth Amendment violation was nothing more than a mere repeal of court orders which went beyond that standard and was not unconstitutional on the theory that it fundamentally altered the judicial system to require those seeking redress from racial isolation to be satisfied with less than full relief from a state court. West's Ann.Cal.Const.Art. 1, § 7; U.S.C.A.Const.Amend. 14.

22 Cases that cite this headnote

[7] **Education** Transportation for racial integration; busing

Evidence sustained state court findings that constitutional amendment limiting state court-ordered busing for desegregation to those instances in which a federal court would order busing to correct a Fourteenth Amendment violation was not adopted for a discriminatory purpose. West's Ann.Cal.Const.Art. 1, § 7; U.S.C.A.Const.Amend. 14.

11 Cases that cite this headnote

[8] **Constitutional Law** Intentional or purposeful action requirement

Constitutional Law Intentional or purposeful action

Law neutral on its face may be unconstitutional if motivated by a discriminatory purpose; in determining whether such a purpose is the motivating factor, racially disproportionate effect of official action provides an important starting point. U.S.C.A.Const.Amend. 14.

28 Cases that cite this headnote

****3212** ***527** *Syllabus*[*]

In a California state-court action seeking desegregation of the schools in the Los Angeles Unified School District (District), the trial court, in 1970, found *de jure* segregation in violation of both the State and Federal Constitutions and ordered the District to prepare a desegregation plan. The California Supreme Court affirmed, but based its decision solely upon the Equal Protection Clause of the State Constitution, which bars *de facto* as well as *de jure* segregation. On remand, the trial court approved a desegregation plan that included substantial mandatory pupil reassignment and busing. While the trial court was considering alternative new plans in 1979, the voters of California ratified an amendment (Proposition I) to the State Constitution which provides that state courts shall not order mandatory pupil assignment ****3213** or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The trial court denied the District's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment. The court then ordered implementation of a revised plan that again included substantial mandatory pupil reassignment and busing. The California Court of Appeal reversed, concluding that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation. The Court of Appeal also held

that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.

Held: Proposition I does not violate the Fourteenth Amendment. Pp. 3216–3222.

(a) This Court's decisions will not support the contention that once a State choses to do "more" than the Fourteenth Amendment requires, it may never recede. Such an interpretation of that Amendment would be destructive of a State's democratic processes and of its ability to experiment in dealing with the problems of a heterogeneous population. Proposition I does not embody, expressly or implicitly, a racial classification. ***528** The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification. Pp. 3216–3219.

(b) Proposition I cannot be characterized as something more than a mere repeal. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, distinguished. The State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment. Nor does Proposition I allocate governmental or judicial power on the basis of a discriminatory principle. A "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. It was constitutional for the people of the State to determine that the Fourteenth Amendment's standard was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I. Pp. 3216–3219.

(c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion that Proposition I in fact was not enacted with a discriminatory purpose. The purposes of the Proposition—chief among them the educational benefits of neighborhood schooling—are legitimate, nondiscriminatory objectives, and the state court characterized the claim of discriminatory intent on the part of millions of voters as but "pure speculation." Pp. 3221–3222.

113 Cal.App.3d 633, 170 Cal.Rptr. 495, affirmed.

Attorneys and Law Firms

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Fred Okrand, Mark D. Rosenbaum, Mary Ellen Gale, Bruce J. Ennis, E. Richard Larson,* and *Paul Hoffman.*

G. William Shea argued the cause for respondents. With him on the brief for respondent Board of Education of City of Los Angeles were *Peter W. James, David T. Peterson, Michael M. Johnson* and *Jerry F. Halverson. Cliff Fridkis* filed a brief for respondent Bustop, Inc.

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging affirmance. With him on the ***529** brief were *Assistant Attorney General Reynolds, Deputy Solicitor General Wallace,* and *Richard G. Wilkins.**

* Briefs of *amici curiae* urging reversal were filed by *Steven Shiffrin* for the African American Education Commission et al.; by *Louis E. Wolcher, Mark N. Aaronson, Vilma S. Martinez, Peter Roos, William L. Robinson,* and *Norma J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Alan G. Marer, William T. Keogh,* and *Joseph Cotchett* for Margaret Tinsley et al.

Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian,* Attorney General, *Willard A. Shank,* Chief Assistant Attorney General, *Richard D. Martland,* Assistant Attorney General, and *Geoffrey L. Graybill,* Deputy Attorney General, for the State of California; by *Anthony D. Blankley* for Congresswoman Bobbi Fiedler; and by *G. Kip Edwards* and *Michael D. Torpey* for the Palo Alto Unified School District.

Briefs of *amici curiae* were filed by *John H. Larson, James W. Briggs, Allan B. McKittrick,* and *Steven J. Carnevale* for the County of Los Angeles; by *Leonard Sacks,* for State Senator Alan Robbins; by *Thomas F. Casey III* for the Belmont School Distroct et al.; by *Penn Foote* for the California Teachers Association; by *Robert H. Finch* for the Citizens Legal Defense Alliance, Inc.; by *Myron D. Alexander* for the League of Women Voters of California; by *John McTernan* and *George Slaff* for the Members of the Bar of the State of California; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

Opinion

Justice POWELL delivered the opinion of the Court.

An amendment to the California Constitution provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The question for our decision is whether this provision is itself in violation of the Fourteenth Amendment.

****3214** I

This litigation began almost 20 years ago in 1963, when minority students attending school in the Los Angeles Unified School District (District) filed a class action in state court ***530** seeking desegregation of the District's schools.[1] The case went to trial some five years later, and in 1970 the trial court issued an opinion finding that the District was substantially segregated in violation of the State and Federal Constitutions. The court ordered the District to prepare a desegregation plan for immediate use. App. 139.

On the District's appeal, the California Supreme Court affirmed, but on a different basis. *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976). While the trial court had found *de jure* segregation in violation of the Fourteenth Amendment of the United States Constitution, see App. 117, 120–121, the California Supreme Court based its affirmance solely upon the Equal Protection Clause of the State Constitution.[2] The court explained that under the California Constitution "state school boards ... bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be ***531** de facto or de jure in origin." 17 Cal.3d, at 290, 130 Cal.Rptr., at 730, 551 P.2d, at 34. The court remanded to the trial court for preparation of a "reasonably feasible" plan for school desegregation. *Id.*, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.[3]

On remand, the trial court rejected the District's mostly voluntary desegregation plan but ultimately approved a second plan that included substantial mandatory school reassignment and transportation—"busing"—on a racial and ethnic basis.[4] The ****3215** plan was put into effect in the fall of 1978, but after one year's experience, all parties to the litigation were dissatisfied. See 113 Cal.App.3d 633, 636, 170 Cal.Rptr. 495, 497 (1981). Although the plan continued in operation, the trial court began considering alternatives in October 1979.

In November 1979 the voters of the State of California ratified Proposition I, an amendment to the Due Process and ***532** Equal Protection Clauses of the State Constitution.[5] Proposition I conforms the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment:

> "[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause...."[6]

***533** Following approval of Proposition I, the District asked the Superior Court to halt all mandatory reassignment and busing of pupils. App. 185. On May 19, 1980, the court denied the District's application. The court reasoned that Proposition I was of no effect in this case in light of the court's 1970 finding of *de jure* segregation by the District in violation of the Fourteenth Amendment. Shortly thereafter, the court ordered implementation of a revised desegregation plan, one that again substantially relied upon mandatory pupil reassignment and transportation.[7]

****3216** The California Court of Appeal reversed. 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1981). The court found that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation.[8] Thus, Proposition I ***534** was applicable to the trial court's desegregation plan and would bar that part of the plan requiring mandatory student reassignment and transportation. Moreover, the court concluded that Proposition I was constitutional under the Fourteenth Amendment. *Id.*, at 654, 170 Cal.Rptr., at 509. The court found no obligation on the part of the State to retain a greater remedy at state law against racial segregation than was provided by the Federal Constitution. *Ibid.* The court rejected the claim that Proposition I was adopted with a discriminatory purpose. *Id.*, at 654–655, 170 Cal.Rptr., at 509.[9]

Determining Proposition I to be applicable and constitutional, the Court of Appeal vacated the orders entered by the Superior Court. The California Supreme Court denied hearing. App. to Pet. for Cert. 73a.[10] We granted certiorari. 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 206 (1981).

***535** II

[1] We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.[11] We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

[2] Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. ****3217** It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state-law obligation to ***536** take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.[12]

[3] Nonetheless, petitioners contend that Proposition I is unconstitutional on its face. They argue that Proposition I employs an "explicit racial classification" and imposes a "race-specific" burden on minorities seeking to vindicate state-created rights. By limiting the power of state courts to enforce the state-created right to desegregated schools, petitioners contend, Proposition I creates a "dual court system" that discriminates on the basis of race.[13] They emphasize that other state-created rights may be vindicated by the state courts without limitation on remedies. Petitioners argue that the "dual court system" created by Proposition I is unconstitutional unless supported by a compelling state interest.

[4] We would agree that if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest. "A racial classification, regardless of purported motivation, is presumptively invalid ***537** and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). See *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). But Proposition I does not embody a racial classification.[14] It neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards.[15] Indeed, even if Proposition I had ****3218** a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[16] In addition, this Court previously has held that even when a neutral law has a disproportionately ***538** adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.[17]

[5] Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.[18] This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place. In *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 414, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977), we found that the school board's mere repudiation of an earlier resolution calling for desegregation did not violate the Fourteenth Amendment.[19] In *Reitman v. Mulkey*, 387 U.S. 369, 376, 87 S.Ct. 1627, 1631, 18 L.Ed.2d 830 (1967), and again in *Hunter v. Erickson,* 393 U.S. 385, 390, n. 5, 89 S.Ct. 557, 560, n. 5, 21 L.Ed.2d 616 (1969), we were careful to note that the laws under review did more than "mere[ly] repeal" existing antidiscrimination legislation.[20] ***539** In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.[21]

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our **3219 heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.[22] Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.[23] Yet these would be the results of requiring a State *540 to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people.

III

[6] Petitioners seek to avoid the force of the foregoing considerations by arguing that Proposition I is not a "mere repeal." Relying primarily on the decision in *Hunter v. Erickson, supra*, they contend that Proposition I does not simply repeal a state-created right but fundamentally alters the judicial system so that "those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[24] We do not view *Hunter* as controlling here, nor are we persuaded by petitioners' characterization of Proposition I as something more than a mere repeal.

In *Hunter* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the City Council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The *541 amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U.S., at 389–390, 89 S.Ct., at 559–560. Thus, whereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle.[25] As such, the charter **3220 amendment placed an impermissible, "special burde[n] on racial minorities within the governmental process." *Id.*, at 391, 89 S.Ct., at 560–561.[26]

Hunter involved more than a "mere repeal" of the fair housing ordinance; persons seeking anti-discrimination housing laws —presumptively racial minorities—were "singled out for mandatory referendums while no other group ... face[d] that obstacle." *James v. Valtierra, supra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334, 28 L.Ed.2d 678 (1971). By contrast, even on the assumption that racial minorities benefited from the busing required by state law, Proposition I is less than a "repeal" of the California Equal Protection Clause. As noted above, after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.

Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the *542 same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940). Remedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts. Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas.[27] Surely it was constitutional for the California Supreme Court to caution that although "in some circumstances busing will be an appropriate and useful element in a desegregation plan," in other circumstances "its 'costs,' both in financial and educational terms, will render its use inadvisable." See n. 3, *supra*. It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I.[28]

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

***543** IV

The California Court of Appeal also rejected petitioners' claim that Proposition I, if facially valid, was nonetheless unconstitutional because enacted with a discriminatory purpose. The court reasoned that the purposes of the Proposition were well stated ****3221** in the Proposition itself.[29] Voters may have been motivated by any of these purposes, chief among them the educational benefits of neighborhood schooling. The court found that voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem. See n. 1, *supra.* It characterized petitioners' claim of discriminatory intent on the part of millions of voters as but "pure speculation." 113 Cal.App.3d, at 655, 170 Cal.Rptr., at 509.

[7] In *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), the Court considered the constitutionality of another California Proposition. In that case, the California Supreme Court had concluded that the Proposition was unconstitutional because it gave the State's approval to private racial discrimination. This Court agreed, deferring to the findings made by the California court. The Court noted that the California court was "armed ... with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate." *Id.*, at 378, 87 S.Ct., at 1633. Similarly, in this case, ***544** again involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court.[30]

[8] Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an 'important starting point.' " *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 274, 99 S.Ct., at 2293, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

Proposition I in no way purports to limit the power of state courts to remedy the effects of intentional segregation with its accompanying stigma. The benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities. See nn. 1 and 16, *supra.* Moreover, the Proposition simply removes one means of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.[31]

***545** ****3222** Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose. See 113 Cal.App.3d, at 654–655, 170 Cal.Rptr., at 509. In this case the Proposition was approved by an overwhelming majority of the electorate.[32] It received support from members of all races.[33] The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate.

Accordingly the judgment of the California Court of Appeal is

Affirmed.

Justice BLACKMUN, with whom Justice BRENNAN joins, concurring.

While I join the opinion of the Court, I write separately to address what I believe are the critical distinctions between this case and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896.

***546** The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the

ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a "just framework," *Hunter v. Erickson*, 393 U.S. 385, 393, 89 S.Ct. 557, 562, 21 L.Ed.2d 616 (1969) (Harlan, J., concurring), it is unlikely that they will be drawn on just principles.

The Court's conclusion in *Seattle* followed inexorably from these considerations. In that case the statewide electorate reallocated decisionmaking authority to " 'mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Washington v. Seattle School District No. 1*, *supra*, at 470, 102 S.Ct., at 3195 (emphasis in original), quoting *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 562 (Harlan, J., concurring). The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be "relegated, by state fiat, in a most basic way to second-class status." *Plyler v. Doe*, 457 U.S. 202, 233, 102 S.Ct. 2382, 2403, 72 L.Ed.2d 786 (1982) (BLACKMUN, J., concurring).

In my view, something significantly different is involved in this case. State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling for petitioners ***547** on a *Hunter* theory seemingly would mean that ****3223** statutory affirmative-action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.

In short, the people of California—the same "entity" that put in place the State Constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to *address* racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment," *Washington v. Seattle School District No. 1*, 458 U.S., at 458, 102 S.Ct., at 3203 (emphasis in original), for those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I. And I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—" 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' " *Supra*, at 486, 102 S.Ct., at 3203, quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234 (1938).

Because I find *Seattle* distinguishable from this case, I join the opinion and judgment of the Court.

Justice MARSHALL, dissenting.

The Court today addresses two ballot measures, a state constitutional amendment, and a statutory initiative each of which is admittedly designed to substantially curtail, if not eliminate, the use of mandatory student assignment or transportation as a remedy for *de facto* segregation. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (*Seattle*), the Court concludes that Washington's Initiative 350, which effectively prevents school boards from ordering mandatory school assignment in the absence of a finding of *de jure* segregation within the meaning of the Fourteenth Amendment, is unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking ***548** structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, *supra*, at 470, 102 S.Ct., at 3195. Inexplicably, the Court simultaneously concludes that California's Proposition I, which effectively prevents a state court from ordering the same mandatory remedies in the absence of a finding of *de jure* segregation, *is* constitutional because "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Ante*, at 3220. Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court's decision to uphold Proposition I.

I

In order to understand fully the implications of the Court's action today, it is necessary to place the facts concerning the adoption of Proposition I in their proper context. Nearly two decades ago, a unanimous California Supreme Court declared that "[t]he segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 880, 31 Cal.Rptr. 606, 608–609, 382 P.2d 878, 880–881 (1963). Recognizing that the "right to an equal opportunity for education and the harmful consequences of segregation" do not differ according to the *cause* of racial ****3224** isolation, the California Supreme Court declined to adopt the distinction between *de facto* and *de jure* segregation engrafted by this Court on the Fourteenth Amendment. ***549** *Id.*, at 881, 31 Cal.Rptr., at 609–610, 382 P.2d, at 881–882. Instead, the court clearly held that "school boards [must] take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.*, at 881, 31 Cal.Rptr., at 610, 382 P.2d, at 882.

As the California Supreme Court subsequently explained, the duty established in *Jackson* does not require that "each school in a district ... reflect the racial composition of the district as a whole." *Crawford v. Board of Education*, 17 Cal.3d 280, 302, 130 Cal.Rptr. 724, 738, 551 P.2d 28, 42 (1976) (*Crawford I*). Rather, it is sufficient that school authorities "take reasonable and feasible steps to eliminate *segregated* schools, i.e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." *Id.*, at 303, 130 Cal.Rptr., at 739, 551 P.2d, at 43 (emphasis in original). Moreover, the California courts have made clear that the primary responsibility for implementing this state constitutional duty lies with local school boards. "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, ... the judiciary should [not] intervene in the desegregation process." *Id.*, at 305–306, 130 Cal.Rptr., at 741, 551 P.2d, at 45. If, however, a school board neglects or refuses to implement meaningful programs designed to bring about an end to racial isolation in the public schools, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children." *Id.*, at 307, 130 Cal.Rptr., at 741, 551 P.2d, at 45. When judicial intervention is necessary, the court "may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate the harmful consequences of school segregation in the district." *Id.*, at 307, 130 Cal.Rptr., at 742, 551 P.2d, at 46. Moreover, "once a school board defaults in its constitutional task, the court, in ***550** devising a remedial order, is not precluded from requiring the busing of children as part of a reasonably feasible desegregation plan." *Id.*, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

Like so many other decisions protecting the rights of minorities, California's decision to eradicate the evils of segregation regardless of cause has not been a popular one. In the nearly two decades since the State Supreme Court's decision in *Jackson*, there have been repeated attempts to restrain school boards and courts from enforcing this constitutional guarantee by means of mandatory student transfers or assignments. In 1970, shortly after the San Francisco Unified School District voluntarily adopted a desegregation plan involving mandatory student assignment, the California Legislature enacted Education Code § 1009.5, Cal.Educ.Code Ann. § 1009.5, currently codified at Cal.Educ.Code Ann. § 35350 (West 1978), which provides that "[n]o governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." In *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669 (1971), the California Supreme Court interpreted this provision only to bar a school district from compelling students, without parental consent, to use means of transportation furnished by the district. Construing the statute to prohibit nonconsensual assignment of students for the purpose of eradicating *de jure* or *de facto* segregation, the court concluded, would clearly violate both the State and the Federal Constitutions by "exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in ****3225** the schools." *Id.*, at 943, 92 Cal.Rptr., at 311, 479 P.2d, at 671.

The very next year, opponents of mandatory student assignment for the purpose of achieving racial balance again attempted to eviscerate the state constitutional guarantee recognized in *Jackson.* Proposition 21, which was enacted by referendum in November 1972, stated that "[n]o public school ***551** student shall, because of his race, creed, or color, be assigned to or be required to attend a particular

school." Predictably, the California Supreme Court struck down Proposition 21 "for the same reasons set forth by us in *Johnson*." *Santa Barbara School District v. Superior Court*, 13 Cal.3d 315, 324, 118 Cal.Rptr. 637, 645, 530 P.2d 605, 613 (1975).

Finally, in 1979, the people of California enacted Proposition I. That Proposition, like all of the previous initiatives, effectively deprived California courts of the ability to enforce the state constitutional guarantee that minority children will not attend racially isolated schools by use of what may be "the sole and exclusive means of eliminating racial segregation in the schools," *San Francisco Unified School District v. Johnson, supra*, at 943, 92 Cal.Rptr., at 311, 479 P.2d, at 671, mandatory student assignment and transfer. Unlike the earlier attempts to accomplish this objective, however, Proposition I does not purport to prevent mandatory assignments and transfers when such measures are predicated on a violation of the Federal Constitution. Therefore, the only question presented by this case is whether the fact that mandatory transfers may still be made to vindicate federal constitutional rights saves this initiative from the constitutional infirmity presented in the previous attempts to accomplish this same objective. In my view, the recitation of the obvious—that a state constitutional amendment does not override federal constitutional guarantees—cannot work to deprive minority children in California of their federally protected right to the equal protection of the laws.

II

A

In *Seattle*, the Court exhaustively set out the relevant principles that control the present inquiry. We there found that a series of precedents, exemplified by *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y.1970) (three-judge court), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), establish that the Fourteenth Amendment ***552** prohibits a State from allocating "governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S., at 470, 102 S.Ct., at 3195 (emphasis in original). We concluded that "state action of this kind ... 'places *special* burdens on racial minorities within the governmental process' ... thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Ibid.* (emphasis in original), quoting *Hunter v. Erickson*, *supra*, at 391, 395, 89 S.Ct., at 560, 562 (Harlan, J., concurring).

It is therefore necessary to determine whether Proposition I works a "nonneutral" reallocation of governmental power on the basis of the racial nature of the decision. This determination is also informed by our decision in *Seattle*. In that case we were presented with a statewide initiative which effectively precluded local school boards from ordering mandatory student assignment or transfer except where required to remedy a constitutional violation. We concluded that the initiative violated the Fourteenth Amendment because it reallocated decisionmaking authority over racial issues from the local school board to a "new and remote level of government." *Seattle*, at 483, 102 S.Ct., at 3202. In reaching this conclusion, we specifically affirmed three principles that are particularly relevant to the present inquiry.

First, we rejected the State's argument that a statewide initiative prohibiting mandatory ****3226** student assignment has no "racial overtones" simply because it does not mention the words "race" or "integration." *Seattle*, at 471, 102 S.Ct., at 3195. We noted that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350." *Ibid.* In light of its language and the history surrounding its adoption, we found it "beyond reasonable dispute ... that the initiative was enacted ' "because of," not merely "in spite of," its adverse effects upon' busing for integration." ***553** *Ibid.*, quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Moreover, we rejected the Solicitor General's remarkable contention, a contention also pressed here, that "busing for integration ... is not a peculiarly 'racial' issue at all." *Seattle*, at 471–472, 102 S.Ct., at 3196. While not discounting the value of an integrated education to non-minority students, we concluded that *Lee v. Nyquist, supra*, definitively established that "desegregation of the public schools ... at bottom inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Seattle*, 458 U.S., at 472, 102 S.Ct., at 3196.

Second, the *Seattle* Court determined that Initiative 350 unconstitutionally reallocated power from local school boards to the state legislature or the statewide electorate. After the enactment of Initiative 350, local school boards continued to

exercise considerable discretion over virtually all educational matters, including student assignment. Those seeking to eradicate *de facto* segregation, however, were forced to "surmount a considerably higher hurdle than persons seeking comparable legislative action," *Seattle*, at 474, 102 S.Ct., at 3197, for instead of seeking relief from the local school board, those pursuing this racial issue were forced to appeal to a different and more remote level of government. Just as in *Hunter v. Erickson, supra*, where those interested in enacting fair housing ordinances were compelled to gain the support of a majority of the electorate, we held that this reallocation of governmental power along racial lines offends the Equal Protection Clause. Our holding was not altered by the fact that those seeking to combat *de facto* segregation could still pursue their cause by petitioning local boards to enact voluntary measures or by seeking action from the state legislature. Nor were we persuaded by the argument that no transfer of power had occurred because the State was ultimately responsible for the educational policy of local school boards We found it sufficient that Initiative 350 had deprived those seeking ***554** to redress a racial harm of the right to seek a particularly effective form of redress from the level of government ordinarily empowered to grant the remedy.

Finally, the Court's decision in *Seattle* implicitly rejected the argument that state action that reallocates governmental power along racial lines can be immunized by the fact that it specifically leaves intact rights guaranteed by the Fourteenth Amendment. The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.

B

In my view, these principles inexorably lead to the conclusion that California's Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against *de facto* segregation in the public schools. Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," *Seattle*, at 471, 102 S.Ct., at 3195, and the majority today concedes, that "court-ordered busing in *excess* of that required by the Fourteenth Amendment ... prompted the initiation and probably the adoption of Proposition ****3227** I." *Ante*, at 3218, n.18 (emphasis in original).[1] Because "minorities may consider busing for integration to be 'legislation that is in their interest,' " *Seattle*, at 474, 102 S.Ct., at 3197, quoting ***555** *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 562 (Harlan, J., concurring), Proposition I is sufficiently "racial" to invoke the*Hunter* doctrine.[2]

Nor can there be any doubt that Proposition I works a substantial reallocation of state power. Prior to the enactment of Proposition I, those seeking to vindicate the rights enumerated by the California Supreme Court in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963), just as those interested in attaining any other educational objective, followed a two-stage procedure. First, California's minority community could attempt to convince the local school board voluntarily to comply with its constitutional obligation to take reasonably feasible steps to eliminate racial isolation in the public schools. If the board was either unwilling or unable to carry out its constitutional duty, those seeking redress could petition the California state courts to require school officials to live up to their obligations. Busing could be required as part of a judicial remedial order. *Crawford I*, 17 Cal.3d, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

Whereas Initiative 350 attempted to deny minority children the first step of this procedure, Proposition I eliminates by fiat the second stage: the ability of California courts to order meaningful compliance with the requirements of the State Constitution. After the adoption of Proposition I, the only method of enforcing against a recalcitrant school board the state constitutional duty to eliminate racial isolation is to petition either the state legislature or the electorate as a whole. Clearly, the rules of the game have been significantly ***556** changed for those attempting to vindicate this state constitutional right.[3]

The majority seeks to conceal the unmistakable effects of Proposition I by calling it a "mere repeal" of the State's earlier commitment to do " 'more' than the Fourteenth Amendment requires." *Ante*, at 3216. Although ****3228** it is true that we have never held that the "mere repeal of an existing [anti-discrimination] ordinance violates the Fourteenth Amendment," *Hunter v. Erickson*, *supra*, at 390, n.5, 89 S.Ct., at 560, n.5, it is equally clear that the reallocation of governmental power created by Proposition I is not a "mere repeal" within the meaning of any of our prior decisions.

In *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977), the new members of the Dayton Board of Education repudiated a resolution drafted by their predecessors admitting the Board's role in the establishment of a segregated school system and calling for various remedial actions. In ***557** concluding that the Board was constitutionally permitted to withdraw its own prior *mea culpa*, this Court was careful to note that "*[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs.* " *Id.*, at 413, 97 S.Ct., at 2772 (emphasis added). Therefore, the only time that this Court has squarely held that a "mere repeal" did not violate the Fourteenth Amendment, it was presented with a situation where a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy. It is no surprise that such conduct passed constitutional muster.

By contrast, in *Seattle, Hunter*, and *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967),[4] the three times that this Court has explicitly rejected the argument that a proposed change constituted a "mere repeal" of an existing policy, the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy. This case falls squarely within this latter category. To be sure, the *right* to be free from racial isolation in the public schools remains unaffected by Proposition I. See *ante*, at 3217; see, *McKinny v. Oxnard Union High School District Board of Trustees*, 31 Cal.3d 79, 92–93, 181 Cal.Rptr. 549, 556, 642 P.2d 460, 467 (1982). But Proposition I does repeal the power of the state court to *enforce* this existing constitutional guarantee through the use of mandatory pupil assignment and transfer.

The majority asserts that the Fourteenth Amendment does not "require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Ante*, at 3219. A state court's authority to order appropriate remedies for ***558** state constitutional violations, however, is no more based on the "final authority" of the people than the power of the local Seattle School Board to make decisions regarding pupil assignment is premised on the State's ultimate control of the educational process. Rather, the authority of California courts to order mandatory student assignments in this context springs from the same source as the authority underlying other remedial measures adopted by state and federal courts in the absence of statutory authorization: the "courts power to provide equitable relief" to remedy a constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554 (1971); *Crawford I*, 17 Cal.3d, at 307, 130 Cal.Rptr., at 742, 551 P.2d, at 46 ("a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate ... school segregation"). Even assuming that the source of a court's power to remedy a constitutional violation can be traced back to "the people," the majority's conclusion that "the people" can therefore confer that remedial power on a discriminatory basis is ****3229** plainly inconsistent with our prior decisions. In*Hunter v. Erickson*, 393 U.S., at 392, 89 S.Ct., at 561, we struck down the referendum at issue even though the people of Akron, Ohio, undoubtedly retained "final authority" for all legislation. Similarly, in *Seattle* we concluded that the reallocation of power away from local school boards offended the Equal Protection Clause even though the State of Washington "is ultimately responsible for providing education within its borders." 458 U.S., at 477, 102 S.Ct., at 3199. The fact that this change was enacted through popular referendum, therefore, cannot immunize it from constitutional review. See*Lucas v. Colorado General Assembly*, 377 U.S. 713, 736–737, 84 S.Ct. 1459, 1473–1474, 12 L.Ed.2d 632 (1964).

As in *Seattle, Hunter*, and *Reitman*, Proposition I's repeal of the state court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves. That this repeal drastically alters the substantive ***559** rights granted by existing policy is patently obvious from the facts of this litigation.[5] By prohibiting California courts from ordering mandatory student assignment when necessary to eliminate racially isolated schools, Proposition I has placed an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of those who seek to vindicate other rights granted by state law. This Court's precedents demonstrate that, absent a compelling state interest, which respondents have hardly demonstrated, such a discriminatory barrier cannot stand.[6]

***560** The fact that California attempts to cloak its discrimination in the mantle of the Fourteenth Amendment does not alter this result. Although it might seem "paradoxical" to some Members of this Court that a referendum that adopts the wording of the Fourteenth Amendment might violate it, the paradox is specious.

Because of the Supremacy Clause, Proposition I would have precisely the same legal effect if it contained no reference to the Fourteenth Amendment. The lesson of *Seattle* is that a State, in prohibiting conduct that is not required by the Fourteenth Amendment, may nonetheless create a discriminatory reallocation of governmental power that does violate equal protection. The fact that some less effective avenues remain open to those interested in mandatory student assignment to eliminate racial isolation, like the fact that the voters in *Hunter* conceivably might have enacted fair housing ****3230** legislation, or that those interested in busing to eliminate racial isolation in *Seattle* conceivably might use the State's referendum process, does not justify the discriminatory reallocation of governmental decisionmaking.

In this case, the reallocation of power occurs in the judicial process—the major arena minorities have used to ensure the protection of rights "in their interest." *Hunter v. Erickson*, *supra*, at 395, 89 S.Ct., at 563 (Harlan, J., concurring). Certainly, *Hunter* and *Seattle* cannot be distinguished on the ground that they concerned the reallocation of legislative power, whereas Proposition I redistributes the inherent power of a court to tailor the remedy to the violation. As we have long recognized, courts too often have been "the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963). See *Reitman v. Mulkey*, 387 U.S., at 377, 87 S.Ct., at 1632 (invalidating state constitutional amendment because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, ***561** *or judicial* regulation at any level of the state government") (emphasis added). It is no wonder, as the present case amply illustrates, that whatever progress has been made towards the elimination of *de facto* segregation has come from the California courts. Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools than a simple reallocation of an often unavailable and unresponsive legislative process. To paraphrase, "[i]t surely is an excessively formal exercise ... to argue that the procedural revisions at issue in *Hunter* [and *Seattle*] imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by [Proposition I] does not erect comparable political obstacles." *Seattle*, 458 U.S., at 475, n. 17, 102 S.Ct., at 3197, n. 17.

III

Even if the effects of Proposition I somehow can be distinguished from the enactments at issue in *Hunter* and *Seattle*, the result reached by the majority today is still plainly inconsistent with our precedents. Because it found that the segregation of the California public schools violated the Fourteenth Amendment, the state trial court never considered whether Proposition I was itself unconstitutional because it was the product of discriminatory intent. Despite the absence of *any* factual record on this issue, the Court of Appeal rejected petitioners' argument that the law was motivated by a discriminatory intent on the ground that the recitation of several potentially legitimate purposes in the legislation's preamble rendered any claim that it had been enacted for an invidious purpose "pure speculation." 113 Cal.App.3d 633, 655, 170 Cal.Rptr. 495, 509 (1981).

In *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977), we declared that "[d]etermining ***562** whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners assert that the disproportionate impact of Proposition I, combined with the circumstances surrounding its adoption and the history of opposition to integration cited *supra*, at 3223–3225, clearly indicates the presence of discriminatory intent. See Brief for Petitioners 64–96. Yet despite the fact that *no inquiry* has been conducted into these allegations by either the trial or the appellate court, this Court, in its haste to uphold the banner of "neighborhood schools," affirms a factual determination that was never made. Such blind allegiance to the conclusory statements of a ****3231** lower court is plainly forbidden by our prior decisions.[7]

IV

Proposition I is in some sense "better" than the Washington initiative struck down in *Seattle*.[8] In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the schoolhouse door to comply voluntarily with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proved

effective—the full remedial powers of the state judiciary. In the name of the State's "ability to experiment," *ante*, at 3216, the Court today allows this placement of yet another burden ***563** in the path of those seeking to counter the effects of nearly three centuries of racial prejudice. Because this decision is neither justified by our prior decisions nor consistent with our duty to guarantee all citizens the equal protection of the laws, I must dissent.

All Citations

458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948, 5 Ed. Law Rep. 82

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 In 1980 the District included 562 schools with 650,000 students in an area of 711 square miles. In 1968 when the case went to trial, the District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980 the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other. See 113 Cal.App.3d 633, 642, 170 Cal.Rptr. 495, 501 (1981).

2 "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature. We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in [*Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963)] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.' " *Crawford v. Board of Education*, 17 Cal.3d, at 285, 130 Cal.Rptr., at 726, 551 P.2d, at 30. The court explained that federal cases were not controlling:

> "In focusing primarily on ... federal decisions ... defendant ignores a significant line of California decisions, decisions which authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.*, at 290, 130 Cal.Rptr., at 729–730, 551 P.2d, at 33–34.

3 In stating general principles to guide the trial court on remand, the State Supreme Court discussed the 'busing' question: "While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that "busing" is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field.... [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.*, at 309, 130 Cal.Rptr., at 743, 551 P.2d, at 47. It noted as well that a state court should not intervene to speed the desegregation process so long as the school board takes "reasonably feasible steps to alleviate school segregation," *id.*, at 305, 130 Cal.Rptr., at 741, 551 P.2d, at 45, and that "a court cannot properly issue a 'busing' order so long as a school district continues to meet its constitutional obligations." *Id.*, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

4 The plan provided for the mandatory reassignment of approximately 40,000 students in the fourth through eighth grades. Some of these children were bused over long distances requiring daily round-trip bus rides of as long as two to four hours. In addition, the plan provided for the voluntary transfer of some 30,000 students.

> Respondent Bustop, Inc., unsuccessfully sought to stay implementation of the plan. See *Bustop, Inc. v. Board of Education*, 439 U.S. 1380, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (REHNQUIST, J., in chambers); *Bustop, Inc. v. Board of Education*, 439 U.S. 1384, 99 S.Ct. 44, 58 L.Ed.2d 92 (1978) (POWELL, J., in chambers).

5 Proposition I was placed before the voters following a two-thirds vote of each house of the state legislature. Cal.Const., Art. 18, § 1. The State Senate approved the Proposition by a vote of 28 to 6, the State Assembly by a vote of 62 to 17. The voters favored the Proposition by a vote of 2,433,312 (68.6%) to 1,112,923 (31.4%). The Proposition received a

majority of the vote in each of the State's 58 counties and in 79 of the State's 80 assembly districts. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3–4, 43–49.

6 Proposition I added a lengthy proviso to Art. 1, § 7(a), of the California Constitution. Following passage of Proposition I, § 7 now provides, in relevant part:

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
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> —
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> "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.
>
> "In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

7 The Superior Court ordered the immediate implementation of the revised plan. The District was unsuccessful in its effort to gain a stay of the plan pending appeal. See *Board of Education v. Superior Court*, 448 U.S. 1343, 101 S.Ct. 21, 65 L.Ed.2d 1166 (1980) (REHNQUIST, J., in chambers).

8 "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment.... But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements." 113 Cal.App.3d, at 645–646, 170 Cal.Rptr., at 503.

9 The Court of Appeal also rejected the claim that Proposition I deprived minority children of a "vested right" to desegregated education in violation of due process. See *id.*, at 655–656, 170 Cal.Rptr., at 509–510. Petitioners no longer advance this claim.

10 On March 16, 1981, the District directed that mandatory pupil reassignment under the Superior Court's revised plan be terminated on April 20, 1981. On that date, parents of children who had been reassigned were given the option of returning their children to neighborhood schools. According to respondent Board of Education, approximately 7,000 pupils took this option of whom 4,300 were minority students. Brief for Respondent Board of Education 10.

> The state courts refused to enjoin termination of the plan. On April 17, 1981, however, the United States District Court for the Central District of California issued a temporary restraining order preventing termination of the plan. *Los Angeles NAACP v. Los Angeles Unified School District*, 513 F.Supp. 717. The District Court found that there was a "fair chance" that intentional segregation by the District could be demonstrated. *Id.*, at 720. The District Court's order was vacated on the following day by the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District v.*

District Court, 650 F.2d 1004 (1981). On remand the District Court denied the District's motion to dismiss. This ruling has been certified for interlocutory appeal. See Brief for Respondent Board of Education 10, n. 4.

On September 10, 1981, the Superior Court approved a new, voluntary desegregation plan.

11 Respondent Bustop, Inc., argues that far from doing "more" than the Fourteenth Amendment requires, the State actually violated the Amendment by assigning students on the basis of race when such assignments were not necessary to remedy a federal constitutional violation. See Brief for Respondent Bustop, Inc., 10–18. We do not reach this contention.

12 In this respect this case differs from the situation presented in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896.

In an opinion delivered after Proposition I was enacted, the California Supreme Court stated that "the amendment neither releases school districts from their State Constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation." *McKinny v. Oxnard Union High School District Board of Trustees*, 31 Cal.3d 79, 92–93, 181 Cal.Rptr. 549, 566, 642 P.2d 460, 467 (1982). Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state-court enforcement of state *statutes* requiring busing for desegregation or for any other purpose. Cf. *Brown v. Califano*, 201 U.S.App.D.C. 235, 244, 627 F.2d 1221, 1230 (1980) (legislation limiting power of federal agency to require busing by local school boards held constitutional in view of the "effective avenues for desegregation" left open by the legislation).

13 "[I]t is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case." Brief for Petitioners 48.

14 In *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." *Id.*, at 391, 89 S.Ct., at 560. In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in *Hunter* are missing. See *infra.*

15 A neighborhood school policy in itself does not offend the Fourteenth Amendment. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28, 91 S.Ct. 1267, 1282, 28 L.Ed.2d 554 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes"). Cf. 20 U.S.C. § 1701: "(a) The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments."

16 In the Los Angeles School District, white students are now the racial minority, see n. 1, *supra.* Similarly, in Los Angeles County, racial minorities, including those of Spanish origin, constitute the majority of the population. See U.S. Dept. of Commerce, 1980 Census of Population and Housing, California, Advance Reports 6 (Mar.1981).

17 See *Washington v. Davis*, 426 U.S. 229, 238–248, 96 S.Ct. 2040, 2046–2052, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *James v. Valtierra*, 402 U.S. 137, 141, 91 S.Ct. 1331, 1333, 28 L.Ed.2d 678 (1971).

18 Proposition I is not limited to busing for the purpose of racial desegregation. It applies neutrally to "pupil school assignment or pupil transportation" in general. Even so, it is clear that court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I.

19 See *Dayton Bd. of Ed. v. Brinkman*, 443 U.S., at 531, n. 5, 99 S.Ct., at 2976, n. 5 ("Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment").

20 In *Hunter* we noted that "we do not hold that mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment." 393 U.S., at 390, n. 5, 89 S.Ct., at 560, n. 5. In *Reitman* the Court held that California Proposition 14 was unconstitutional under the Fourteenth Amendment not because it repealed two pieces of antidiscrimination legislation, but because the Proposition involved the State in private racial discrimination: "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." 387 U.S., at 380–381, 87 S.Ct., at 1634.

21 Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason. See *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

22 See *Palmer v. Thompson*, 403 U.S. 217, 228, 91 S.Ct. 1940, 1946, 29 L.Ed.2d 438 (1971) ("To hold ... that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped ... would plainly discourage the expansion and enlargement of needed services in the long run") (BURGER, C. J., concurring); *Reitman v. Mulkey, supra*, 387 U.S., at 395, 87 S.Ct., at 1641 ("Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable") (Harlan, J., dissenting).

23 In his dissenting opinion in *Reitman v. Mulkey, supra*, at 395, 87 S.Ct., at 1641, Justice Harlan remarked upon the need for legislative flexibility when dealing with the "delicate and troublesome problems of race relations." He noted:

> "The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum." 387 U.S., at 395–396, 87 S.Ct., at 1641.

24 Tr. of Oral Arg. 6. See *id.*, at 7–8 ("The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue, provide less than full judicial remedy").

25 "In the case before us ... the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 393 U.S., at 395, 89 S.Ct., at 563 (Harlan, J., concurring).

26 The *Hunter* Court noted that although "the law on its face treats Negro and white, Jew and gentile in an identical manner," *id.*, at 391, 89 S.Ct., at 560, a charter amendment making it more difficult to pass antidiscrimination legislation could only disadvantage racial minorities in the governmental process.

27 Petitioners contend that Proposition I only restricts busing for the purpose of racial discrimination. The Proposition is neutral on its face, however, and respondents—as well as the State in its *amicus* brief—take issue with petitioners' interpretation of the provision.

28 Similarly, a "dual constitution" is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others. Nor is a "dual executive branch" created when an agency is given enforcement powers in one area but not in another. Cf. *Brown v. Califano*, 201 U.S.App.D.C. 235, 627 F.2d 1221 (1980) (upholding federal legislation prohibiting a federal executive agency, but not local school officials or federal courts, from requiring busing).

29 The Proposition contains its own statement of purpose:

> "[T]he Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

30 Cf. *Washington v. Davis*, 426 U.S., at 253, 96 S.Ct., at 2054 ("The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.") (STEVENS, J., concurring).

31 In *Brown v. Califano, supra*, the Court of Appeals found that a federal statute preventing the Department of Health, Education, and Welfare (HEW) from requiring busing "to a school other than the school which is nearest the student's home," 42 U.S.C. § 2000d, was not unconstitutional. HEW retained authority to encourage school districts to desegregate through other means, and the enforcement powers of the Department of Justice were left untouched. The court therefore concluded that the limits on HEW's ability to order mandatory busing did not have a discriminatory effect. And, having done so, it refused to inquire into legislative motivation: "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." 201 U.S.App.D.C., at 248, 627 F.2d, at 1234 (footnote omitted).

32 Cf. *Washington v. Davis*, *supra*, at 253, 96 S.Ct., at 2054 (STEVENS, J., concurring) ("It is unrealistic ... to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it").

33 Proposition I received support from 73.9% of the voters in Los Angeles County which has a "minority" population—including persons of Spanish origin—of over 50%. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3. See n. 16, *supra.* By contrast, the Proposition received its smallest percentage of the vote in Humboldt and Marin Counties which are nearly all-white in composition.

1 Just as in *Seattle*, the fact that other types of student transfers conceivably might be prohibited does not alter this conclusion: "Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by" Proposition I. *Seattle*, at 471, 102 S.Ct., at 3195. Indeed in their response to the petition for certiorari, respondents characterized Proposition I as addressing but "one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy." Brief in Opposition 9.

2 It is therefore irrelevant whether the "benefits of neighborhood schooling are racially neutral," as the majority asserts. *Ante*, at 3221; see *ante*, at 3218. In *Seattle*, 458 U.S., at 472, 102 S.Ct., at 3196, we specifically rejected the argument that because some minorities as well as whites supported the initiative, it could not be considered a racial classification.

3 There can be no question that the practical effect of Proposition I will be to deprive state courts of "the sole and exclusive means of eliminating racial segregation in the schools." *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 943, 92 Cal.Rptr. 309, 311, 479 P.2d 669, 671 (1971). As we have often noted, "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina Board of Ed. v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). Moreover, Proposition I prevents a state court from ordering school officials to take any action respecting *pupil school assignment*, as well as pupil transportation. Presumably, state courts could not design a remedy involving the "pairing" or "clustering" of schools, even if such a remedy did not involve *any* "busing." In the present case, the state trial court found that the voluntary programs proposed by the Los Angeles School Board were "constitutionally suspect" because they "place[d] the burden of relieving the racial isolation of the minority student upon the minority student." App. 160. Consequently, since "a voluntary program would not serve to integrate the community's schools," *Seattle*, 458 U.S., at 473, n. 16, 102 S.Ct., at 3197, n. 16, Proposition I, like the measures at issue in *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y.1970) (three-judge court), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), and *Seattle*, precludes the effective enjoyment by California's minority children of their right to eliminate racially isolated schools.

4 In *Reitman v. Mulkey*, this Court struck down another California ballot measure, granting every resident the absolute constitutional right to sell or rent his property to whomever he or she chooses. We held that the provision amounted to an unconstitutional authorization of private discrimination.

5 Indeed Proposition I by its express terms allows for the modification of existing plans upon the application of any interested person. Art. 1, § 7(a).

6 As the majority notes, Proposition I states that the "people of the State of California find and declare that this amendment is necessary to serve compelling public interests," including, *inter alia*, "making the most efficient use of ... limited financial

resources," protecting the "health and safety" of all students, preserving "harmony and tranquility," and "protecting the environment." *Ante*, at 3215, n. 6. These purported justifications, while undoubtedly meritorious, are clearly insufficient to sustain the racial classification established by Proposition I. As we have often noted, racial classifications may only be upheld where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). It goes without saying that a self-serving conclusory statement of necessity will not suffice to fulfill this burden. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28, 29–31, 91 S.Ct. 1267, 1282, 1283, 28 L.Ed.2d 554 (1971) (rejecting a similar list of justifications for establishing a racial classification). "In any event, [respondents] have failed to show that the purpose[s] they impute to the [Proposition] could not be accomplished by alternative methods, not involving racial distinctions." *Lee v. Nyquist*, 318 F.Supp., at 720.

Parenthetically, it is interesting to note that the allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in the official list of justifications. The absence of any mention of this supposed justification is not surprising in light of the fact that the Proposition's ban on student "assignment" effectively prevents desegregation remedies that would not require a student to leave his "neighborhood." See n. 3, *supra.*

7 The majority's reliance on *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), is therefore misplaced. How can any deference be given to the state court's "knowledge of the facts and circumstances concerning the passage and potential impact" of Proposition I, *id.*, at 378, 87 S.Ct., at 1633, when no such findings were ever made.

8 Initiative 350, however, at least did "not hinder [the] State from enforcing [the State] Constitution." *Seattle*, 458 U.S., at 490, n. 3, 102 S.Ct., at 3205, n. 3 (POWELL, J., dissenting).

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138 S.Ct. 1916
Supreme Court of the United States

Beverly R. GILL, et al., Appellants
v.
William WHITFORD, et al.

No. 16–1161
|
Argued Oct. 3, 2017.
|
Decided June 18, 2018.

Synopsis

Background: Democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that state legislative redistricting plan drafted and enacted by Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that systematically diluted voting strength of Democratic voters statewide based on their political beliefs, in violation of Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in a few districts that they won by overwhelming margins. After trial before a three-judge panel of the United States District Court for the Western District of Wisconsin, Ripple, Circuit Judge, sitting by designation, 218 F.Supp.3d 837, judgment was entered for plaintiffs, an injunction was entered, 2017 WL 383360, and plaintiffs' motion to amend the judgment was granted, 2017 WL 2623104. Consideration of jurisdiction for direct appeal was postponed by the Supreme Court, and the judgment was stayed.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] voters' allegations, that the redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not support Article III standing;

[2] evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address the effect that a gerrymander had on the votes of particular citizens, as required for injury-in-fact element for Article III standing; but

[3] Supreme Court would not direct dismissal of voters' claims, and instead would remand the case so voters would have opportunity to prove concrete and particularized injuries.

Vacated and remanded.

Justice Kagan filed a concurring opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

West Headnotes (18)

[1] **Federal Civil Procedure** In general; injury or interest
Federal Civil Procedure Rights of third parties or public

A plaintiff seeking relief in federal court must first demonstrate that he has Article III standing to do so, including that he has a personal stake in the outcome, distinct from a generally available grievance about government. U.S.C.A. Const. Art. 3, § 2, cl. 1.

55 Cases that cite this headnote

[2] **Federal Civil Procedure** In general; injury or interest

The threshold requirement for Article III standing, under which a plaintiff must have a personal stake in the outcome, distinct from a generally available grievance about government, ensures that federal courts act as judges, and do not engage in policymaking properly left to elected representatives. U.S.C.A. Const. Art. 3, § 2, cl. 1.

53 Cases that cite this headnote

[3] **States** Compactness; contiguity; gerrymandering in general

Taking political considerations into account in fashioning a state legislative reapportionment plan is not sufficient to invalidate it as a partisan gerrymander, because districting inevitably has and is intended to have substantial political consequences.

7 Cases that cite this headnote

[4] **Constitutional Law** Political Questions

Failure of political will does not justify unconstitutional remedies, because the power of federal judges to say what the law is rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity, for Article III jurisdiction, of resolving, according to legal principles, a plaintiff's particular claim of legal right. U.S.C.A. Const. Art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

To ensure that the Federal Judiciary respects the proper and properly limited role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

28 Cases that cite this headnote

[6] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Rights of third parties or public

A federal court is not a forum for generalized grievances, and the requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy ensures that courts exercise power that is judicial in nature. U.S.C.A. Const. Art. 3, § 2, cl. 1.

45 Cases that cite this headnote

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

The requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy is enforced by insisting that a plaintiff satisfy a three-part test for Article III standing: (1) he suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

122 Cases that cite this headnote

[8] **Federal Civil Procedure** In general; injury or interest

Foremost among the requirements for Article III standing is injury in fact, which requires a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff in a personal and individual way. U.S.C.A. Const. Art. 3, § 2, cl. 1.

88 Cases that cite this headnote

[9] **Election Law** Nature and source of right

Election Law Persons entitled to bring contest

A person's right to vote is individual and personal in nature, and thus, voters who allege facts showing disadvantage to themselves as individuals have Article III standing to sue to remedy that disadvantage. U.S.C.A. Const. Art. 3, § 2, cl. 1.

55 Cases that cite this headnote

[10] **States** Persons entitled to sue, standing, and parties

To extent that vote dilution was Wisconsin Democratic voters' alleged harm from Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan, that injury was district specific because the disadvantage to a voter as an individual resulted from the boundaries of the particular district in which he resided, and thus, a voter's remedy had to be limited to the inadequacy that produced his injury in fact as element for Article III standing, which remedy would be revision of the boundaries of the voter's own district. U.S.C.A. Const. Art. 3, § 2, cl. 1.

48 Cases that cite this headnote

[11] **Constitutional Law** Elections

A plaintiff who alleges that he is the object of a racial gerrymander, i.e., a drawing of legislative district lines on the basis of race, has Article III standing to assert only that his own district has been so gerrymandered. U.S.C.A. Const. Art. 3, § 2, cl. 1.

17 Cases that cite this headnote

[12] **Constitutional Law** Elections

A plaintiff who complains of racial gerrymandering, but who does not live in a gerrymandered district, asserts only a generalized grievance against governmental conduct of which he or she does not approve, which is not sufficient to support Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

29 Cases that cite this headnote

[13] **States** Persons entitled to sue, standing, and parties

Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed district-by-district.

7 Cases that cite this headnote

[14] **States** Persons entitled to sue, standing, and parties

Allegation of Wisconsin Democratic voters, that Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not involve individual and personal injury of the kind required for Article III standing; such allegation presented an undifferentiated, generalized grievance. U.S.C.A. Const. Art. 3, § 2, cl. 1.

15 Cases that cite this headnote

[15] **States** Persons entitled to sue, standing, and parties

At pleading stage, Wisconsin Democratic voters sufficiently alleged particularized harm, as required for injury-in-fact element for Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, by alleging that the plan diluted the influence of their votes as a result of packing or cracking in their legislative districts. U.S.C.A. Const. Art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[16] **States** Persons entitled to sue, standing, and parties

Assuming that Wisconsin Democratic voters' partisan gerrymandering claims were justiciable, injury in fact, as element for voters' Article III standing, depended on effect of Republican-controlled Wisconsin legislature's state legislative redistricting plan, not mapmakers' intent, and required a showing of a burden on plaintiffs' votes that was actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[17] **States** Persons entitled to sue, standing, and parties

Assuming that Democratic voters' partisan gerrymandering claims, arising from Republican-controlled Wisconsin legislature's state legislative redistricting plan, were justiciable, evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address effect that a gerrymander had on votes of particular citizens, as required for injury-in-fact element for Article III standing; partisan-asymmetry metrics such as efficiency gap measured something else entirely, i.e., effect that a gerrymander had on the fortunes of political parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

26 Cases that cite this headnote

[18] **Federal Courts** Particular cases

States Persons entitled to sue, standing, and parties

States Judgment and relief in general

Supreme Court, upon determining that Wisconsin Democratic voters had failed to demonstrate their Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, would not direct dismissal of voters' claims, and instead would remand the case to three-judge District Court so that voters would have opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes; the case was unusual because it concerned an unsettled kind of claim the Court had not agreed upon, for which contours and justiciability were unresolved, and four voters alleged that they lived in districts in which Democrats like them had been packed or cracked. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6 Cases that cite this headnote

****1919** *Syllabus*[*]

***48** Members of the Wisconsin Legislature are elected from single-member legislative districts. Under the Wisconsin Constitution, the legislature must redraw the boundaries of those districts following each census. After the 2010 census, the legislature passed a new districting plan known as Act 43. Twelve Democratic voters, the plaintiffs in this case, alleged that Act 43 ****1920** harms the Democratic Party's ability to convert Democratic votes into Democratic seats in the legislature. They asserted that Act 43 does this by "cracking" certain Democratic voters among different districts in which those voters fail to achieve electoral majorities and "packing" other Democratic voters in a few districts in which Democratic candidates win by large margins. The plaintiffs argued that the degree to which packing and cracking has favored one political party over another can be measured by an "efficiency gap" that compares each party's respective "wasted" votes—*i.e.,* votes cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win—across all legislative districts. The plaintiffs claimed that the statewide enforcement of Act 43 generated an excess of wasted Democratic votes, thereby violating the plaintiffs' First Amendment right of association and their Fourteenth Amendment right to equal protection. The defendants, several members of the state election commission, moved to dismiss the plaintiffs' claims. They argued that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative district in which they vote. The three-judge District Court denied the defendants' motion and, following a trial, concluded that Act 43 was an unconstitutional partisan gerrymander. Regarding standing, the court held that the plaintiffs had suffered a particularized injury to their equal protection rights.

Held : The plaintiffs have failed to demonstrate Article III standing. Pp. 1926 – 1934.

(a) Over the past five decades this Court has repeatedly been asked to decide what judicially enforceable limits, if any, the Constitution sets on partisan gerrymandering. Previous attempts at an answer have left few clear landmarks for addressing the question and have generated ***49** conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury. See *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298, *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85, *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158

L.Ed.2d 546, and *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609. Pp. 1926 – 1929.

(b) A plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. That requirement ensures that federal courts "exercise power that is judicial in nature," *Lance v. Coffman,* 549 U.S. 437, 439, 441, 127 S.Ct. 1194, 167 L.Ed.2d 29. To meet that requirement, a plaintiff must show an injury in fact—his pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.,* which "affect[s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351.

The right to vote is "individual and personal in nature," *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506, and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage, *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs here alleged that they suffered such injury from partisan gerrymandering, which works through the "cracking" and "packing" of voters. To the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is ****1921** district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "asserts only a generalized grievance against governmental conduct of which he or she does not approve." *United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635.

The plaintiffs argue that their claim, like the claims presented in *Baker* and *Reynolds,* is statewide in nature. But the holdings in those cases were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362. Here, the plaintiffs' claims turn on allegations that their ***50** votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey,* 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606.

The plaintiffs argue that their legal injury also extends to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. To date, however, the Court has not found that this presents an individual and personal injury of the kind required for Article III standing. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. The harm asserted by the plaintiffs in this case is best understood as arising from a burden on their own votes. Pp. 1928 – 1932.

(c) Four of the plaintiffs in this case pleaded such a particularized burden. But as their case progressed to trial, they failed to pursue their allegations of individual harm. They instead rested their case on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence. First, they presented testimony pointing to the lead plaintiff's hope of achieving a Democratic majority in the legislature. Under the Court's cases to date, that is a collective political interest, not an individual legal interest. Second, they produced evidence regarding the mapmakers' deliberations as they drew district lines. The District Court relied on this evidence in concluding that those mapmakers sought to understand the partisan effect of the maps they were drawing. But the plaintiffs' establishment of injury in fact turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130. Third, the plaintiffs presented partisan-asymmetry ****1922** studies showing that Act 43 had skewed Wisconsin's statewide map in favor of Republicans. Those studies do not address the effect that a gerrymander has on the votes of particular citizens. They measure instead the effect that a gerrymander has on

the fortunes of political parties. That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. Pp. 1931 – 1934.

(d) Where a plaintiff has failed to demonstrate standing, this Court usually directs dismissal. See, *e.g., DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589. Here, however, where the case concerns an unsettled kind of claim that the Court has not agreed upon, the contours and ***51** justiciability of which are unresolved, the case is remanded to the District Court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 264–265, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314. Pp. 1933 – 1934.

218 F.Supp.3d 837, vacated and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS and GORSUCH, JJ., joined except as to Part III. KAGAN, J., filed a concurring opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***52** The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries ***53** of the State's legislative districts. A group of ****1923** Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. ***54** The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

[1] **[2]** But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), distinct from a "generally available grievance about government," *Lance v. Coffman,* 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*). That threshold requirement "ensures that we act *as judges,* and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry,* 570 U.S. 693, 700, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

I

Wisconsin's Legislature consists of a State Assembly and a State Senate. Wis. Const., Art. IV, § 1. The 99 members of the Assembly are chosen from single districts that must

"consist of contiguous territory and be in as compact form as practicable." § 4. State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district. See § 5; Wis. Stat. § 4.001 (2011).

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. Art. IV, § 3. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the Legislature ***55** and the Governor—split on party lines—were unable to agree on new districting plans. The legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. See 1983 Wis. Laws ch. 4. In 2011, a Republican legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. See Wis. Stat. §§ 4.009, 4.01–4.99; 2011 Wis. Laws ch. 4. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote. 218 F.Supp.3d 837, 853 (W.D.Wis.2016).

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." 1 App. 32, Complaint ¶ 15. They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" ****1924** Democratic voters around Wisconsin. *Id.,* at 28–30, ¶¶ 5–7. As they explained:

> "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." *Id.,* at 29, ¶ 5.

Four of the plaintiffs—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—alleged that they lived in State Assembly districts where Democrats have been cracked or packed. *Id.,* at 34–36, ¶¶ 20, 23, 24, 26; see *id.,* at 50–53, ¶¶ 60–70 (describing packing and cracking in Assembly Districts 22, 26, 66, and 91). All of the plaintiffs ***56** also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly." *Id.,* at 33, ¶ 16.

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. *Id.,* at 28–29, ¶ 5. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. *Id.,* at 30, ¶ 7. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." *Id.,* at 31, ¶ 10. They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action. *Id.,* at 36, ¶¶ 28–30.

The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court, see 28 U.S.C. § 2284(a), denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across ***57** the state." *Whitford v. Nichol,* 151 F.Supp.3d 918, 924 (W.D.Wis.2015). It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, ... they should be permitted to bring a statewide claim." *Id.,* at 926.

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that

he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map —their Demonstration Plan—the projected Democratic share ****1925** of the Assembly vote in Whitford's district would be 82%. 147 Record 35–36. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." *Id.,* at 37. Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." *Ibid.* As he explained, "[t]he only practical way to accomplish my policy objectives is to get a majority of the Democrats in the Assembly and the Senate ideally in order to get the legislative product I prefer." *Id.,* at 33.

The plaintiffs also presented the testimony of legislative aides Adam Foltz and Tad Ottman, as well as that of Professor Ronald Gaddie, a political scientist who helped design the Act 43 districting map, regarding how that map was designed and adopted. In particular, Professor Gaddie testified about his creation of what he and the District Court called "S curves": color-coded tables of the estimated partisan skew of different draft redistricting maps. See 218 F.Supp.3d, at 850, 858. The colors corresponded with assessments regarding whether different districts tilted Republican ***58** or Democratic under various statewide political scenarios. The S curve for the map that was eventually adopted projected that "Republicans would maintain a majority under any likely voting scenario," with Democrats needing 54% of the statewide vote to secure a majority in the legislature. *Id.,* at 852.

Finally, the parties presented testimony from four expert witnesses. The plaintiffs' experts, Professor Kenneth Mayer and Professor Simon Jackman, opined that—according to their efficiency-gap analyses—the Act 43 map would systematically favor Republicans for the duration of the decade. See *id.,* at 859–861. The defendants' experts, Professor Nicholas Goedert and Sean Trende, opined that efficiency gaps alone are unreliable measures of durable partisan advantage, and that the political geography of Wisconsin currently favors Republicans because Democrats —who tend to be clustered in large cities—are inefficiently distributed in many parts of Wisconsin for purposes of winning elections. See *id.,* at 861–862.

At the close of evidence, the District Court concluded—over the dissent of Judge Griesbach—that the plaintiffs had proved a violation of the First and Fourteenth Amendments. The court set out a three-part test for identifying unconstitutional gerrymanders: A redistricting map violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Id.,* at 884.

The court went on to find, based on evidence concerning the manner in which Act 43 had been adopted, that "one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade." *Id.,* at 896. It also found that the "more efficient distribution of Republican voters has ***59** allowed the Republican Party to translate its votes into seats with significantly greater ease and to achieve—and preserve —control of the Wisconsin legislature." *Id.,* at 905. As to the third prong of its test, the District Court concluded that the burdens the Act 43 map imposed on Democrats could not be explained by "legitimate state prerogatives [or] neutral factors." *Id.,* at 911. The court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban ****1926** centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process," but found that this inherent geographic disparity did not account for the magnitude of the Republican advantage. *Id.,* at 921, 924.

Regarding standing, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." *Id.,* at 928. It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." *Ibid.* The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced ... is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." *Id.,* at 930.

Judge Griesbach dissented. He wrote that, under this Court's existing precedents, "partisan intent" to benefit one party

rather than the other in districting "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches." *Id.,* at 939. He observed that the plaintiffs had not attempted to prove that "specific districts ... had been gerrymandered," but rather had "relied on statewide data and calculations." *Ibid*. And he argued that the plaintiffs' proof, resting as it did on statewide ***60** data, had "no relevance to any gerrymandering injury alleged by a voter in a single district." *Id.,* at 952. On that basis, Judge Griesbach would have entered judgment for the defendants.

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U.S.C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction. 582 U.S. 914, 137 S.Ct. 2268, 198 L.Ed.2d 698 (2017).

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.

[3] Our first consideration of a partisan gerrymandering claim came in *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). There a group of plaintiffs challenged the constitutionality of a Connecticut redistricting plan that "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.,* at 738, 93 S.Ct. 2321. To that end, the redistricting plan broke up numerous towns, "wiggl[ing] and joggl[ing]" district boundary lines in order to "ferret out pockets of each party's strength." *Id.,* at 738, and n. 3, 752, ***61** n. 18, 93 S.Ct. 2321. ****1927** The plaintiffs argued that, notwithstanding the rough population equality of the districts, the plan was unconstitutional because its consciously political design was "nothing less than a gigantic political gerrymander." *Id.,* at 752, 93 S.Ct. 2321. This Court rejected that claim. We reasoned that it would be "idle" to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," because districting "inevitably has and is intended to have substantial political consequences." *Id.,* at 752–753, 93 S.Ct. 2321.

Thirteen years later came *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Unlike the bipartisan gerrymander at issue in *Gaffney,* the allegation in *Bandemer* was that Indiana Republicans had gerrymandered Indiana's legislative districts "to favor Republican incumbents and candidates and to disadvantage Democratic voters" through what the plaintiffs called the "stacking" (packing) and "splitting" (cracking) of Democrats. 478 U.S., at 116–117, 106 S.Ct. 2797 (plurality opinion). A majority of the Court agreed that the case before it was justiciable. *Id.,* at 125, 127, 106 S.Ct. 2797. The Court could not, however, settle on a standard for what constitutes an unconstitutional partisan gerrymander.

Four Justices would have required the *Bandemer* plaintiffs to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.,* at 127, 106 S.Ct. 2797. In that plurality's view, the plaintiffs had failed to make a sufficient showing on the latter point because their evidence of unfavorable election results for Democrats was limited to a single election cycle. See *id.,* at 135, 106 S.Ct. 2797.

Three Justices, concurring in the judgment, would have held that the "Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.,* at 147, 106 S.Ct. 2797 (opinion of O'Connor, J.). Justice O'Connor took issue, in particular, with the plurality's focus on factual questions concerning "statewide ***62** electoral success." *Id.,* at 158, 106 S.Ct. 2797. She warned that allowing district courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.,* at 160, 106 S.Ct. 2797.

Justice Powell, joined by Justice Stevens, concurred in part and dissented in part. In his view, the plaintiffs' claim was not simply that their "voting strength was diluted statewide," but rather that "certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates." *Id.,* at 162, 169, 106 S.Ct. 2797. Thus, he would have focused on the question "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.,* at 165, 106 S.Ct. 2797.

Eighteen years later, we revisited the issue in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). In that case the plaintiffs argued that Pennsylvania's Legislature had created "meandering and irregular" congressional districts that "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to provide an advantage to Republican candidates for Congress. *Id.,* at 272–273, 124 S.Ct. 1769 (plurality opinion) (brackets omitted).

The *Vieth* Court broke down on numerous lines. Writing for a four-Justice plurality, Justice Scalia would have held that the plaintiffs' claims were nonjusticiable ****1928** because there was no "judicially discernible and manageable standard" by which to decide them. *Id.,* at 306, 124 S.Ct. 1769. On those grounds, the plurality affirmed the dismissal of the claims. *Ibid.* Justice KENNEDY concurred in the judgment. He noted that "there are yet no agreed upon substantive principles of fairness in districting," and that, consequently, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden" on constitutional rights. *Id.,* at 307–308, 124 S.Ct. 1769. He rejected the principle advanced by the plaintiffs—that "a majority of voters ***63** in [Pennsylvania] should be able to elect a majority of [Pennsylvania's] congressional delegation"—as a "precept" for which there is "no authority." *Id.,* at 308, 124 S.Ct. 1769. Yet Justice KENNEDY recognized the possibility that "in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens" representational rights. *Id.,* at 312, 124 S.Ct. 1769.

Four Justices dissented in three different opinions. Justice Stevens would have permitted the plaintiffs' claims to proceed on a district-by-district basis, using a legal standard similar to the standard for racial gerrymandering set forth in *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). See 541 U.S., at 335–336, 339, 124 S.Ct. 1769. Under this standard, any district with a "bizarre shape" for which the only possible explanation was "a naked desire to increase partisan strength" would be found unconstitutional under the Equal Protection Clause. *Id.,* at 339, 124 S.Ct. 1769. Justice Souter, joined by Justice GINSBURG, agreed that a plaintiff alleging unconstitutional partisan gerrymandering should proceed on a district-by-district basis, as "we would be able to call more readily on some existing law when we defined what is suspect at the district level." See *id.,* at 346–347, 124 S.Ct. 1769.

Justice BREYER dissented on still other grounds. In his view, the drawing of single-member legislative districts—even according to traditional criteria—is "rarely ... politically neutral." *Id.,* at 359, 124 S.Ct. 1769. He therefore would have distinguished between gerrymandering for passing political advantage and gerrymandering leading to the "unjustified entrenchment" of a political party. *Id.,* at 360–361, 124 S.Ct. 1769.

The Court last took up this question in *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*). The plaintiffs there challenged a mid-decade redistricting map passed by the Texas Legislature. As in *Vieth,* a majority of the Court could find no justiciable standard by which to resolve the plaintiffs' partisan gerrymandering claims. Relevant to this case, an *amicus* brief ***64** in support of the *LULAC* plaintiffs proposed a "symmetry standard" to "measure partisan bias" by comparing how the two major political parties "would fare hypothetically if they each ... received a given percentage of the vote." 548 U.S., at 419, 126 S.Ct. 2594 (opinion of KENNEDY, J.). Justice KENNEDY noted some wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *Id.,* at 420, 126 S.Ct. 2594. Aside from that problem, he wrote, the partisan bias standard shed no light on "how much partisan dominance is too much." *Ibid.* Justice KENNEDY therefore concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Ibid.*

Justice Stevens would have found that the Texas map was a partisan gerrymander ****1929** based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. *Id.,* at 466–467, 471–473, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and Justice GINSBURG, noted that he would not "rule out the utility of a criterion of

symmetry," and that "further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.,* at 483–484, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part).

B

[4] At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must* : The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Tr. of Oral Arg. 62. Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." *Clinton v. City of New York,* 524 U.S. 417, 449, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (KENNEDY, J., concurring). Our power as judges to "say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803), rests not on the default of politically accountable ***65** officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts in *Gaffney, Bandemer, Vieth,* and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

[5] **[6]** **[7]** **[8]** To ensure that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." *Baker,* 369 U.S., at 204, 82 S.Ct. 691. A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." *Lance,* 549 U.S., at 439, 441, 127 S.Ct. 1194. We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.,* which "affect [s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[9] We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, "voters who allege facts showing ***66** disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs in ****1930** this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28–29, 32–33, Complaint ¶¶ 5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.,* at 32–33, ¶ 15.

[10] To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[ ]," *Baker,* 369 U.S., at 206, 82 S.Ct. 691 therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." *Lewis v. Casey,* 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

[11] **[12]** **[13]** For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race —has standing to assert only that his own district has been so gerrymandered. See *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she

does not approve." *Id.,* at 745, 115 S.Ct. 2431. Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints ***67** must proceed "district by district." *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 262, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015).

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds,* which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." Brief for Appellees 29. But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker,* 369 U.S., at 206, 82 S.Ct. 691.

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362; see, *e.g., Moss v. Burkhart,* 220 F.Supp. 149, 156–160 (W.D.Okla.1963) (directing the county-by-county reapportionment of the Oklahoma Legislature), aff'd *sub nom. Williams v. Moss,* 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964) (*per curiam*).

Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their ****1931** votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be. Cf. ***68** *Alabama Legislative Black Caucus,* 575 U.S., at 262–263, 135 S.Ct., at 1265. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis,* 518 U.S., at 357, 116 S.Ct. 2174.

[14] The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance,* 549 U.S., at 442, 127 S.Ct. 1194. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (*per curiam*).

We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. Justice KAGAN's concurring opinion endeavors to address "other kinds of constitutional harm," see *post,* at 1938, perhaps involving different kinds of plaintiffs, see *post,* at 1938 – 1939, and differently alleged burdens, see *post,* at 81. But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. See *Public Workers v. Mitchell,* 330 U.S. 75, 90, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (noting that courts must "respect the limits of [their] unique authority" and engage in "[j]udicial exposition ... only when necessary to decide definite issues between litigants"). The reasoning of this Court ***69** with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

[15] Four of the plaintiffs in this case—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their

votes as a result of packing or cracking in their legislative districts. See 1 App. 34–36, Complaint ¶¶ 20, 23, 24, 26. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. See *Defenders of Wildlife,* 504 U.S., at 561, 112 S.Ct. 2130. As the proceedings in the ****1932** District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial—and their arguments before this Court—on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. 147 Record 37. His testimony points merely to his hope of achieving a Democratic majority in the legislature—what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Brief for Appellees 32. ***70** Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances." *Lance,* 549 U.S., at 439, 441, 127 S.Ct. 1194.

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." 218 F.Supp.3d, at 891. Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. *Ibid.* The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," *id.,* at 893; 2 App. 344, or which would result in "Statistical Pick Ups" for Republicans. 218 F.Supp.3d, at 893 (alterations omitted). And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost." *Ibid.*

[16] The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing." *Id.,* at 895. That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130.

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies similar to those discussed in *LULAC.* ***71** The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." Brief for Appellees 37. In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry—the "efficiency gap" of wasted votes. See *supra,* at 1923 – 1924. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit. See Stephanopoulos & McGhee, ****1933** Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015); McGhee, Measuring Partisan Bias in Single–Member District Electoral Systems, 39 Leg. Studies Q. 55 (2014).

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." 1 App. 28–29, Complaint ¶ 5 (emphasis deleted). That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. See Brief for Eric McGhee as *Amicus Curiae* 6, and n. 3. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny. See Brief for Appellees 52–53, and n. 17.

[17] The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just "a pencil and paper or a hand calculator"—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. Brief for Heather K. Gerken et al. as *Amici Curiae* ***72** 27 (citing Wang, Let Math Save Our Democracy, N.Y. Times, Dec. 5, 2015). We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative—even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

[18] In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. See, *e.g.*, ***73** *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). This is not the ****1934** usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus,* 575 U.S., at 264–265, 135 S.Ct., at 1266 (remanding for further consideration of the plaintiffs' gerrymandering claims on a district-by-district basis). We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury. *Cuno,* 547 U.S., at 353, 126 S.Ct. 1854.

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring.

The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. See *ante,* at 1929 – 1932. The Court also holds that none of the plaintiffs here have yet made that required showing. See *ante,* at 1931 – 1932.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts, see *ante,* at 1933 – 1934. I write to address in more detail what kind of evidence the ***74** present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing—that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury—an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim—from standing on down to remedy—would be statewide in nature.

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic **1935 principles." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. 787, 791, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015) (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 292, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); alterations omitted). More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to *75 disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. See *ante,* at 1930 – 1931 ("Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted"); see also *ante,* at 1929 – 1930, 1931 – 1932. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." *Ante,* at 1931. And the mechanism used to wreak that harm is "packing" and "cracking." *Ante,* at 1929 – 1930. In a relatively few districts, the mapmakers packed supermajorities of Democratic voters—well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters—spreading them sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes. *Ibid.*

The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); see *ante,* at 1930 – 1931. It arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. *76 *Wesberry v. Sanders,* 376 U.S. 1, 7, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself] as [an] individual [ ]": Her vote counted for less than the votes of other citizens in her State. *Baker v. Carr,* 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); see *ante,* at 1930 – 1931. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim—in the one-person, one-vote context or any other—always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." *Wesberry,* 376 U.S., at 7, 84 S.Ct. 526. And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. See *ante,* at 1931 – 1932. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Cf. *Voinovich v. Quilter,* 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (explaining **1936 that packing or cracking can also support racial vote dilution claims). Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map. See *ante,* at 1929 – 1930, 1931. So when she shows that her

district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)); see *ante,* at 1931 – 1932.

In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. Cf. *ante,* at 1933 (suggesting ***77** how an alternative map may shed light on vote dilution or its absence); *Easley v. Cromartie,* 532 U.S. 234, 258, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (discussing the use of alternative maps as evidence in a racial gerrymandering case); *Cooper v. Harris,* 581 U.S. 285, 317–322, 137 S.Ct. 1455, 1478–1482, 197 L.Ed.2d 837 (2017) (same); Brief for Political Geography Scholars as *Amici Curiae* 12–14 (describing computer simulation techniques for devising alternative maps). For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

Here, the Court is right that the plaintiffs have so far failed to make such a showing. See *ante,* at 1931 – 1933. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. See *ante,* at 1932, 1931 – 1933. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, see *infra,* at 1937 – 1939, Whitford is not "among the injured" in a vote dilution challenge. *Lujan,* 504 U.S., at 563, 112 S.Ct. 2130 (quoting *Sierra Club,* 405 U.S., at 735, 92 S.Ct. 1361). Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. See *ante,* at 1931 – 1932. So they too did not show the injury—a less valuable vote—central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so ***78** that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." *Ante,* at 1934. That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. ****1937** Recall that the plaintiffs here alleged—and the District Court found, see 218 F.Supp.3d 837, 896 (W.D.Wis.2016)—that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district (see, *e.g., Benisek v. Lamone,* post, p. 155 (*per curiam*)) or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent —a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State—and that they graded draft maps according to the amount of advantage ***79** those maps conferred on Republicans. See 218 F.Supp.3d, at 890–896. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[ ] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Alabama*

Legislative Black Caucus v. Alabama, 575 U.S. 254, 263, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015). And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." *Id.,* at 266–267, 135 S.Ct., at 1267. The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be." *Ante,* at 16. But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." *Ibid.* (emphasis added). Not necessarily—but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

II

Everything said so far relates only to suits alleging that a partisan gerrymander ****1938** dilutes individual votes. That is the ***80** way the Court sees this litigation. See *ante,* at 1929 – 1932. And as I'll discuss, that is the most reasonable view. See *infra,* at 1939 – 1940. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

Justice KENNEDY explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546. "Representative democracy," Justice KENNEDY pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. *Id.,* at 314, 124 S.Ct. 1769 (opinion concurring in judgment) (quoting *California Democratic Party v. Jones,* 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000)). That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." 541 U.S., at 314, 124 S.Ct. 1769. Such action "burden[s] a group of voters' representational rights." *Ibid.*; see *id.,* at 315, 124 S.Ct. 1769 (similarly describing the "burden[ ] on a disfavored party and its voters" and the "burden [on] a group's representational rights"). And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views." *Id.,* at 314–315, 124 S.Ct. 1769.

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This ***81** is the kind of "burden" to "a group of voters' representational rights" Justice KENNEDY spoke of. *Id.,* at 314, 124 S.Ct. 1769. Members of the "disfavored party" in the State, *id.,* at 315, 124 S.Ct. 1769 deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). See *Anderson v. Celebrezze,* 460 U.S. 780, 791–792, and n. 12, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on ... associational rights"). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). Cf. *California Democratic Party,* 530 U.S., at 586, 120 S.Ct. 2402 (holding that a state law violated state political parties' First Amendment rights of association). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies.

Standing, we have long held, "turns on the nature and source of the claim asserted." *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm ****1939** alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. See *ante,* at 1929 – 1932; *supra,* at 1935 – 1936. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party ***82** and carry out that organization's activities and objects. See *supra,* at 1937 – 1939. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." 1 App. 61, Complaint ¶ 91. Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of ... their association with a political party." Brief for Appellees 36 (internal quotation marks omitted). And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used, see *infra,* at 1939 – 1940). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them. *Ante,* at 1933.

In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose—although as noted above, it could easily have supported the alternative theory of associational ***83** harm, see *supra,* at 1939. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes, see *supra,* at 1937 – 1939. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Brief for Appellees 29–30. Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's ****1940** opinion is about a suit challenging a partisan gerrymander on a particular ground—that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." *Ante,* at 1931. And in particular, it leaves for another day the theory of harm advanced by Justice KENNEDY in *Vieth* : that a partisan gerrymander interferes with the vital "ability of citizens to band together" to further their political beliefs. 541 U.S., at 314, 124 S.Ct. 1769 (quoting *California Democratic Party,* 530 U.S., at 574, 120 S.Ct. 2402). Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." *Ante,* at 1931. A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. *Vieth,* 541 U.S., at 315, 124 S.Ct. 1769 (opinion of KENNEDY, J.); see *supra,* at 1937 – 1939. ***84** And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too—as to standing, liability, and remedy alike.

III

Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth,*

541 U.S., at 316, 124 S.Ct. 1769 (opinion of KENNEDY, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.,* at 317, 124 S.Ct. 1769 (internal quotation marks omitted). It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around." *Arizona State Legislature,* 576 U.S., at 824, 135 S.Ct., at 2677 (quoting Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005)).

And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences. The congressional brief describes a "cascade of negative results" from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems. Brief for Bipartisan Group of Current and Former Members of Congress as *Amici Curiae* 4; see *id.,* at 10–23. The state legislators tell a similar story. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal [ ]." Brief for Bipartisan Group of 65 Current and Former State Legislators as *Amici Curiae* 6, 25.

***85** I doubt James Madison would have been surprised. What, he asked when championing the Constitution, would make the House of Representatives work? The House must be structured, he answered, to instill in its members "an habitual recollection of their dependence on the people." The Federalist No. 57, p. 352 (C. Rossiter ed. 1961). Legislators must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Ibid.* When that moment does not come—when legislators can entrench themselves in office despite the people's will—the foundation ****1941** of effective democratic governance dissolves.

And our history offers little comfort. Yes, partisan gerrymandering goes back to the Republic's earliest days; and yes, American democracy has survived. But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). See Brief for Political Science Professors as *Amici Curiae* 28. Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record. *Id.,* at 3. The technology will only get better, so the 2020 cycle will only get worse.

Courts have a critical role to play in curbing partisan gerrymandering. Over fifty years ago, we committed to providing judicial review in the redistricting arena, because we understood that "a denial of constitutionally protected rights demands judicial protection." *Reynolds,* 377 U.S., at 566, 84 S.Ct. 1362. Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy ***86** for their constitutional harms. Of course, their dire need provides no warrant for courts to disregard Article III. Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. *E.g., Lance v. Coffman,* 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*); *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); *United States v. Hays,* 515 U.S. 737, 747, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). The Court departs from our usual practice because this is supposedly "not the usual case." *Ante,* at 1933 – 1934. But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. See *ante,* at 1929 – 1932. After a year and a half of litigation in the District Court, including a 4–day trial, the plaintiffs had a more-than-ample opportunity

to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

All Citations

585 U.S. 48, 138 S.Ct. 1916, 201 L.Ed.2d 313, 86 USLW 4415, 18 Cal. Daily Op. Serv. 5845, 2018 Daily Journal D.A.R. 5768, 27 Fla. L. Weekly Fed. S 373

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

113 S.Ct. 1075
Supreme Court of the United States

Joan GROWE, Secretary of State of Minnesota, et al., Appellants,
v.
James EMISON et al.

No. 91–1420
|
Argued Nov. 2, 1992.
|
Decided Feb. 23, 1993.

Synopsis
Action was brought seeking declaratory and injunctive relief barring use of allegedly fragmented districts for future elections and adoption of new districts. A three judge panel of the United States District Court for the District of Minnesota, Lay, Circuit Judge, and Magnuson, J., 782 F.Supp. 427, held that redistricting plan adopted by state court fragmented minority voting interest and failed to provide affirmative relief necessary to adequately protect minority voting rights under the Voting Rights Act, and adopted different plan containing super-majority minority senate district for a city. Appeal was taken. The Supreme Court, Justice Scalia, held that district court had erred in not deferring to state court's timely efforts to redraw legislative and congressional districts, and (2) district court had erred in concluding that state court's legislative plan violated Voting Rights Act.

Reversed and remanded.

West Headnotes (10)

[1] **Federal Courts** Federal-state relations, questions of state law, and parallel state proceedings

When federal and state courts find themselves exercising concurrent jurisdiction over same subject matter, federal court generally need neither abstain (i.e. dismiss case before it) nor defer to state proceedings (i.e. withhold action until state proceedings have concluded).

30 Cases that cite this headnote

[2] **Federal Courts** Pullman abstention
Federal Courts Stay

Pullman doctrine, recognizing that federal courts should not prematurely resolve constitutionality of state statute, calls for deferral of federal suit pending conclusion of state proceedings, rather than abstention in form of dismissal of federal suit.

26 Cases that cite this headnote

[3] **States** Evidence in general
United States Judicial review and enforcement

Absent evidence that appropriate state bodies will fail timely to perform duty of apportioning federal congressional and state legislative districts, following new census results, federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it. U.S.C.A. Const. Art. 1, § 2, cl. 3.

38 Cases that cite this headnote

[4] **Injunction** Redistricting and reapportionment
States Judicial intervention and immunity in general

Federal district court erred by issuing injunction prohibiting any state court plan implementation of state legislative and federal congressional redistricting, while affording Legislature time to complete plan it was preparing; requirement that federal courts defer to state redistricting efforts applied to courts as well as legislatures. U.S.C.A. Const. Art. 1, § 2, cl. 3.

45 Cases that cite this headnote

[5] **Courts** Restraining Particular Proceedings

Federal district court could not enjoin state court from proceeding with plan for state legislative and federal congressional redistricting, even though federal lawsuit challenging existing districts claimed violation of Voting Rights Act, while state lawsuit did not. U.S.C.A. Const. Art. 1, § 2, cl. 3; Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

30 Cases that cite this headnote

[6] **Courts** Restraining Particular Proceedings

Federal courts could not enjoin state court adoption of plan for state legislative and federal congressional redistricting, so as to narrow choice of applicable plans to one being adopted pursuant to federal litigation or one being adopted by state legislature, on grounds that 90–day period during which unsuccessful state litigants could appeal state court plan would create problems of establishing definitive districts in time for elections; requirement that districts be established in time for elections did not mandate that time be allowed for judicial review. U.S.C.A. Const. Art. 1, § 2, cl. 3; 51 M.S.A., Rules Civ.App.Proc., Rule 104.01.

19 Cases that cite this headnote

[7] **Courts** Restraining Particular Proceedings

Federal district court erred by issuing injunction prohibiting implementation of plan for state legislative redistricting, adopted by state court; after state court entered that order, federal court was limited under full faith and credit statute to entertaining federal court complaints relating to legislative redistricting only to extent those claims challenged state court's plan. 28 U.S.C.A. § 1738; U.S.C.A. Const. Art. 1, § 2, cl. 3.

35 Cases that cite this headnote

[8] **Courts** Restraining Particular Proceedings

Federal Courts Reapportionment

Federal court considering challenge to existing congressional districts erred by not deferring to state court's timely consideration of congressional reapportionment, and issuing injunction having effect of preventing state court from developing redistricting plan. U.S.C.A. Const. Art. 1, § 2, cl. 3.

24 Cases that cite this headnote

[9] **States** Dilution of voting power in general

Requirements for successful vote dilution claim with respect to proposed multimember district, announced in *Thornberg v. Gingles,* applied as well to voter fragmentation claim involving single member district. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

134 Cases that cite this headnote

[10] **States** Compactness; contiguity; gerrymandering in general

Voter fragmentation had not been established, as necessary to support noncompact super-majority minority state legislative district comprising areas north and south of downtown business district; no statistical showing had been made of a minority group that was politically cohesive, or that there was white majority bloc voting. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

159 Cases that cite this headnote

****1076** ***25** *Syllabus*[*]

Shortly after a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other election officials, appellee voters filed a similar action against essentially the same officials in the Federal District Court. Both suits alleged that, in light of the 1990 census results, the State's congressional and legislative districts were malapportioned, in violation of the Federal and State Constitutions; the federal suit contained the additional claim that the current districts diluted the vote of minority groups in Minneapolis, in violation of § 2 of the Voting Rights Act of 1965. Both suits sought declaration that the current districts were unlawful, and judicial construction of new districts if the state legislature failed to act. After the state legislature adopted a new legislative districting plan,

which contained numerous drafting errors, a second federal action was filed raising constitutional challenges to the new legislative districts; the two federal suits were consolidated. The District Court set a deadline for the legislature to act on redistricting plans, but refused to abstain or defer to the state-court proceedings. The state court, having found the new legislative districts defective because of the drafting errors, issued a preliminary legislative redistricting plan correcting most of those errors, to be held in abeyance pending further action by the legislature. Before the state court could take additional action, the District Court stayed the state-court proceedings; this Court vacated that stay. When the Governor vetoed the legislature's effort to correct the defective legislative redistricting plan, and to adopt new congressional districts, the state court issued a final order adopting its legislative plan, and held hearings on the congressional plans submitted by the parties. Before the state court could issue a congressional plan, however, the District Court adopted its own redistricting ****1077** plans, both legislative and congressional, and permanently enjoined interference with state implementation of those plans. The District Court found, in effect, that the state court's legislative plan violated the Voting Rights Act because it did not contain a "super-majority minority" Senate district; its own plan contained such a district, designed to create a majority composed of at least three separately identifiable minority groups.

***26** *Held:*

1. The District Court erred in not deferring to the state court's timely efforts to redraw the legislative and congressional districts. States have the primary duty and responsibility to perform that task, and federal courts must defer their action when a State, through its legislative *or* judicial branch, has begun in timely fashion to address the issue. *Scott v. Germano,* 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965). Absent evidence that these branches cannot timely perform their duty, a federal court cannot affirmatively obstruct, or permit federal litigation to impede, state reapportionment. Judged by these principles, the District Court erred in several respects: It set a deadline for reapportionment directed only to the state legislature, instead of to the legislature and courts; it issued an injunction that treated the state court's provisional legislative plan as "interfering" in the reapportionment process; it failed to give the state court's final order adopting a legislative plan *legal effect* under the principles of federalism and comity embodied in the full faith and credit statute; and it actively prevented the state court from issuing its own congressional plan, although it appears that the state court was prepared to do so. Pp. 1080–1083.

2. The District Court erred in its conclusion that the state court's legislative plan violated § 2 of the Voting Rights Act. The three prerequisites that were identified in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), as necessary to establish a vote-dilution claim with respect to a multimember districting plan—a minority group that is sufficiently large and geographically compact to constitute a majority in a single-member district, minority political cohesion, and majority bloc voting that enables defeat of the minority's preferred candidate—are also necessary to establish a vote-fragmentation claim with respect to a single-member district. In the present case, even making the dubious assumption that the minority voters were geographically compact, the record contains no statistical or anecdotal evidence of majority bloc voting or minority political cohesion among the distinct ethnic and language minority groups the District Court combined in the new district. The *Gingles* preconditions were not only ignored but were on this record unattainable. Pp. 1083–1085.

722 F.Supp. 427, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

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***27** Sol. Gen. Kenneth W. Starr, Washington, DC, as amicus curiae for U.S. supporting the appellants.

Bruce Donald Willis, Minneapolis, MN, for appellees.

Opinion

Justice SCALIA delivered the opinion of the Court.

This case raises important issues regarding the propriety of the District Court's pursuing reapportionment of Minnesota's state legislative and federal congressional districts in the face of Minnesota state-court litigation seeking similar relief, and regarding the District Court's conclusion that the state court's legislative plan violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973.

I

In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials ****1078** responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution. *Cotlow v. Growe,* No. C8–91–985. The plaintiffs asserted that the 1990 federal census results revealed a significant change in the distribution of the state population, and requested that the court declare the current districts unlawful and draw new districts if the legislature failed to do so. In February, the parties stipulated that, in light of the new census, the challenged districting plans were ***28** unconstitutional. The Minnesota Supreme Court appointed a Special Redistricting Panel (composed of one appellate judge and two district judges) to preside over the case.

In March, a second group of plaintiffs filed an action in federal court against essentially the same defendants, raising similar challenges to the congressional and legislative districts. *Emison v. Growe,* 782 F.Supp. 427. The *Emison* plaintiffs (who include members of various racial minorities) in addition raised objections to the legislative districts under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, alleging that those districts needlessly fragmented two Indian reservations and divided the minority population of Minneapolis. The suit sought declaratory relief and continuing federal jurisdiction over any legislative efforts to develop new districts. A three-judge panel was appointed pursuant to 28 U.S.C. § 2284(a).

While the federal and state actions were getting underway, the Minnesota Legislature was holding public hearings on, and designing, new legislative districts. In May, it adopted a new legislative districting plan, Chapter 246, Minn.Stat. §§ 2.403–2.703 (Supp.1991), and repealed the prior 1983 apportionment. It was soon recognized that Chapter 246 contained many technical errors—mistaken compass directions, incorrect street names, noncontiguous districts, and a few instances of double representation. By August, committees of the legislature had prepared curative legislation, Senate File 1596 and House File 1726 (collectively, Senate File 1596), but the legislature, which had adjourned in late May, was not due to reconvene until January 6, 1992.

Later in August, another group of plaintiffs filed a second action in federal court, again against the Minnesota Secretary of State. *Benson v. Growe,* No. 4–91–603. The *Benson* plaintiffs, who include the Republican minority leaders of the Minnesota Senate and House, raised federal and state constitutional challenges to Chapter 246, but no Voting ***29** Rights Act allegations. The *Benson* action was consolidated with the *Emison* suit; the *Cotlow* plaintiffs, as well as the Minnesota House of Representatives and State Senate, intervened.

With the legislature out of session, the committees' proposed curative measures for Chapter 246 pending, and the state court in *Cotlow* considering many of the same issues, the District Court granted the defendants' motion to defer further proceedings pending action by the Minnesota Legislature. It denied, however, defendants' motion to abstain in light of the *Cotlow* suit, or to allow the state court first to review any legislative action or, if the legislature failed to act, to allow the state court first to issue a court-ordered redistricting plan. The District Court set a January 20, 1992, deadline for the state legislature's action on both redistricting plans, and appointed special masters to develop contingent plans in the event the legislature failed to correct Chapter 246 or to reapportion Minnesota's eight congressional districts.

Meanwhile, the *Cotlow* panel concluded (in October) that Chapter 246, applied as written (*i.e.,* with its drafting errors), violated both the State and Federal Constitutions, and invited the parties to submit alternative legislative plans based on Chapter 246. It also directed the parties to submit by mid-October written arguments on any Chapter 246 violations of the Voting Rights Act. In late ****1079** November, the state court issued an order containing its preliminary legislative redistricting plan—essentially Chapter 246 with the technical corrections (though not the stylistic corrections) contained in Senate File 1596. (Since no party had responded to its order concerning Voting Rights Act violations, the court concluded that Chapter 246 did not run afoul of that Act.) It proposed putting its plan into effect on January 21, 1992, if the legislature had not acted by then. Two weeks later, after further argument, the *Cotlow* panel indicated it ***30** would release a revised and final version of its legislative redistricting plan in a few days.

In early December, before the state court issued its final plan, the District Court stayed all proceedings in the *Cotlow* case, and enjoined parties to that action from "attempting to enforce or implement any order of the ... Minnesota

Special Redistricting Panel which has proposed adoption of a reapportionment plan relating to state redistricting or Congressional redistricting." App. to Juris. Statement 154. The court explained its action as necessary to prevent the state court from interfering with the legislature's efforts to redistrict and with the District Court's jurisdiction. It mentioned the *Emison* Voting Rights Act allegations as grounds for issuing the injunction, which it found necessary in aid of its jurisdiction, see 28 U.S.C. § 1651. One judge dissented.

Four days later the state court issued an order containing its final legislative plan, subject to the District Court's injunction and still conditioned on the Legislature's failure to adopt a lawful plan. The same order provided, again subject to the District Court's injunction, that congressional redistricting plans be submitted by mid-January. The obstacle of the District Court injunction was removed on January 10, 1992, when, upon application of the *Cotlow* plaintiffs, we vacated the injunction. 502 U.S. 1022, 112 S.Ct. 855, 116 L.Ed.2d 764.

When the legislature reconvened in January, both Houses approved the corrections to Chapter 246 contained in Senate File 1596 and also adopted a congressional redistricting plan that legislative committees had drafted the previous October. The Governor, however, vetoed the legislation. On January 30, the state court issued a final order adopting its legislative plan and requiring that plan to be used for the 1992 primary and general elections. By February 6, pursuant to an order issued shortly after this Court vacated the injunction, the parties had submitted their proposals for congressional redistricting, and on February 17 the state court held hearings on the competing plans.

***31** Two days later, the District Court issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with state implementation of those plans. 782 F.Supp. 427, 448–449 (Minn.1992). The *Emison* panel found that the state court's modified version of Chapter 246 "fails to provide the equitable relief necessary to cure the violation of the Voting Rights Act," *id.,* at 440, which in its view required at least one "super-majority minority" Senate district, a district in which the minority constitutes a clear majority. The District Court rejected Chapter 246 as a basis for its plan, and instead referred to state policy as expressed in the Minnesota Constitution and in a resolution adopted by both Houses of the legislature. See Minn. Const., Art. 4, § 2; H.R.Con.Res. No. 2, 77th Leg., Reg.Sess. (1991). Judge MacLaughlin dissented in part. The District Court was unanimous, however, in its adoption of a congressional redistricting plan, after concluding that the preexisting 1982 plan violated Art. I, § 2, of the Federal Constitution. Although it had received the same proposed plans submitted to the state court earlier that month, it used instead a congressional plan prepared by its special masters. Finally, the District Court retained jurisdiction to ensure adoption of its reapportionment ****1080** plans and to enforce the permanent injunction.

In early March, the state court indicated that it was "fully prepared to release a congressional plan" but that the federal injunction prevented it from doing so. In its view, the federal plan reached population equality "without sufficient regard for the preservation of municipal and county boundaries." App. to Juris.Statement 445–446.

Appellants sought a stay of the District Court's February order pending this appeal. Justice BLACKMUN granted the stay with respect to the legislative redistricting plan. No. 91–1426 (Mar. 11, 1992) (in chambers). We noted probable jurisdiction. 503 U.S. 958, 112 S.Ct. 1557, 118 L.Ed.2d 206 (1992).

***32** II

In their challenge to both of the District Court's redistricting plans, appellants contend that, under the principles of *Scott v. Germano,* 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965) (*per curiam*), the court erred in not deferring to the Minnesota Special Redistricting Panel's proceedings. We agree.

[1] **[2]** The parties do not dispute that both courts had jurisdiction to consider the complaints before them. Of course federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.,* dismiss the case before it) nor defer to the state proceedings (*i.e.,* withhold action until the state proceedings have concluded). See *McClellan v. Carland,* 217 U.S. 268, 282, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910). In rare circumstances, however, principles of federalism and comity dictate otherwise. We have found abstention necessary, for example, when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain

ongoing state criminal proceedings. See *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814–817, 96 S.Ct. 1236, 1244–1246, 47 L.Ed.2d 483 (1976) (collecting examples). We have required deferral, causing a federal court to "sta[y] its hands," when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941).[1]

***33** In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself. In *Germano,* a Federal District Court invalidated Illinois' Senate districts and entered an order requiring the State to submit to the court any revised Senate districting scheme it might adopt. An action had previously been filed in state court attacking the same districting scheme. In that case the Illinois Supreme Court held (subsequent to the federal court's order) that the Senate districting scheme was invalid, but expressed confidence that the General Assembly would enact a lawful plan during its then current session, scheduled to end in July 1965. The Illinois Supreme Court retained jurisdiction to ensure that the upcoming 1966 general elections would be conducted pursuant to a constitutionally valid plan.

****1081** This Court disapproved the District Court's action. The District Court "should have stayed its hand," we said, and in failing to do so overlooked this Court's teaching that state courts have a significant role in redistricting. 381 U.S., at 409, 85 S.Ct., at 1527.

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.
>
> "...The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election...." *Ibid.* (citations omitted).

[3] ***34** Today we renew our adherence to the principles expressed in *Germano,* which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, § 2. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

[4] Judged by these principles, the District Court's December injunction of state-court proceedings, vacated by this Court in January, was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state *judicial* redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as "interfering" in the reapportionment process. But the doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment. The Minnesota Special Redistricting Panel's issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable "interference," was precisely the sort of state judicial supervision of redistricting we have encouraged. See *Germano,* 381 U.S., at 409, 85 S.Ct., at 1526 (citing cases).

[5] Nor do the reasons offered by the District Court for its actions in December and February support departure from the *Germano* principles. It is true that the *Emison* plaintiffs alleged that the 1983 legislative districting scheme violated ***35** the Voting Rights Act, while the *Cotlow* complaint never invoked that statute. *Germano,* however, does not require that the federal and state-court complaints be identical; it instead focuses on the nature of the relief requested: reapportionment of election districts. Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.

[6] The District Court also expressed concern over the lack of time for orderly appeal, prior to the State's primaries, of any judgment that might issue from the state court, noting that Minnesota allows the losing party 90 days to appeal. See Minn.Rule Civ.App.Proc. 104.01. We fail to see the relevance

of the speed of appellate review. *Germano* requires only that the state agencies adopt a constitutional plan "within ample time ... to be utilized in the [upcoming] election," 381 U.S., at 409, 85 S.Ct., at 1527. It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States ****1082** must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year. Our consideration of this appeal, long after the Minnesota primary and final elections have been held, itself reflects the improbability of completing judicial review before the necessary deadline for a new redistricting scheme.

[7] It may be useful to describe what ought to have happened with respect to each redistricting plan. The state court entered its judgment adopting its modified version of Chapter 246 in late January (nearly three weeks before the federal court issued its opinion). That final order, by declaring the legislature's version of Chapter 246 unconstitutional and adopting a legislative plan to replace it, altered the status quo: The state court's plan became the law of Minnesota. At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, ***36** 28 U.S.C. § 1738, obligated the federal court to give that judgment *legal effect,* rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing. See *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 286, 296, 90 S.Ct. 1739, 1742, 1747, 26 L.Ed.2d 234 (1970). In other words, after January 30 the federal court was empowered to entertain the *Emison* plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged the *state court's* plan. Cf. *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978) (opinion of WHITE, J.).

[8] With respect to the congressional plan, the District Court did not ignore any state-court judgment, but only because it had actively prevented such a judgment from issuing. The wrongfully entered December injunction prevented the Special Redistricting Panel from developing a contingent plan for congressional redistricting, as it had for legislative redistricting prior to the injunction. The state court's December order to the parties for mid-January submission of congressional plans was rendered a nullity by the injunction, which was not vacated until January 10. The net effect was a delay of at least a few weeks in the submissions to the state court, and in hearings on those submissions. A court may not acknowledge *Germano* in one breath and impede a state court's timely development of a plan in the next. It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. But the January 20 deadline that the District Court established here was explicitly directed *solely at the legislature.* The state court was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention.

Of course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries. ***37** *Germano* requires deferral, not abstention. But in this case, in addition to the fact that the federal court itself had been (through its injunction) a cause of the state court's delay, it nonetheless appeared that the state court was fully prepared to adopt a congressional plan in as timely a manner as the District Court. The Special Redistricting Panel received the same plans submitted to the federal court, and held hearings on those plans two days before the federal court issued its opinion. The record simply does not support a conclusion that the state court was either unwilling or unable to adopt a congressional plan in time for the elections.[2] What occurred here was not a last-minute federal-court rescue of ****1083** the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course. The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment.

III

[9] **[10]** The District Court concluded that there was sufficient evidence to prove minority vote dilution in a portion of the city of Minneapolis, in violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] 782 F.Supp., at 439. Choosing not ***38** to apply the preconditions for a vote-dilution violation set out by this Court for challenges to multimember districts, see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the court instead proceeded directly to the "totality of circumstances" test in § 2(b) and found unlawful dilution. It rejected, as a basis for its redistricting plan, Chapter 246, Chapter 246 as modified by Senate File 1596, and the state court's version of Chapter 246, and adopted instead its special masters' legislative plan, which includes a Senate district stretching from south Minneapolis,

around the downtown area, and then into the northern part of the city in order to link minority populations. This oddly shaped creation, Senate District 59, is 43 percent black and 60 percent minority, including at least three separately identifiable minority groups.[4] In the District Court's view, based on "[j]udicial experience, as well as the results of past elections," a super-majority minority Senate district in Minneapolis was required in order for a districting scheme to comply with the ***39** Voting Rights Act. 782 F.Supp., at 440. We must review this analysis because, if it is correct, the District Court was right to deny effect to the state-court legislative redistricting plan.

As an initial matter, it is not clear precisely which legislative districting plan produced the vote dilution that necessitated the super-majority remedy. For almost a decade prior to the 1992 election season, the only legislative districting plan that had been in use in Minnesota was the 1983 plan, which all parties agreed was unconstitutional in light of the 1990 census. More importantly, the state court had *declared* the 1983 plan to be unconstitutional in its final order of January 30. Once that order issued, the *Emison* ****1084** plaintiffs' claims that the 1983 plan violated the Voting Rights Act became moot, unless those claims also related to the superseding plan. But no party to this litigation has ever alleged that either Chapter 246, or the modified version of Chapter 246 adopted by the state court, resulted in vote dilution. The District Court did not hold a hearing or request written argument from the parties on the § 2 validity of any particular plan; nor does the District Court's discussion focus on any particular plan.

Although the legislative plan that in the court's view produced the § 2 "dilution" violation is unclear, the District Court did clearly conclude that the state court's plan could not remedy that unspecified violation because it "fail[ed] to provide the affirmative relief necessary to adequately protect minority voting rights." *Id.,* at 448. The District Court was of the view, in other words, as the dissenting judge perceived, see *id.,* at 452, and n. 6 (MacLaughlin, J., concurring in part and dissenting in part), that *any* legislative plan lacking a super-majority minority Senate district in Minneapolis violated § 2. We turn to the merits of this position.

Our precedent requires that, to establish a vote-dilution claim with respect to a multimember districting plan (and ***40** hence to justify a super-majority districting remedy), a plaintiff must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S., at 50–51, 106 S.Ct., at 2766–2767. We have not previously considered whether these *Gingles* threshold factors apply to a § 2 dilution challenge to a single-member districting scheme, a so-called "vote fragmentation" claim. See *id.,* at 46–47, n. 12, 106 S.Ct., at 2764, n. 12. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts, see, *e.g., id.,* at 47, and n. 13, 106 S.Ct., at 2764, and n. 13; *id.,* at 87, 106 S.Ct., at 2785 (O'CONNOR, J., concurring in judgment); *Rogers v. Lodge,* 458 U.S. 613, 616–617, 102 S.Ct. 3272, 3274–3275, 73 L.Ed.2d 1012 (1982); see also *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966)—which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment, see, *e.g., Connor v. Finch,* 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977). It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply: The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, see *Gingles, supra,* at 50, n. 17, 106 S.Ct., at 2765, n. 17. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population, see *Gingles, supra,* at 51, 106 S.Ct., at 2766. Unless these ***41** points are established, there neither has been a wrong nor can be a remedy.[5]

****1085** In the present case, even if we make the dubious assumption that the minority voters were "geographically compact," there was quite obviously a higher-than-usual need for the second of the *Gingles* showings. Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential. See *Badillo v. Stockton,* 956 F.2d

884, 891 (CA9 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs,* 906 F.2d 524 (CA 11 1990); *Campos v. Baytown,* 840 F.2d 1240, 1244 (CA5 1988), cert. denied, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989). Since a court may not presume bloc voting within even a single minority group, see *Gingles, supra,* at 46, 106 S.Ct., at 2764, it made no sense for the District Court to (in effect) indulge that presumption as to bloc voting within an agglomeration of distinct minority groups.

We are satisfied that in the present case the *Gingles* preconditions were not only ignored but were unattainable. As the District Court acknowledged, the record simply "contains no statistical evidence" of minority political cohesion (whether of one or several minority groups) or of majority bloc voting in Minneapolis. 782 F.Supp., at 436, n. 30. And even anecdotal evidence is lacking. Recognizing this void, the court relied on an article identifying bloc voting as a ***42** national phenomenon that is " 'all but inevitable.' " *Ibid.,* quoting Howard & Howard, The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm, 83 Colum.L.Rev. 1615, 1625 (1983). A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minneapolis. Cf. *Gingles,* 478 U.S., at 58–61, 106 S.Ct., at 2770–2771 (summarizing statistical and anecdotal evidence in that case). Section 2 "does not assume the existence of racial bloc voting; plaintiffs must prove it." *Id.,* at 46, 106 S.Ct., at 2764.

* * *

The District Court erred in not deferring to the state court's efforts to redraw Minnesota's state legislative and federal congressional districts. Its conclusion that the state court's legislative districting plan (which it treated as merely one available option) violated § 2 of the Voting Rights Act was also erroneous. Having found these defects, we need not consider the other points of error raised by appellants.

The judgment is reversed, and the case is remanded with instructions to dismiss.

So ordered.

All Citations

507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388, 61 USLW 4163

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 We have referred to the *Pullman* doctrine as a form of "abstention," see 312 U.S., at 501–502, 61 S.Ct., at 645–646. To bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* "deferral." *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute, just as *Germano* deferral recognizes that federal courts should not prematurely involve themselves in redistricting.

2 Although under Minnesota law legislative districts must be drawn before precinct boundaries can be established, see Minn.Stat. § 204B.14, subd. 3 (Supp.1991), congressional districts were not needed in advance of the March 3 precinct caucuses. Congressional district conventions did not take place until late April and early May.

3 That section provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political

subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

4 These percentages refer to total population. To establish whether a § 2 violation has occurred (which presumably requires application of the same standard that measures whether a § 2 violation has been remedied) other courts have looked to, not the district's total minority population, but the district's minority population *of voting age.* See, *e.g., Romero v. Pomona,* 883 F.2d 1418, 1425–1426, and n. 13 (CA9 1989) (citing cases). *Gingles* itself repeatedly refers to the voting population, see, *e.g.,* 478 U.S., at 48, 50, 106 S.Ct., at 2765, 2766. We have no need to pass upon this aspect of the District Court's opinion.

5 *Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. *Gingles, supra,* at 46–47, n. 12, 106 S.Ct., at 2764, n. 12. We do not reach that question in the present case either: Although the *Emison* plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan.

End of Document

New York
Official Reports

282 A.D. 353, 122 N.Y.S.2d 721

In the Matter of HELENA HOLLAND, Doing Business as 'HOLLAND VOCATIONAL SERVICE', Appellant,

v.

EDWARD W. EDWARDS et al., as Members of the State Commission Against Discrimination, Respondents.

In the Matter of STATE COMMISSION AGAINST DISCRIMINATION, Respondent,

v.

HELENA HOLLAND, Doing Business as 'HOLLAND VOCATIONAL SERVICE', Appellant.

Supreme Court of New York,
Appellate Division, First Department.
July 7, 1953.

CITE TITLE AS: Matter of Holland v Edwards

***353 Civil rights**

Discriminatory practices --- Employment agencies --- (1) State Commission Against Discrimination found that employment agency operator's oral and written inquiries of applicant showed an unlawful discrimination; commission's order prohibited further inquiries of applicants as to race, color, creed or national origin, and required agency to furnish commission with lists of applicants, job orders and referrals as well as directing or prohibiting other specified acts by the agency; order was within commission's powers and was not unreasonable --- (2) Commission was created by State Law Against Discrimination (Executive Law, art. 15, as added by L. 1945, ch. 118, and amd. by L. 1952, ch. 285) under State's police power and to fulfill constitutional guaranty of civil rights; commission has plenary jurisdiction within statutory field (Executive Law, §§ 290, 294, 297) --- (3) Supreme Court must accept as *354 conclusive all sufficiently supported factual findings of commission (Executive Law, § 298); statute to be liberally construed; court's power of revision not limited to arbitrary, capricious or illegal situations --- (4) Some of questions asked by agency, although in themselves not unlawful employment practices, may become harmful practice, when considered together

1. At a hearing before the State Commission Against Discrimination there was uncontroverted evidence that an employment agency gave an applicant for employment an application form which contained a question whether the applicant's family name had ever been changed, and that thereafter the operator of the agency, on looking over the completed form, told the applicant that 'one of the schools sounded like a British school', inquired as to whether a former employer of the applicant was Jewish and as to the spelling of that employer's wife's maiden name, commented on the 'rather odd' spelling of the applicant's name and asked if it were British, stating that she herself was a Canadian. The commission decided that the oral and written inquiries, taken together, expressed a discrimination as to creed and national origin not based on a bona fide occupational qualification. An order of the commission prohibited the operator of the agency from making any inquiries, direct or indirect, when interviewing applicants for employment, as to race, creed, color or national origin, from giving consideration to such factors in evaluating applicants and from using without the commission's prior approval, application blanks referring to change of family name. The order further directed the agency to apply the same evaluation standards to all applicants without considering such factors, not to furnish to prospective employers information on such subjects or to accept from prospective employers orders containing any such limitations, to furnish the commission with all job orders 'which raise a question' whether a discriminatory limitation or specification is intended, to furnish to the commission for one year a list of applicants for employment with results obtained and a list of all job orders placed and referrals thereto and to make available to the commission books and records of the business. The powers thus exercised by the commission do not transcend its statutory grant and are not unreasonable in view of the record. Special Term properly granted an order of compliance with the commission's determination and dismissed the agency operator's petition to annul such determination.

2. The commission was created by the State Law Against Discrimination in an express 'exercise of the police power' of the State and in fulfilling the constitutional guaranty of civil rights. (Executive Law, art. 15, added by L. 1945, ch.

118, and amd. by L. 1952, ch. 285.) It was given 'power to eliminate and prevent discrimination in employment' based on race, creed, color or national origin 'by employers, labor organizations, employment agencies or other persons' and to 'take other actions against discrimination' with 'general jurisdiction and power for such purposes' (Executive Law, § 290, formerly § 125). Within the area of prescribed action and in the field of discrimination as prescribed by the statute, the jurisdiction of the commission is plenary. Moreover, the commission, which shall 'formulate policies to effectuate the purposes of this article' (Executive Law, § 294), was empowered, upon finding, after a hearing, that a respondent has engaged in an unlawful employment practice, to issue an order 'requiring such respondent to cease and desist' from such practice 'and to take such affirmative action' as 'in the judgment of the commission will effectuate the purposes of this article, and including a requirement for report of the manner of compliance.' (§ 297.)

***355** 3. In reviewing the commission's directives, the Supreme Court must accept the factual findings as conclusive if they are supported by sufficient evidence on the record considered as a whole, must construe the statute liberally to accomplish its purposes and may make any order which it deems the commission should have made. (Executive Law, § 298.) The court's power of revision is not limited to situations regarded as arbitrary, capricious or illegal.

4. Although some of the questions asked the applicant by the agency, when considered by themselves, would not constitute an unlawful employment practice, they are capable, all together, of becoming the kind of practice defined by the statute as harmful to the welfare of the State. The commission cannot be regarded as unreasonable in finding as it did and its findings must be confirmed.

APPEAL from an order of the Supreme Court at Special Term (GAVAGAN, J.), entered October 20, 1952, in New York County, which (1) granted a motion by respondents for an order requiring appellant to cease and desist from certain alleged discriminating practices and to take certain affirmative acts, and (2) denied a motion by appellant for an order annulling the determination of respondents.

William E. Vogel of counsel (*Burke & Burke,* attorneys), for appellant.

Henry Spitz of counsel (*Milton Rosenberg* with him on the brief; *Henry Spitz,* attorney), for respondent.

BERGAN, J.

The petitioner Holland operates an employment agency and by this proceeding reviews a determination by the State Commission Against Discrimination containing directives and requirements affecting petitioner's business.

By a separate proceeding in pursuance of the New York Law Against Discrimination (Executive Law, art. 15) the commission seeks an order compelling compliance with its determination. The court at Special Term has dismissed the Holland petition to annul the determination and has granted the order of compliance sought by the commission. From these decisions embodied in one order Holland appeals.

The record made at a hearing of the charges before the commission is factually undisputed, since petitioner who had filed an answer and who was present with her attorney at the hearing on June 16, 1952, rested before any testimony was taken and left the hearing room.

Rue Kingsley was the main witness at the hearing. She testified that on September 18, 1951, in response to a newspaper advertisement for a secretary she went to the Holland agency in New York and made application. She has married since ***356** that date; before her marriage her name was Rue Lehds. She testified that she was given an employment application form which she filled out. Among other things, it contained a question whether her family name or her name was 'ever changed legally or otherwise.'

She testified that after the form was filled out she was interviewed by Miss Holland, who said to her on looking over the application form that 'one of the schools sounded like a British school.' The testimony continued: 'And then she proceeded to inquire about' a former employer listed on the application. 'She asked if he was Jewish. I said 'yes'. And there was a further question about that. I remember answering it or rather qualifying it by saying I believed he was of German-Jewish descent'. The testimony continued that inquiry was then made as to the maiden name of that employer's wife. 'She proceeded to ask me to spell it out, which I did. She then said 'What sort of name is that?' * * * She then commented on the spelling of my name * * *. She said it was a rather odd spelling. I believe she asked if it was British. She then told me she was a Canadian.'

The decision of the commission after factual findings which seem to us fully justified by the record, was that the oral and written inquiries described in the testimony 'taken together, expressed a limitation, specification or discrimination as to creed and national origin, not based on a bona fide occupational qualification.' It was further determined that the 'form of application' itself 'expresses a limitation,

specification or discrimination as to creed and national origin.'

The order which was entered by the commission based on its findings and decision was that the petitioner Holland 'cease and desist' from certain acts while acting in the course of business as an employment agency. This order may be summarized by saying that it prohibited the making of 'any inquiries' either 'directly or indirectly' when interviewing applicants for employment 'respecting race, creed, color or national origin'; from giving consideration to those factors in evaluating applicants; and from using in the application blanks reference to change of family name unless previously approved by the commission.

The commission's order contained certain additional requirements for affirmative action by the petitioner Holland. Among the requirements were a direction to apply the same standards ***357** for evaluation of all applicants for employment without considering race, creed, color or national origin; a direction not to furnish prospective employers information on these subjects; not to accept orders from prospective employers containing any such limitations; and to furnish the commission with all job orders 'which raise a question' whether a limitation or specification, discriminatory under the intent of the statute is intended.

The commission further directed that the petitioner furnish it for a period of a year a list of persons who apply for employment, with the results obtained; and a list of all job orders placed and the referrals thereto; and to make available to the commission books and records of the business.

The petitioner's argument here in the main part is that she made no inquiries which could be regarded as an unlawful employment practice; that the form of application blank used was not unlawful; that the commission has no jurisdiction over the petitioner; that there is, in any event, no basis for some of the affirmative directions in the commission's order.

We concern ourselves first of all with the scope of the commission's power. Its range may be seen by examining the problem with which the Legislature dealt by chapter 118 of the Laws of 1945 and the tasks which it imposed on the commission to carry out the policy of the State announced in its Law Against Discrimination.

In an express 'exercise of the police power,' and in fulfillment of the guaranty of the Constitution for civil rights, the Legislature found that the practice of discrimination against any of New York's inhabitants 'because of race, creed, color or national origin' is both a threat to the rights of inhabitants and a menace to the democratic state. (L. 1945, ch. 118; Executive Law, § 125, now § 290).

The commission was created by that section 'with power to eliminate and prevent discrimination in employment' based on considerations of race, creed, color or national origin, 'either by employers, labor organizations, employment agencies or other persons'. Besides being authorized to eliminate and prevent such discrimination the commission was given an omnibus grant of power to 'take other actions against discrimination' as defined in the statute and given an additional grant of 'general jurisdiction and power' for the purposes described. The language originally employed has been amended somewhat in detail (L. 1952, ch. 285) but the changes certainly did not narrow the power of the commission.

***358** It would not be easy to conceive authority more broadly stated than this was by the Legislature in its delegation to the commission, and within the area of prescribed action and in the field of discrimination as defined by the statute the jurisdiction of the commission must be taken as plenary.

The plenary powers thus granted are given plenary implementation. The commission shall 'formulate policies to effectuate the purposes of this article'. (§ 294 in the current enumeration.) Upon finding after a hearing that a respondent has engaged in an unlawful employment practice within the definition of the statute, the commission shall issue an order 'requiring such respondent to cease and desist' from such practice 'and to take such affirmative action' as 'in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance.' (§ 297.)

The Supreme Court has a dual function in all this which differs somewhat in its detail from the relationship generally standing between court and administrative agency (§ 298). The scope of review seems broader than that admissible under article 78 of the Civil Practice Act on the one hand; but on the other there is a concomitant duty resting on the court to enforce the orders of the commission which are deemed by the court to be lawful.

The court at Special Term on review instituted by a party aggrieved 'shall have jurisdiction of the proceeding and of the questions determined therein' and shall have power to make 'an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission'. The commission is authorized by the same section to make application to the court for an order of enforcement of its determination.

Thus the court has entrusted to it a measure of judicial responsibility measured along the wide boundary of direct administrative responsibility vested in the commission to

effect the legislative purpose to discourage discrimination in employment processes. On a judicial review the court must take the commission's factual findings as conclusive if they are supported by 'sufficient' evidence 'on the record considered as a whole'.

When the court, in turn, reaches the legal questions arising from an interpretation of the statute, its language must be construed liberally 'for the accomplishment of the purposes thereof.' (§ 300.) An objection shall not be considered by ***359** the court if it was not first raised before the commission unless 'excused because of extraordinary circumstances.' (§ 298.)

But in reviewing the directives of the commission the court, after accepting the facts as found to the extent they rest on substantial evidence, may make any order which it deems the commission should have made. This power of review transcends our accustomed way of looking at judicial review in New York since the power of revision is not here limited to situations that would be regarded as arbitrary, capricious or illegal. It seems to have been the deliberate view of the Legislature that the large powers given to the commission should be followed by an unusual measure of judicial supervision and a shared judicial responsibility.

Since petitioner did not offer any proof at the hearing, the commission could have accepted as entirely true on the record before it the statements attributed to petitioner in the course of the application for employment made by Rue Kingsley. Accepting these statements as found by the commission we would regard as entirely warranted the finding of the commission that petitioner's inquiries constituted an unlawful employment practice.

We know, of course, that in detail some of the questions found to have been asked, considered in an insulated detachment from contextual questions, would not constitute an unlawful employment practice. The question about a change of family name, for instance, could be entirely removed from any purpose of discrimination, and in the hands of another agency or another employer, might be treated by the commission, or might be regarded by the court on review, as being quite appropriate to the employment under consideration or to the personal history or qualification of the applicant as a 'bona fide occupational qualification.' (§ 296, subd. 1, par. [c].) The requirement by the commission here that any further question of this sort be submitted to it for approval before use is an implicit recognition of such possibility.

All this, in the end, turns upon how facts are evaluated and how they are seen in correlation with each other. Discrimination in selection for employment based on considerations of race, creed or color is quite apt to be a matter of refined and elusive subtlety. Innocent components can add up to a sinister totality.

The inquiry concerning a previous change of name, plus inquiry concerning the nation of schooling, the religion of one's former employer and his wife, the national origin of one's name, may each be harmless under some circumstances, asked by some ***360** questioners of some applicants, but in their aggregate they have a curiously jarring effect. They are surely quite capable, all together, of becoming the kind of practice which the Legislature defined as harmful to the welfare of the State. At least we are not required on this record to believe that the commission was unreasonable in thinking as it did about the practices complained of.

When we reach that point in our inquiry we must confirm the findings, and the conclusions of the commission based on those findings, and address ourselves then to the order here reviewed. The findings of unlawful employment practices being justified by the record, that part of the order which requires petitioner to cease and desist from the enumerated acts seems to us not only wholly justified, but to be substantially what the statute commands the petitioner not to do in any event.

She was required by this part of the order, for instance, to cease and desist from making any inquiries in interviewing applicants for employment relating to race, creed, color or national origin. She was required additionally to end the use of the question into a change of family name, which, whatever might be said of it otherwise, was as this petitioner used it, capable of being found part of a practice prohibited by the statute. It was clearly within the power of the commission to prohibit that after finding its use as part of a discriminatory practice.

The requirement that petitioner refuse to take assignments to obtain employees in which discrimination might be an element and the requirement to furnish lists of applicants, employers and referrals, all seem likewise within the powers of the commission and justified by the findings in relation to the impact of the statute on the practices of this petitioner.

Petitioner complains especially that the direction to furnish lists of applications and employers and the results of referrals exceeds the power of the commission. But after a finding that the petitioner has engaged in discriminatory employment practice, the power to require that the commission be furnished with such information seems to us placed by the statute beyond all doubt. Upon such a finding the commission's order may require the respondent 'to take such affirmative action * * * as, in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance.' The

power to direct a report of compliance, to which this part of the order complained of is directed, not only falls within the general terms of the commission's ***361** authority, but also within a specific detail of its grant of power.

The powers thus exercised do not transcend the statutory grant; nor are they unreasonable if one reads this record. The other questions raised on appeal are without substance.

A statute of this kind is not workable by force. It must rest for its success on the good will of the community. But its enactment represents the mature and deliberate judgment of the people of the State, and such a formal expression of such a judgment has a way of winning, in the end, a general acceptance. Experience develops the acceptance. People who may have disagreed with either its purpose or its workability in the first place, learn to live with it and take it as it is.

The legislative judgment points the way to the feasibility of greater harmony in the community than might be thought possible in the abstract, and what is more important, practical administrative means have been found to help this feasibility along.

We ought to let the statute function freely in the area of legislative delegation. We see no undue harm or undue hardship to the petitioner from these directions of the commission.

The order should be affirmed.

COHN, J. (dissenting in part).

While in the main, I am in accord with the well considered opinion of my associate Mr. Justice BERGAN, I think that in one respect the commission's order is unauthorized.

Subdivision (g) of paragraph 2 of the commission's order is improper in that it requires petitioner to maintain a record of the names and addresses of all persons who apply for opportunities to work through the petitioner for a period of one year from the date of the order, together with a full statement of the action taken by petitioner in connection with such applications, including the job openings to which each applicant was referred; the result of such referral, and all job orders placed with petitioner for a period of one year from the date of the order including as to each job order the name and the address of the employer placing the job order, the job specifications and names of the job applicants referred in response to such job order and the result of such referrals. That part of the order is punitive in character and places petitioner, in effect, on probation for a period of one year. Such an order is beyond the jurisdiction of the commission, which is authorized under section 297 of the Executive Law (L. 1945, ch. 118, § 1, as amd. by L. 1952, ch. 285, § 7) only to require a respondent to cease and desist from an ***362** unlawful employment practice and to take affirmative action, including hiring, reinstatement or upgrading of employees, including a requirement for report of the manner of compliance.

Accordingly, I vote to modify to the extent of eliminating subdivision (g) of paragraph 2 of the commission's order and in all other respects to affirm.

CALLAHAN and BREITEL, JJ., concur with BERGAN, J.; COHN, J., dissents in part in opinion, in which DORE, J. P., concurs.

Order affirmed.

427 F.Supp.3d 286
United States District Court, N.D. New York.

Frank J. MEROLA, Plaintiff,

v.

Andrew M. CUOMO et al., Defendants.

1:19-cv-899 (GLS/TWD)
|
Signed 12/13/2019

Synopsis

Background: County clerk brought action against State of New York to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license. State moved to dismiss, and clerk sought preliminary injunction.

Holdings: The District Court, Gary L. Sharpe, Senior District Judge, held that:

[1] clerk had standing to challenge DLAPA as preempted by federal law, but

[2] clerk lacked capacity to sue under New York law to challenge DLAPA.

Motions granted in part and denied in part.

West Headnotes (9)

[1] **Federal Courts** Pleadings and motions
Federal Courts Evidence; Affidavits

When standing is lacking, the court's subject matter jurisdiction is implicated and the proper method for seeking dismissal on that basis is under rule governing subject matter jurisdiction, which would allow for the submission and consideration by the court of matters outside the pleadings. Fed. R. Civ. P. 12(b)(1).

1 Case that cites this headnote

[2] **Federal Civil Procedure** In general; injury or interest

Where standing is questioned, even under a rule that would ordinarily require the court to exclude matters presented outside of the pleadings, like rules governing dismissal for failure to state a claim and judgment on the pleadings, the district court is authorized to consider matters outside the pleadings and make findings of fact when necessary. Fed. R. Civ. P. 12(b)(6), 12(c).

[3] **Federal Civil Procedure** Judgment on the Pleadings

The standard for addressing a motion for judgment on the pleadings is the same as that for a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6), 12(c).

[4] **Federal Courts** Evidence; Affidavits
Federal Courts Weight and sufficiency

Under motion to dismiss for lack of subject matter jurisdiction, the standard of review is similar to that of motion to dismiss for failure to state a claim, except that the court may refer to evidence outside the pleadings and a plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

1 Case that cites this headnote

[5] **Federal Civil Procedure** In general; injury or interest

Standing is a threshold question, which should be addressed at the outset of the litigation.

1 Case that cites this headnote

[6] **Election Law** Citizenship
Federal Preemption Motor vehicles; highways

County clerk had standing to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license, as preempted by federal law; clerk took oath of office in which he swore to support United States Constitution and the New York Constitution, and clerk alleged complying with DLAPA would require him to violate the Supremacy Clause as well as State constitutional proscription on voting by non-citizens. U.S. Const. art. 6, § 2; N.Y. Vehicle and Traffic Law §§ 201, 508.

[7] **Municipal Corporations** Capacity to sue or be sued in general

Under New York law, municipalities, and, by extension, their officers, lack capacity to sue the State because they are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents.

[8] **Municipal Corporations** Capacity to sue or be sued in general

An exception to the general rule barring local governmental challenges to State legislation is when the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.

[9] **Counties** Capacity to sue or be sued in general

Public Employment Actions by employees, officers, and agents

County clerk lacked capacity to sue under New York law to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license, since complying with DLAPA would not force clerk to violate the Supremacy Clause or State constitutional proscription against disenfranchisement, and county board of elections was tasked with reviewing and examining voting applications and verification of voters' identities. U.S. Const. art. 6, § 2; N.Y. Vehicle and Traffic Law §§ 201, 508; N.Y. Election Law § 5-210(8)-(9).

1 Case that cites this headnote

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MEMORANDUM-DECISION AND ORDER

Gary L. Sharpe, Senior District Judge

I. Introduction

To the dissatisfaction of the parties and public-at-large, courts are at times unable to pass upon the merits of a case for one ***288** reason or another. There are various reasons why the ultimate question for which parties seek judicial review cannot be broached. This is such a case. It should be noted that cases like this one, where the court is constrained to dismiss without deciding the legal issues at play — here, a challenge to New York's Driver's License Access and Privacy Act (DLAPA),[1] more commonly referred to as the "Green Light Law" — does not mean in the vernacular that the "law

is legal," despite what any politician may claim, (Dkt. No. 27, Attach. 7 at 2). Indeed the court has not and cannot pass upon that question no matter how compelling the arguments are on one side or the other. With that caveat in mind, the court turns to the issues now before it.

[1] **[2]** Pending are a motion for a preliminary injunction filed by plaintiff Frank J. Merola, Clerk of the County of Rennselaer, New York, and a cross motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure[2] filed by defendants Andrew M. Cuomo, Governor of the State of New York, Letitia A. James, Attorney General of the State of New York, and Mark J.F. Schroeder, Commissioner of the New York State Department of Motor Vehicles (DMV) (hereinafter collectively referred to as "the State"). (Dkt. Nos. 27, 30.)[3] For the reasons that follow, the State's cross motion to dismiss is granted, and Merola's motion for a preliminary injunction is denied as moot.

II. Background[4]

The DLAPA, which goes into effect on December 14, 2019, modifies sections 201, ***289** 502, and 508 of the New York Vehicle and Traffic Law. *See* L. 2019, ch 37. The amendments alter the New York State driver's licensing scheme in three material ways that are at issue here by: (1) forbidding disclosure or sharing of applicant information except under limited circumstances; (2) expanding the approved forms of identification accepted for obtaining a driver's license; and (3) requiring prompt notice to an individual about whom a request for information was made by "any agency that primarily enforces immigration law." *Id.* §§ 2-6. Some county clerks throughout the State of New York, like Merola, are required to perform DMV functions, such as the issuance of driver's licenses. *See* N.Y. Veh. & Traf. Law § 205(1).

Broadly speaking, Merola challenges the DLAPA as prempted by federal law. (Compl. ¶¶ 40, 78, Dkt. No. 1.) He contends that he confronts a dilemma: comply with the DLAPA and violate the United States Constitution and expose himself to federal criminal liability, or refuse to comply with the DLAPA and be subject to removal from office and a loss of funding. (Compl. ¶ 77; Dkt. No. 32 at 5-6.) The State promotes this legislation as advancing "public safety and economic growth." (Dkt. No. 30, Attach. 1 at 1.)

Some sixteen days before this action was commenced, a near-identical case was commenced in the United States District Court for the Western District of New York, involving a similar challenge to the DLAPA. (*Kearns v. Cuomo*, Dkt. No. 1, 1:19-cv-902.) The plaintiff there, Michael Kearns, is the Clerk of Erie County, and he brought his action against the same defendants named in this matter. (*See generally id.*) That action has since been dismissed for lack of standing and an appeal is pending with the Second Circuit. *See Kearns v. Cuomo*, 415 F.Supp.3d 319 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019).

III. Standards of Review

[3] "The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Wright v. Monroe Cmty. Hosp.*, 493 F. App'x 233, 234 (2d Cir. 2012) (internal quotation marks and citation omitted). For a full discussion of the governing standard, the court refers the parties to its prior decision in *Ellis v. Cohen & Slamowitz, LLP*, 701 F. Supp. 2d 215, 218 (N.D.N.Y. 2010), *abrogated on other grounds by Altman v. J.C. Christensen & Assocs., Inc.*, 786 F.3d 191 (2d Cir. 2015).

[4] As mentioned above, *see supra* note 2, to the extent that standing is challenged, the State's motion is properly considered under Rule 12(b)(1). Under Rule 12(b)(1), the standard of review is similar to that of Rule 12(b)(6), except that the court "may refer to evidence outside the pleadings ... [and a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citations omitted).

IV. Discussion

A. Cross Motion to Dismiss

The State makes a handful of arguments in support of its cross motion to dismiss. (Dkt. No. 30, Attach. 1.) Two of them urge dismissal for the threshold issues of lack of standing and capacity, while the others go to the merits of Merola's claims. (*Id.* at 9-35.)

***290** *i. Standing*

[5] Standing is a "threshold question," which should be addressed at the outset of the litigation. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). The broad contours of standing — an injury-in-fact, causation, and redressability, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) — and the finer points were discussed at length in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 2019 WL 5849513, but Merola's sole theory of standing here is different from that proffered in *Kearns*. (Dkt. No. 32 at 3-9.)

Relying on *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), and *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), Merola contends that he "unquestionably [has] established oath-of-office standing to pursue his claims in his official capacity as County Clerk." (Dkt. No. 32 at 3.)[5] While the State attempted to get out in front of this theory in its memorandum of law filed in support of its cross motion, it primarily focused on other bases of standing, or the lack thereof. (Dkt. No. 30, Attach. 1 at 11-20.) That is, in part, the fault of the briefing schedule, which was set to accommodate the sensitive timing issues in this case, and the State has not had the opportunity[6] to address Merola's specific contentions about oath-of-office standing raised in his response. In any case, the State argues that compliance with the DLAPA is not at odds with either the Federal or State Constitutions. (*Id.* at 19.) It claims further that Merola's subjective belief that his compliance would violate the Federal Constitution is insufficient, and his argument about the adverse consequences that would befall him (removal from office and loss of licensing revenue) are "highly speculative and premature." (*Id.* at 19-20.)

In *Allen*, the Supreme Court indicated, in dicta, the existence of standing where a plaintiff who "ha[s] taken an oath to support the United States Constitution" is "in the position of having to choose between violating [his] oath and taking a step—refusal to comply with [a challenged state statute]—that would be likely to bring [his] expulsion from office and also" a loss of funding. 392 U.S. at 241 n.5, 88 S.Ct. 1923. This doctrine, sometimes called the " 'dilemma' theory of standing," has been recognized by the Supreme Court, Second Circuit, and other Circuits in subsequent cases, although it is infrequently invoked. *Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995); *see* ***291** *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Aguayo*, 473 F.2d at 1100.

[6] Here, Merola took an oath of office in which he "solemnly sw[ore] that [he] w[ould] support the constitution of the United States, and the constitution of the State of New York, and that [he] w[ould] faithfully discharge the duties of the office ..., according to the best of [his] ability." (Dkt. No. 27, Attach. 2 ¶ 8.) He argues that the only requirement he need meet in order to establish oath-of-office standing is his good faith belief that compliance with the DLAPA would require him to violate the Federal Constitution. (Dkt. No. 32 at 5.) Merola disputes the applicability of *Finch v. Mississippi State Med. Association, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979), relied upon by the State, (Dkt. No. 30, Attach. 1 at 19-20), which held that a mere belief that a statute violates the constitution is insufficient to establish standing, *see Finch*, 585 F.2d at 774, as at odds with *Allen* and *Aguayo*, and not binding on this court in any event, (Dkt. No. 32 at 6). Alternatively, Merola argues that he has adequately demonstrated a realistic threat of removal from office or the loss of funding should those requirements be deemed a part of the test for oath-of-office standing by this court. (*Id.* at 6-7.) Because the briefing is lacking on the finer points, and Merola has made a colorable argument for standing based on his oath of office, (*id.* at 5-6), dismissal on this ground would be inappropriate at this juncture.

ii. Capacity

The State contends that Merola lacks capacity to sue under New York law and that he cannot demonstrate that he should benefit from an exception to the general bar preventing municipalities and their officers from challenging state legislation. (Dkt. No. 30, Attach. 1 at 9-11.) In opposition, Merola argues that the DLAPA would require him to violate a federal constitutional proscription, namely the Supremacy Clause, as well as a state constitutional proscription "on voting by non-citizens," and that he, therefore, has capacity to sue despite the general bar against suits by municipal officers. (Dkt. No. 32 at 9.) Because Merola lacks capacity as discussed below, dismissal is required.

[7] **[8]** Capacity, juxtaposed with standing, "is conceived to be a party's personal right to litigate in a federal court." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1542 (3d ed. Supp. 2019). The "[c]apacity to sue or be sued is determined," as relevant here, "by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). In New York, municipalities, and, by extension, their officers,

lack capacity to sue because they "are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York v. New York*, 86 N.Y.2d 286, 290, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995). There are limited "exceptions to the general rule barring local governmental challenges to State legislation," only one of which is at issue here: "where 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.' " *Id.* at 291-92, 631 N.Y.S.2d 553, 655 N.E.2d 649 (quoting *In re Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086 (1977) (citing *Board of Education of Central School District No. 1 v. Allen*, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), *aff'd*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968))); *see* ***292** *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 185 Misc. 2d 704, 708, 713 N.Y.S.2d 908 (Sup. Ct. 2000), *aff'd as modified*, 282 A.D.2d 166, 723 N.Y.S.2d 262 (3d Dep't 2001).

Merola contends that his compliance with the DLAPA will force him to violate proscriptions in both the Federal and State Constitutions. (Dkt. No. 32 at 9.) He snarkily points the finger at the State for "not surprisingly, fail[ing] to provide a single citation for the unsupportable argument that the Supremacy Clause is not a 'constitutional proscription.' " (*Id.*) While his observation is true, it is similarly true that he failed to cite contrary authority. Insofar as his one-sentence State Constitution argument is concerned, which is best described as half-hearted, Merola provides no citation to where in the State Constitution the "proscription on voting by non-citizens," (*id.*), exists, leaving the court to guess.

While the court is loathe to engage in semantics, it is necessary here. A "proscription" is a prohibition or "an imposed restraint or restriction." Merriam Webster's Collegiate Dictionary (10th ed. 1997). Anecdotally, New York courts have interpreted constitutional or statutory proscriptions to be something expressly forbidden and along the lines of "no (blank) shall (blank)." *See, e.g., Bellanca v. N.Y. State Liquor Auth.*, 54 N.Y.2d 228, 230-31, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981) (referring to an older version of N.Y. Alco. Bev. Cont. Law § 106(6-a)'s prohibition against topless dancing as a "blanket *proscription* against all topless dancing" as well as New York State Constitution Art. 1, § 8's prohibition against any law abridging speech as a proscription (emphasis added)); *accord Weiner v. McCord*, 264 A.D.2d 864, 866, 694 N.Y.S.2d 807 (3d Dep't 1999) (considering the following language: "No member of this state shall be disfranchised" as an express constitutional proscription).

With this interpretation in mind, Merola's first argument carries no weight. Indeed, the Supremacy Clause contains no proscription whatsoever. The Clause in its entirety provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. No proscription is evident, unlike, for example, the First Amendment's "Congress shall make no law ...," *id.* amend. I, or the Fourth Amendment's proclamation that the right against unreasonable searches "shall not be violated," *id.* amend. IV. The list of federal constitutional proscriptions is long, but it does not include the Supremacy Clause and, therefore, cannot support Merola's assertion.

[9] Merola's argument about the State Constitution fares no better. As mentioned above, no citation is provided to the supposed "proscription on voting by non-citizens." (Dkt. No. 32 at 9.) However, Article I, § 1 of the New York State Constitution provides:

> No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever ***293** there is no contest or contests for such nominations or election as may be prescribed by general law.

If this is the wellspring of the proscription referenced by Merola, it does not help his cause. The language contains a proscription, *see Weiner*, 264 A.D.2d at 866, 694 N.Y.S.2d 807 — a prohibition against disenfranchisement — but it is not what Merola claims it to be: *a proscription on voting by non-citizens.*[7] The court by no means intends to intimate that the DLAPA results in disenfranchisement, but, even if it did along the lines of Merola's argument, his claim that "as the State agent offering voter registration" he would be required "to violate the State Constitution proscription on voting by

non-citizens," (Dkt. No. 32 at 9), is steps removed and wholly speculative. The DLAPA requires no such conduct by Merola. This is chiefly so because any prospective non-citizen voter licensed to drive under the DLAPA would have to affirmatively lie about his or her eligibility to vote. (Dkt. No. 30, Attach. 1 at 4-5.) Ultimately, the county board of elections is tasked with review and examination of voting applications and verification of the applicant's identity. *See* N.Y. Elec. Law § 5-210(8)-(9). For obvious reasons, it cannot be said that Merola would be forced to violate the State Constitution's proscription against disenfranchisement in the event that such a person engages in criminal conduct. For all of these reasons, Merola cannot demonstrate that he has capacity to sue under the constitutional proscription exception, and dismissal is required.

B. Preliminary Injunction

Because dismissal is required given Merola's lack of capacity to bring suit, his motion for a preliminary injunction, (Dkt; No. 27), is denied as moot.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the State of Connecticut's letter motion seeking permission to file an amicus curiae brief (Dkt. No. 33) is **GRANTED**; and it is further

ORDERED that the State's letter motion seeking permission to respond to the United States' memorandum of law (Dkt. No. 35) is **DENIED**; and it is further

ORDERED that the State's cross motion to dismiss (Dkt. No. 30) is **GRANTED**, and the complaint (Dkt. No. 1) is **DISMISSED**; and it is further

ORDERED that Merola's motion for a preliminary injunction (Dkt. No. 27) is **DENIED** as moot; and it is further

ORDERED that the Clerk close this case; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

All Citations

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Footnotes

1 *See* L. 2019, ch 37.

2 Without any explanation why they may be properly considered on a Rule 12(c) motion, the State submitted affidavits and attached exhibits from two Department of Motor Vehicle employees for the purpose of providing background information. (Dkt. No. 30, Attachs. 2-6.) The matters presented outside of the pleadings must be excluded from consideration absent any argument why they may be properly considered without conversion to summary judgment. *See* Fed. R. Civ. P. 12(d); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (explaining that the complaint includes any attached written instrument, materials incorporated by reference, and documents integral to the complaint). It is unclear why the State moved for dismissal pursuant to Rule 12(c) only. (Dkt. No. 30, Attach. 1 at 1.) When standing is lacking, the court's subject matter jurisdiction is implicated and the proper method for seeking dismissal on that basis is Rule 12(b)(1), which would allow for the submission and consideration by the court of matters outside the pleadings. In any case, where standing is questioned, even under a rule that would ordinarily require the court to exclude matters presented outside of the pleadings, like Rule 12(b)(6) or (c), "the district court is authorized to consider matters outside the pleadings and make findings of fact when necessary." *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 378 (S.D.N.Y. 2002) (citations omitted), *on reconsideration*, 219 F. Supp. 2d 576 (S.D.N.Y. 2002), *aff'd sub nom. First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). For this reason, the court has considered Merola's declaration, which was submitted in conjunction with his preliminary injunction motion, (Dkt. No. 27, Attach. 2), to the extent that it bears on the standing question.

3 The court has also considered an amicus curiae brief filed by the Attorney General of Connecticut on behalf of the State of Connecticut and joined by California, the District of Columbia, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington, (Dkt. No. 33, Attach. 1), and a memorandum of law filed by the United States as intervenor

pursuant to Rule 5.1(c) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a) to defend the constitutionality of 8 U.S.C. §§ 1373 and 1644, (Dkt. No. 34). The amicus curiae brief and United States' memorandum of law present arguments that are ultimately not germane to the disposition of the case.

4 In addition to the court's prior Summary Order, (Dkt. No. 22 at 1-2), the Decision and Order in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 323-25, 2019 WL 5849513, at *2-3 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019), includes relevant background information.

5 Merola makes no effort to oppose the several other arguments, largely overlapping with those that formed the basis of the dismissal for lack of standing in *Kearns*, which have also been advanced by the State here. (*Compare* Dkt. No. 30, Attach. 1 at 11-20, *with* Dkt. No. 32 at 3-9.) In addition, Merola, who brings this action only in his official capacity, has requested leave to amend to add individual capacity claims in the event the court "deems it necessary and appropriate." (Dkt. No. 32 at 8 n.5.) The court does not engage in such hand-holding. If Merola was inclined to seek leave to amend, he should have done so consistent with the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(a)(4). Additionally, it is not clear how Merola would establish standing by bringing his causes of action in his individual capacity. Indeed, *Kearns* soundly rejected individual standing under nearly identical circumstances. *See* 415 F.Supp.3d at 330-36, 2019 WL 5849513, at *6-12.

6 Despite the limitations of the briefing schedule, the State did not request permission to file an otherwise unpermitted reply in further support of its cross motion, which is contemplated by the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(c).

7 The court is left to guess at whether Merola intends to suggest that watering down the vote with ineligible voters who fraudulently register disenfranchises lawful voters. Just like his failure to elaborate upon his argument about where in the State Constitution the proscription exists, he has not adequately explained his argument in this regard, which is a basis to reject it.

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United States District Court, S.D. New York.

NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, SPRING VALLEY BRANCH; Julio Clerveaux; Chevon Dos Reis; Eric Goodwin; Jose Vitelio Gregorio; Dorothy Miller; and Hillary Moreau, Plaintiffs,

v.

EAST RAMAPO CENTRAL SCHOOL DISTRICT, Defendant.

No. 17-CV-8943 (CS)
|
Signed 05/25/2020

Synopsis
Background: Interest group and minority registered voters brought action against school district, alleging that the election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA).

Holdings: The District Court, Cathy Seibel, J., held that:

[1] population of Black and Latino voters in school district was sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system;

[2] district's Black and Latino communities were politically cohesive, and white majority voted sufficiently as a bloc to enable it usually to defeat minority-preferred candidates;

[3] election system through which a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of Black and Latino minority voters resulted in minority vote dilution in violation of VRA; and

[4] school district was enjoined from holding any further elections under its at-large system, and was ordered to propose a compliant remedial plan that divided the district into nine voting wards – one for each board seat.

Injunction ordered.

West Headnotes (32)

[1] **Election Law** Dilution of voting power in general

To establish that the minority vote is diluted in violation of the Voting Rights Act of 1965, a plaintiff must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[2] **Election Law** Dilution of voting power in general

Lack of electoral success is evidence of vote dilution under Voting Rights Act of 1965 (VRA), but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[3] **Election Law** Dilution of voting power in general

If a plaintiff satisfies preconditions to a minority vote dilution claim under Voting Rights Act of 1965 (VRA), the court must then examine the totality of the circumstances, including by assessing the following non-exclusive factors: (1) the history of voting-related discrimination in the political subdivision, (2) the extent to which voting is racially polarized, (3) the extent to which voting practices enhance the opportunity for discrimination, (4) the exclusion of members of the minority group from candidate slating processes, (5) the extent to which minority group

members bear the effects of past discrimination in areas such as education, employment, and health, (6) the use of overt or subtle racial appeals in political campaigns, and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction, as well as two factors that might have probative value in some cases: (8) the responsiveness of elected officials to the needs of the minority community and (9) whether the policy underlying the use of the contested practice or structure is tenuous. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

1 Case that cites this headnote

[4] **Election Law** Weight and sufficiency

Plaintiffs alleging a minority vote dilution claim under Voting Rights Act of 1965 (VRA) must prove preconditions and vote dilution under the totality of the circumstances by a preponderance of the evidence. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[5] **Election Law** Dilution of voting power in general

Voting Rights Act of 1965 (VRA) does not confer on blacks and Latinos a right to be elected in numbers equal to their proportion in the population or insulate minority candidates from defeat at the polls. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[6] **Election Law** Discriminatory practices proscribed in general

A violation of the Voting Rights Act of 1965 (VRA) can be proved by showing discriminatory effect alone, without showing a specific intent to discriminate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[7] **Election Law** Dilution of voting power in general

Diverse minority groups can be combined to meet litigation requirements under Voting Rights Act of 1965 (VRA), provided they are shown to be politically cohesive. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[8] **Education** Redistricting; Voting Rights Act

Population of Black and Latino voters in school district was sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system, supporting claim that election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); demography expert demonstrated that it was possible to create three majority-Black districts or four, if Black and Latinos were combined, and Black and Latino voters were voting cohesively. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[9] **Election Law** Dilution of voting power in general

Where a significant number of minority group members usually vote for the same candidates, the minority group is politically cohesive and satisfies precondition for establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[10] **Election Law** Weight and sufficiency

Plaintiffs can rely on both statistical and anecdotal evidence to show political cohesion as required to establish precondition for establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[11] **Election Law** Weight and sufficiency

Whether a candidate is minority preferred, for purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA),

cannot be proven by anecdotal evidence but rather only by statistical evidence showing that a candidate received support from more than 50% of minority voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[12] **Election Law** Dilution of voting power in general

Evidence of minority candidates' success does not necessarily negate a finding of bloc voting for purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), particularly if elections are shown usually to be polarized or the success of minority candidates in particular elections can be explained by special circumstances, such as the absence of an opponent or incumbency. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[13] **Election Law** Dilution of voting power in general

For purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. a minority vote dilution claim under Voting Rights Act of 1965 (VRA).

[14] **Education** Redistricting; Voting Rights Act

School district's Black and Latino communities were politically cohesive, and white majority voted sufficiently as a bloc to enable it usually to defeat minority-preferred candidates, supporting claim that election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); while voters did not self-report their race, plaintiffs' experts used ecological statistical models to estimate racial voting patterns, relying on software that used individual-level data, including a voter's surname, geographic location, and the racial composition of the voter's census tract or block to generate the probability that an individual belonged to a racial particular group, and witnesses anecdotally perceived minority cohesion and a large white voting bloc. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

1 Case that cites this headnote

[15] **Education** Redistricting; Voting Rights Act

Election system that school district used to elect members of its board of education, through which a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of politically cohesive Black and Latino minority voters who were numerous enough to constitute a majority in as many as four single-member districts, resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); voting was highly racially polarized in a community where public school students were almost all black or Latino and students attending private schools were almost all white, district held at-large, staggered, off-cycle elections with numbered posts, slating organization in the white, private school community consistently guaranteed election outcomes, victories by candidates of color were arranged by slating organization for the sake of appearance, numerous board decisions privileged private school interests or harmed public education, and some board members had tenuous reasons for wanting to maintain status quo. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[16] **Election Law** Dilution of voting power in general

For purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), whether a white voting bloc may be explained as an expression of political partisanship is properly considered under factor requiring the court to consider the extent to which voting is racially polarized, but the fact

that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry, nor does it require plaintiffs to prove racial bias in community. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[17] **Election Law** Dilution of voting power in general

Even where there is a strong correlation between political partisanship and the voting behavior of Blacks and Whites, plaintiffs can still prevail on a minority vote dilution claim under Voting Rights Act of 1965 (VRA) under the totality of the circumstances where minority voters' failure to elect representatives of their choice is not best explained by partisan politics. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[18] **Election Law** Dilution of voting power in general

An inference of racial animus is unnecessary to establish a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[19] **Election Law** Dilution of voting power in general

A possible race-neutral explanation for racial polarization is not dispositive of a minority vote dilution claim under Voting Rights Act of 1965 (VRA); possible explanations other than race are considered as one aspect of the totality of the circumstances. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[20] **Election Law** Dilution of voting power in general

In considering a minority vote dilution claim under Voting Rights Act of 1965 (VRA), it is proper to explore whether white support for minority candidates can be explained as manipulating the election of a "safe" minority candidate, or by other special circumstances; the issue is not simply whether a candidate is a member of a minority community, but whether the candidate is minority preferred, because if a successful minority candidate is not minority preferred, that is evidence of racial polarization, not the lack thereof. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[21] **Election Law** Dilution of voting power in general

A system that provides only a theoretical avenue for minority candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate contributes to a minority vote dilution violation under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[22] **Election Law** Dilution of voting power in general

In considering the factor asking whether members of the minority group have been denied access to any candidate slating process, for purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a "slating" organization that selects and endorses a group or slate of candidates can be formal or informal. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[23] **Election Law** Dilution of voting power in general

Where minority voters do not have any choice in determining what issues or candidates should or should not be endorsed by the slating organization, the slating process is racially exclusive, supporting a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[24] **Election Law** Dilution of voting power in general

For purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a racially exclusive slating process is not made inclusive by the selection and election of a few minority candidates who may not be true representatives of the minority population. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[25] **Election Law** Dilution of voting power in general

In considering whether members of the minority group have been denied access to any candidate slating process, for purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), the question is not simply whether minority candidates get on the ballot, but whether minorities have any substantial input into the slating process. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[26] **Election Law** Presumptions and burden of proof

Where minority group members suffer effects of prior discrimination and the level of minority participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation to establish a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA); rather, the burden falls to defendant to show that the cause is something else. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[27] **Election Law** Dilution of voting power in general

Appeals in political campaigns can be racial, supporting a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA), when they operate on heightened racial tension, or when a candidate sends campaign materials to white constituents that suggest that an opponent is a person of color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[28] **Election Law** Dilution of voting power in general

Racial appeals in political campaigns need not be permanent or pervasive to support a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[29] **Election Law** Dilution of voting power in general

The election of a few minority candidates does not necessarily foreclose the possibility of dilution of the minority vote in violation of the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[30] **Election Law** Dilution of voting power in general

Special circumstances surrounding minority elections, such as unopposed races and appointment prior to election, weigh against a finding of minority success in elections in an action alleging minority vote dilution under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[31] **Election Law** Weight and sufficiency

In some cases, evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group has probative value to establish a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA); "unresponsiveness" includes failure to respond to complaints of racial discrimination, failure to identify concerns of the minority community, scarcity of outreach sessions in the minority community, failure to respond to unequal school resources and disparate discipline and educational opportunities, and failure to provide

bilingual translations of official forms. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[32] Injunction Redistricting and reapportionment

Upon successful claim of minority vote dilution in violation of Voting Rights Act of 1965 (VRA), occurring as a result of at-large election system used by school district wherein a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of Black and Latino minority voters who were numerous enough to constitute a majority in as many as four single-member districts, district court would enjoin school district from holding any further elections under its at-large system, including the elections currently scheduled, and order school district to propose a compliant remedial plan that divided the district into nine voting wards – one for each board seat. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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DECISION AND ORDER

Seibel, J.

1. This case involves a challenge to the election system that the East Ramapo Central School District (the "District") uses to elect members of its Board of Education (the "Board"). Plaintiffs allege that the election system results in vote dilution – that is, that it affords black and Latino residents "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," ***374** *Thornburg v. Gingles*, 478 U.S. 30, 36, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (internal quotation marks omitted) – in violation of section 2 of the Voting Rights Act of 1965 ("VRA" or the "Act"), which provides, in pertinent part, that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 52 U.S.C. § 10301(a) ("Section 2"). Following a bench trial held on January 22, February 10-14, 18-21, and 24-27, and March 3, 5, and 24, 2020, I make the following findings of fact and conclusions of law.

I. BACKGROUND

A. Plaintiffs

2. Plaintiff National Association for the Advancement of Colored People, Spring Valley Branch ("NAACP") is a racial justice organization that includes District residents. (PX 288 ¶ 3.)[1]

3. Plaintiffs Julio Clerveaux, Chevon Dos Reis, Eric Goodwin, and Dorothy Miller are minority registered voters in the District.[2] In 2017, Dos Reis and Goodwin ran for the Board and believe they were supported by the "public school community," a group of residents interested in improving public schools after past budget cuts. Both lost to white candidates by a margin of approximately 5,000 votes. (PX 279 ¶¶ 25, 64 (Dos Reis); PX 281 ¶¶ 23, 59 (Goodwin); JPTO at 10.) Since 2008, every candidate for whom Dos Reis, Clerveaux, Goodwin, and Miller voted in a contested Board election lost. (PX 279 ¶ 11 (Dos Reis); PX 280 ¶ 9 (Clerveaux); PX 281 ¶ 9 (Goodwin); PX 282 ¶ 11 (Miller).)

B. Defendant

4. The District is a "highly segregated," (Tr. at 514:17-20 (Cooper)),[3] political subdivision of New York State located in Rockland County that in the 2017-2018 school year served approximately 8,843 public school students at fourteen schools and approximately 29,279 private school students, (JPTO at 4; PX 372 ¶ 24).[4] The District's population is approximately 65.7% white, 19.1% black, 10.7% Latino, and 3.3% Asian. (PX 244A ¶ 4.)[5] Most white residents live in

majority-white neighborhoods, and most minority residents live in majority-minority neighborhoods, according to data from the American Community Survey, which is a survey of 2% of households performed by the Census Bureau every year for five years, generating results for 10% of U.S. households. ***375** (Tr. at 256:14-257:7 (Barreto).)[6] Of the white residents in the District, 69.4% live in block groups that are 80% or more white and 33.03% live in block groups that are 95% or more white. Of the minority residents in the District – who are concentrated in and around Hillcrest, Spring Valley, and Nanuet – 55.7% live in block groups that are 83.6% to 98.2% minority. (PX 244A ¶¶ 28-29 & fig.8; *id.* ¶¶ 32-33 & fig.9; *see* Tr. at 512:7-23; 514:14-16 (Cooper).) A "block group" is a collection of several blocks. (*See* note 17 below.)

5. Public school students are almost all black or Latino (92%), and students attending private schools located in the District are almost all white (98%). (JPTO at 4; PX 372 ¶ 24.)[7] Most witnesses acknowledged the existence of a "private school community," consisting of white Orthodox and Hasidic Jews who educate their children in yeshivas, and a "public school community," consisting of all races but primarily black and Latino persons, and virtually all witnesses involved in District elections used those terms. (Tr. at 612:15-614:6 (Castor); *id.* at 1238:11-14 (Germain); *id.* at 2560:11-14 (Charles-Pierre); PX 257 at 191:18-192:2 (Russell); PX 286 ¶ 12 (Price); PX 279 ¶ 58 (Dos Reis); Tr. at 655:25-656:10, 657:17-20 (same); PX 283 ¶¶ 40-41, 67 (Fields); PX 281 ¶¶ 20, 62 (Goodwin); PX 282 ¶¶ 11-15 (Miller); PX 288 ¶¶ 9, 37 (Trotman); Tr. at 1373:20-22 (same); *see* Tr. at 725:5-16, 730:14-17 (Board member Joel Freilich identifying himself as member of "private school community" and someone else as member of "public school community"); *id.* at 997:1-6 (Rabbi Hersh Horowitz discussing "private" and "public school community" vote totals); *id.* at 1896:6-24 (former Board member Suzanne Young-Mercer was on "public school team" but received support from "private school community" including Orthodox and Hasidic voters); *id.* at 1942:5-21 (public school advocate Oscar Cohen identifying public school community as "people of all races" and private school community as Orthodox and ultra-Orthodox); *id.* at 1082:15-18 (Board member Yehuda Weissmandl using term "public school community"); *id.* at 1523:12-14 (Board member Harry Grossman acknowledging "public school advocates" spoke at Board meetings); *id.* at 2479:10-24 (influential community leader Rabbi Yehuda Oshry vetted candidates by ensuring they would be responsive to needs of "Jewish community besides the public school").)

6. The District is governed by nine Board members whose responsibilities include selecting the Superintendent of Schools and approving District personnel, setting a budget and levying taxes, establishing District policies, and evaluating and communicating the "progress and needs of the District to the community, educational governing boards and legislators." (PX 259 ***376** at 1; JPTO at 5.)[8] To register to vote in elections for Board members and to vote on the annual school budget and other ballot referenda in the District, a person must be a United States citizen, a resident of the District for at least thirty days, eighteen years of age or older, and either registered for District elections or registered to vote in general elections in Rockland County. (JPTO at 5.) Board elections are not held with other local, state, or federal elections (that is, they are off cycle), and they are staggered such that three seats – each having a three-year term – are open each year (although on occasion an extra seat will be open if a Board member resigns, dies, or is removed). (*Id.*) Each candidate runs for an individual numbered seat that is elected at large, meaning that all eligible voters in the District cast votes in each race. (*Id.*)[9] Candidates can reside anywhere in the District. (PX 257 at 38:5-8.)

7. A table summarizing the results of Board elections from 2008 through 2018 is set out below, including the year, the candidates, the candidates' races ("W" indicating white, "B" indicating black, and "L" indicating Latino), and the number of votes each received.

Table 1: Summary of Board Elections: 2008-2018. (JPTO at 12 tbl.1.)

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Yr.	Seat 1		Seat 2		Seat 3		Seat 4	TOTAL VOTE COUNT
2008	Aaron Wieder (W) (6,261)*	Steve White (W) (2,415)	Moshe Hopstein (W) (6,533)*		**Nathan Rothschild (W) (5,103)***			9,163
2009	Morris Kohn (W) (8,768)*	Leonardo Vera (L) (4,548)	Carolyn Watson (W) (566)	Margaret Hatton (W) (4,236)	Eliyahu Solomon (W) (8,578)*	Emilia White (B) (4,149)	**Richard Stone (W) (9,224)***	13,708
2010	Antonio Luciano (W) (7,622)	Moses Freidman (W) (7,926)*	**Stephen Price (W) (13,612)***			**Suzanne Young-Mercer (B) (13,839)***		16,056
2011	**Moshe Hopstein (W) (9,904)***	M. Hatton (W) (7,907)	Yehuda Weissmandl (W) (9,923)*	A. Luciano (W) (7,909)	Daniel Schwartz (W) (9,947)*	Carole Anderson (B) (7,818)	Joanne Thompson (B) (13,958)*	18,206
2012	Hiram Rivera (L) (6,315)	Jacob Lefkowitz (W) (8,474)*	Kim Foskew (W) (6,276)*	**E. Solomon (W) (8,460)***	Yonah Rothman (W) (8,521)*	**J. Thompson (B) (6,335)**		15,091
2013	Maraluz Corado (L) (6,806)*	Margaret Tuck (B) (5,244)	Eustache Clerveaux (B) (5,085)	Pierre Germain (B) (6,899)*	Robert Forrest (B) (5,175)	**Bernard Charles (B) (6,833)***		12,317
2014	M. Hopstein (W) (2,388)*		Harry Grossman (W) (2,652)*		Yakov Engel (W) (2,381)*		Y. Weissmandl (W) (2,379)*	4,998
2015	Sabrina Charles-Pierre (B) (4,600)	**Jacob Lefkowitz (W) (6,380)***	Alan Jones (B) (468)	**Y. Rothman (W) (6,523) ***	Natashia Morales (L) (4,864)	S. White (W) (4,615)	Yisroel Eisenbach (W) (556)	Juan Pablo Ramirez (L) (6,293)*	11,694
2016	**B. Charles (B) (7,973)***	K. Foskew (W) (3,972)		**P. Germain (B) (7,860)***	Jean Fields (B) (4,137)	**Y. Weissmandl (W) (7,626)***	N. Morales (L) (4,401))	**S. Charles-Pierre (B) (5,014)***	12,311
2017	Alexandra Manigo (W) (4,964)	Mark Berkowitz (W) (9,158)*	Eric Goodwin (B) (4,910)	**H. Grossman (W) (9,137)***	Joel Frielich (W) (9,530)*	Chevon Dos Reis (L) (4,503)		14,343
2018	**S. Charles-Pierre (B) (9,180)***		Yoel Trieger (W) (7,179)*	Miriam Moster (W) (1,996)	E. Weissmandl (W) (6,977)*	Joselito Cintron (L) (2,308)		9,714

*Key: An * denotes the election winner, **Bold** denotes the incumbent candidate*

C. Legal Standard

[1] 8. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. To establish that the minority vote is diluted, a plaintiff must show that (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances ... – usually to defeat the minority's preferred ***378** candidate," (together, the "*Gingles* preconditions"). *Id.* at 50-51, 106 S.Ct. 2752 (citation omitted). These "showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in larger white voting population." *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993).

[2] **[3]** 9. "Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Johnson v. De Grandy*, 512 U.S. 997, 1011-12, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). Thus, if a plaintiff satisfies the *Gingles* preconditions the court must then examine the totality of the circumstances, including by assessing the following factors identified by the U.S. Senate in Section 2's legislative history: (1) " 'the history of voting-related discrimination in the ... political subdivision,' " (2) " 'the extent to which voting ... is racially polarized,' " (3) the extent to which voting practices " 'enhance the opportunity for discrimination,' " (4) " 'the exclusion of members of the minority group from candidate slating processes,' " (5) " 'the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health,' " (6) " 'the use of overt or subtle racial appeals in political campaigns,' " and (7) " 'the extent to which members of the minority group have been elected to public office in the jurisdiction,' " as well as two factors that might have probative value in some cases: (8) the responsiveness of elected officials to the needs of the minority community and (9) whether " 'the policy underlying the ... use of the contested practice or structure is tenuous.' " *Goosby*, 180 F.3d at 491-92 (quoting *Gingles*, 478 U.S. at 44-45, 106 S.Ct. 2752). "The list of factors is neither comprehensive nor exclusive." *NAACP, Inc. v. City of Niagara Falls*, 65 F.3d 1002, 1008 (2d Cir. 1995) (internal quotation marks omitted). "[N]o specified number of factors need be proved, and ... it is not necessary for a majority of the factors to favor one position or another." *Goosby*, 180 F.3d at 492.

[4] **[5]** 10. Plaintiffs must prove the *Gingles* preconditions and vote dilution under the totality of the circumstances by a preponderance of the evidence. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 443 (N.D.N.Y. 2003). "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Niagara Falls*, 65 F.3d at 1019 n.21 (internal quotation marks omitted). But Section 2 does not confer on blacks and Latinos "a right to [be] elected in numbers equal to their proportion in the population" or insulate minority candidates from defeat at the polls. 52 U.S.C. § 10301(b).

[6] 11. In 1982, Congress amended the VRA to make clear that the Act does not require plaintiffs to show a specific intent to discriminate. *See* S. Rep. No. 97-417, at 2, 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 179, 205. "The amendment was largely a response to [the Supreme] Court's plurality opinion in *Mobile v. Bolden*," 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which held that "minority

voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752. Congress adopted the Court's " 'results test,' " applied in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and "ma[d]e clear that a violation could be proved by showing discriminatory effect alone," ***379** *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752, while also establishing that the VRA did not confer on minorities the right to win elections, *see* 52 U.S.C. § 10301(b). Accordingly, there is "inherent tension" between the results test and § 10301(b) "because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Gingles*, 478 U.S. at 84, 106 S.Ct. 2752 (O'Connor, J., concurring). But it is clear that the VRA prohibits voting practices that result in vote dilution even if such dilution was not intended. *See id.* at 70-71, 106 S.Ct. 2752 (majority opinion).

[7] 12. "[D]iverse minority groups can be combined to meet VRA litigation requirements," *Arbor Hill*, 281 F. Supp. 2d at 445, provided they are shown to be politically cohesive, *see Pope v. County of Albany*, No. 11-CV-736, 2011 WL 3651114, at *3 (N.D.N.Y. Aug. 18, 2011), *aff'd*, 687 F.3d 565 (2d Cir. 2012); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 374-75 (S.D.N.Y.), *aff'd*, 543 U.S. 997, 125 S.Ct. 627, 160 L.Ed.2d 454 (2004).

II. DISCUSSION

A. First *Gingles* Precondition

[8] 13. The first *Gingles* precondition is satisfied because the population of black and Latino voters in the District is sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system. Specifically, Plaintiffs' demography expert William Cooper has demonstrated that the demographics of the District allow for the creation of (1) three majority-black (or majority-minority) wards or (2) four majority-minority wards, if the District's black and Latino voters are combined into a single minority population. (PX 244A ¶ 3; *id.* ¶¶ 55-67 & figs.15-16 (Cooper's illustrative plan showing that black population is sufficiently large and geographically compact to create three majority-minority districts); *id.* ¶¶ 68-82 & figs.17-18 (Cooper's illustrative plan showing that population of blacks and Latinos combined is sufficiently large and geographically compact to create four majority-minority districts).)[10] Although Defendant stipulated only that black voters alone are sufficiently numerous and geographically compact to constitute a majority in at least one potential election district, (JPTO at 14), it does not provide evidence to dispute that it is possible to create three majority-black districts, (*see* Doc. 555 ¶¶ 21-25), or four, if black and Latinos can be combined.[11] Further, Defendant concedes that combining minority groups is permissible " 'where the statistical ***380** evidence is that the minority groups vote cohesively for the same candidates.' " (*Id.* ¶ 37 (quoting *Reed v. Town of Babylon*, 914 F. Supp. 843, 848 (E.D.N.Y. 1996)); *see id.* ¶ 25.) As discussed below in connection with the Court's analysis of the second *Gingles* precondition, (*see* ¶¶ 26-27 below), black and Latino voters are sufficiently cohesive within and across those groups for them to be combined, (Tr. at 289:2-9; *id.* at 289:21-24 (Barreto) ("Black and Latino voters voted for the same candidates. So it wasn't as though blacks were voting for one candidate and Latinos are voting for a third. Black and Latino voters were also voting cohesively with each other.")).[12] Accordingly, the population of minority voters in the District is sufficiently large and geographically compact to constitute a majority in four single-member districts under a ward system.

B. Second and Third *Gingles* Preconditions

[9] **[10]** 14. Where a "significant number of minority group members usually vote for the same candidates," the minority group is politically cohesive and satisfies the second *Gingles* precondition. *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. Plaintiffs can rely on both statistical and anecdotal evidence to show political cohesion. *Pope v. County of Albany*, 94 F. Supp. 3d 302, 333 (N.D.N.Y. 2015).

[11] **[12]** **[13]** 15. Where the majority votes as a bloc and usually defeats the minority-preferred candidate absent special circumstances, the third *Gingles* precondition is satisfied. *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Whether a candidate is minority preferred cannot be proven by anecdotal evidence but rather only by statistical evidence showing that a candidate received support from more than 50% of minority voters. *Niagara Falls*, 65 F.3d at 1018-19. "[E]vidence [of minority candidates' success] does not necessarily negate a finding of bloc voting, particularly if elections are shown usually to be polarized or the success of minority candidates in particular elections can be explained by special circumstances, such as the absence of an opponent or incumbency.' " *Pope*, 687 F.3d at 582 (internal quotation marks and alteration omitted). "Courts have disregarded elections won by minorities after the

initiation of a voting rights suit, where Anglos preferred the minority candidate, or manipulated the election of a safe minority candidate or provided unusual organized political support or campaigned to insure the election of a minority candidate." *Aldasoro v. Kennerson*, 922 F. Supp. 339, 375-76 (S.D. Cal. 1995) (citations omitted); *see Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998) (*per curiam*) ("special circumstances" include majority support for minority-preferred candidates intended to thwart litigation). "[A] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57, 106 S.Ct. 2752.

***381 [14]** 16. Plaintiffs contend that the District's black and Latino communities are politically cohesive and that the white majority votes as a bloc in Board elections so that no minority-preferred candidate has won a contested election since 2007. For the reasons stated below, I find that Plaintiffs are correct and that they have satisfied the second and third *Gingles* preconditions.

17. Plaintiffs' expert in political science and statistical analysis, Dr. Matthew Barreto, (*see* Tr. at 154:5-11), used accurate and scientifically validated methods to identify and analyze racially polarized voting in the District. He is a professor of political science and Chicana/o studies at the University of California, Los Angeles, and the co-founder of a successful political and electoral consulting firm called Latino Decisions. (PX 242B at 44; Tr. at 150:1-3, 151:11-14.)[13] Dr. Barreto has published extensively and recently on voting, race, and statistical methods, including four books and sixty journal articles and book chapters, (*see* PX 242B at 45-48), and has been honored with research awards and fellowships, (*id.* at 49-50). He has published with many of the other leading experts in this field and is up to date on the newest, most innovative methods. He teaches courses on the VRA, racial and ethnic politics, electoral politics, demographics, and statistical analysis. (Tr. at 151:18-152:7.) In sum, Dr. Barreto is extremely well credentialed and at the leading edge of political science and statistical analysis with respect to racially polarized voting and voting estimates. I found him to be entirely credible.

18. Defendant's political science expert, Dr. John Alford, is a professor of political science at Rice University. (*Id.* at 2146:9-10.) He has testified as an expert approximately thirty to forty times in VRA cases, primarily for defendants. (*Id.* at 2146:19-23, 2147:4-7, 2264:23-2265:5.) He teaches courses on voting behavior in elections and, in those courses, covers material on racial voting patterns, (*id.* at 2264:5-8), but he has not published a paper on racially polarized voting, taught any courses on minority politics or voting behavior, or written about a Section 2 case in an academic publication, (*id.* at 2263:25-2264:16). He has not published any peer-reviewed articles using methods of ecological inference or involving surname analysis, and his last article on geocoding analysis was published thirty years ago. (*Id.* at 2263:9-23.) And he is not (nor does he consider himself to be) an expert in the area of race and ethnicity politics. (*Id.* at 2264:17-19.) His testimony, while sincere, did not reflect current established scholarship and methods of analysis of racially polarized voting and voting estimates.

19. In New York, voters do not self-report their race, so voting patterns have to be estimated. To perform this estimation, Dr. Barreto and his colleague Dr. Loren Collingwood used ecological statistical models that "attempt to draw an inference regarding how groups voted using aggregate ecological data." (PX 242A ¶ 7.)[14] Dr. Barreto used two ecological inference ("EI") methods to analyze various data sets.[15] The first method, King's ***382** Ecological Inference ("King's EI"), identifies patterns between the racial make-up of voters in certain precincts and the number of votes candidates received at the corresponding polling places. (*See* PX 242B at 5, 10-11.) The second method, row by column ("RxC"), is an improved EI technique that can generate estimates for more racial groups and more candidates. (*Id.* at 11.) Dr. Barreto's results were consistent across every methodology:

> Across a variety of analyses that Dr. Collingwood and I performed, we found strong and consistent evidence that blacks and Latinos are politically cohesive and that they consistently vote for the candidates which lose elections.
>
> We found strong and consistent evidence that white voters vote cohesively as a bloc[ ] and that they vote for candidates that have won every single election.

(Tr. at 155:6-12.)

20. Of the various data sets that could be used as EI input, Dr. Barreto primarily relied on Bayesian Improved Surname Geocoding ("BISG") data. "BISG is a methodology that uses individual-level data, including a voter's surname, geographic location, and the racial composition of the voter's census tract or block to generate the probability that an individual belongs to a particular group where self-reported

information is not available." (PX 242B at 15.) Starting with the list of actual voters in each election (the "voter file"), Dr. Barreto used the "Who Are You" or "WRU" software package created by scholars Kosuke Imai and Kabir Khanna to estimate the probability that each voter was white, black, Latino, or other using a surname list[16] and geolocation data from the decennial census.[17] (PX 242A ¶ 7; Tr. at 166:13-20, 168-11-172:11; PX 305_0008-09; *see* PX 269 (Kosuke Imai & Kabir Khanna, *Improving Ecological Inference by Predicting Individual Ethnicity from Voter Registration Records*, 24 Pol. Analysis 263 (2016)).)[18]

21. The first step of the BISG analysis plugs in a race estimate based on the voter's surname – for example, census data that shows that of individuals with the surname Jackson, 39% are white and 53% are black. The next step looks at the voter's census block. If, for example, voter Jackson lives on a block that is 80% black and 20% white, that increases the likelihood that voter Jackson is black and makes an estimation of voter Jackson as black more reliable. The software calculates the probability that someone with a 53%-probable black surname who lives in an 80%-black census block is actually ***383** black. (Tr. at 168:9-170:10, 170:24-172:11.)[19]

22. After Dr. Barreto estimated voter race probabilities, he aggregated those probabilities to the precinct level to estimate the racial make-up of each precinct. (*See id.* at 185:23-186:4.) Through a statistical package and method called eiCompare, Dr. Barreto then used both King's EI and RxC to estimate voting preference by race and compared the results. (*Id.* at 164:1-11, 165:5-18.) He used both ecological inference methods because they enabled him to see if the results were consistent across the models and provided "more evidence, more data points [to] take in to draw [his] conclusion." (*Id.* at 287:22-288:7.)

23. The use of BISG has been extensively validated by experts. Dr. Barreto first used surname and geocoding analysis on voter files around 2003 and has continued to use and publish about that method since. (*Id.* at 170:16-23.) In 2009, scientists from the RAND Corporation evaluated the census surname list and geocoding information from the census at the block level and found that the probability that self-reported race matched with a BISG race estimate (that is, "concordance") was 95% for Hispanics and 93% for blacks and whites. (DX 101 at 70, 78.) In 2016, RAND published a second article that describes how BISG can produce estimates of racial disparities within populations with a concordance of 90 to 96%. (PX 274 at 2; Tr. at 181:13-24, 182:5-183:1.) Many respected scholars have used and validated BISG in the political science context and across a variety of disciplines. (Tr. at 192:2-14; *see* PX 269 (validating BISG with results of Florida presidential election);[20] PX 367 (2015 article using surname and geocoding data purchased from data vendor Catalist LLC to estimate race of voting populations in nationwide elections to calculate turnout differences between racial groups); PX 369 at 223-26 (2018 book validating accuracy of Catalist data); PX 368 at 5-6, 13 (2016 article using BISG to estimate voter race and King's EI to estimate precinct-level votes and racial voting preferences); PX 370 (2020 article using BISG race estimates to estimate differences in political campaign contributions across racial groups); *see also* PX 274 at 1 (BISG "can produce accurate estimates of racial/ethnic disparities within populations served when self-reported data are lacking" in health-care context); *id.* at 5 (citing fifteen validation studies and peer-reviewed articles using surname and geocoding analysis); Tr. at 182:19-183:10, 183:20-184:6 (Barreto) (PX 274 summarized validation studies using surname and geocoding analysis); PX 305_0014 (citing peer-reviewed articles on health care and epidemiology); DX 209 at 3 (using BISG in consumer-protection context).) The political science articles were peer reviewed and published in leading journals. (Tr. at 189:23-191:11, 192:2-14.) And both of Defendant's experts, Dr. Alford and demographer Dr. Peter Morrison, have advocated for the use of surname and geocoding analysis to derive racial estimates by geographic unit. (*See* DX 67-02 ***384** ¶ 26 (Dr. Alford suggesting that flaws in Plaintiffs' previous expert's preliminary report could have been corrected if that expert had "estimated voter turnout by race using surnames and voter sign-in records," citing the Imai & Khanna article); DX 99 at 12 n.21 (article co-authored by Dr. Morrison noting availability of BISG to "assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct").)[21]

24. Dr. Barreto applied BISG in the manner proposed in the academic literature – not by attempting to assign individuals to racial categories, but by aggregating individual race estimates to create precinct-level demographic estimates. (Tr. at 185:13-186:4; PX 242A ¶ 7; PX 305_0012; PX 274 at 2-3.) He then used that data as an input to the EI models, which is "exactly the same" as how other scholars have used BISG in the health-care and campaign-donation contexts. (Tr. at 2728:7-23.) Defendant contends that Dr. Barreto did not identify support in the academic literature for using BISG

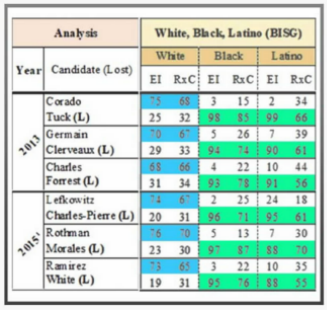
race estimates as an EI input, (*see* Doc. 555 ¶ 107(c)), but his methodology is supported, as described in paragraph 23 above. And Dr. Barreto did not simply estimate a probability distribution for each individual (*e.g.*, a 60% probability that voter X is white, a 30% probability that voter X is black, etc.), as Defendant suggests, (*see* Doc. 555 ¶ 107(b)); rather, he aggregated his estimations to the precinct level as described in the literature, (PX 242A ¶ 7; *see* Tr. at 187:13-21).

25. BISG is particularly reliable for use in the District because of its unique characteristics. BISG models work best in places "where there's more differentiation between names and more differentiation between racial populations of neighborhoods," like the District. (Tr. at 201:18-24.) The District has large populations of Hispanic voters with very commonly occurring Spanish surnames and large populations of white voters with very commonly occurring white surnames. (*Id.* at 202:7-11.) Black and Hispanic surnames rarely overlap, so BISG is still highly precise even in neighborhoods where blacks and Hispanics live together. (*Id.* at 203:23-204:2; *see id.* at 208:5-10.) The District's neighborhoods are racially segregated to "a very high degree," (*id.* at 202:18-20), and many approach 100% white or 100% minority, (*id.* at 210:4-17, 212:20-217:5, 217:25-218:4). And even in neighborhoods where blacks and Latinos live together in the same census block groups, census blocks are more highly segregated, lending confidence to BISG results, which rely on census block data. (*Id.* at 1673:2-1675:19; *see* PX 300; PX 301.) For all these reasons, BISG is likely to provide accurate, reliable estimates in the District.

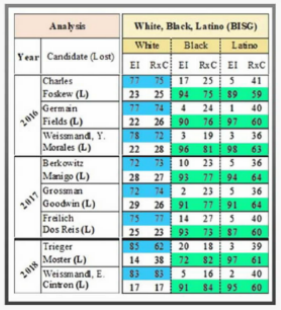
26. Dr. Barreto's King's EI and RxC analyses using BISG data showed that white voters were highly cohesive and consistently voted for the winning candidate in every election. Black and Latino voters were also highly cohesive, both as individual groups and when considered together,[22] and they consistently voted for the losing ***385** candidate. In every contested election, "the candidates who were preferred by a cohesive white voting bloc[ ] beat the candidates preferred by blacks and Latinos." (Tr. at 289:14-290:1; *see* PX 242A ¶¶ 8, 10, 12, 16; PX 243 ¶ 32.) Dr. Alford conceded that white voters are cohesive, concluding that "[a]ll of the results from all of the data sources and all of the methods show the same stable level of 70-80% white support for one candidate in each contest" and that "it is clear that whites are voting cohesively." (DX 13 at 23.)

27. A table summarizing Dr. Barreto's results is set out below.[23]

Table 2: BISG Results for White, Black, and Latino Voters. (PX 305_0049.)



Analysis		White, Black, Latino (BISG)					
		White		Black		Latino	
Year	Candidate (Lost)	EI	RxC	EI	RxC	EI	RxC
2013	Corado	75	68	3	15	2	34
	Tuck (L)	25	32	98	85	99	66
	Germain	70	67	5	26	7	39
	Clerveaux (L)	29	33	94	74	90	61
	Charles	68	66	4	22	10	44
	Forrest (L)	31	34	93	78	91	56
2015	Lefkowitz	74	67	2	25	24	18
	Charles-Pierre (L)	20	31	96	71	95	61
	Rothman	76	70	5	13	7	30
	Morales (L)	23	30	97	87	88	70
	Ramirez	73	65	3	22	10	35
	White (L)	19	31	95	76	88	55



Analysis		White, Black, Latino (BISG)					
		White		Black		Latino	
Year	Candidate (Lost)	EI	RxC	EI	RxC	EI	RxC
2010	Charles	75	75	17	25	5	41
	Foskew (L)	25	25	93	75	89	59
	German	77	74	4	24	1	40
	Fields (L)	22	26	90	76	97	60
	Weissmandl, Y.	78	72	3	19	3	36
	Morales (L)	22	28	96	81	98	63
2017	Berkowitz	72	73	10	23	5	36
	Manigo (L)	28	27	93	77	94	64
	Grossman	72	74	2	23	5	36
	Goodwin (L)	29	26	91	77	91	64
	Frenlich	75	77	14	27	5	40
	Dos Reis (L)	25	23	93	73	87	60
2018	Trieger	85	62	20	18	3	39
	Monter (L)	14	38	72	82	97	61
	Weissmandl, E.	83	83	5	16	2	40
	Cimiron (L)	17	17	91	84	93	60

The numbers in the columns labeled "White," "Black," and "Latino" represent the estimated percentage of each racial group that voted for each candidate. This analysis showed high levels of racially polarized voting in every contested election. White support for the winning candidates ranged from 62-85% Black support for losing candidates ranged from 71-98%, and Latino support for losing candidates ranged from 55-99%. (*Id.*)[24]

28. Dr. Barreto validated his analysis using other methodologies to "see if the data all stack[ ] up and point[ ] in the same direction," (Tr. at 162:14-16), and each method supported his conclusions.

- First, he purchased a data set from a private consulting company called Catalist LLC ("Catalist"), which provides data, analytics, and modeling to political campaigns, civic organizations, and research institutions. (PX ***386** 258 at 21:9-17 (deposition of designated Catalist witness); *see* Tr. at 242:1-6 (Barreto).) Catalist's database of over 240 million voters includes first name, surname, census, and self-reported data. (PX 258 at 52:6-18, 61:19-63:7; Tr. at 245:15-246:9.) Dr. Barreto has used the Catalist data set in the past and found it to be extremely accurate, (Tr. at 242:9-14), it has won awards for accuracy from political and commercial consulting groups, (*id.* at 252:1-3), and it is a highly successful commercial product on which campaigns and others rely, all of which suggest that its results are reliable. Other experts have also relied on and validated Catalist's data, including in VRA cases. (*See* PX 367 at 102; PX 369 at 223-224; *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 598-99 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *Veasey v. Perry*, 71 F. Supp. 3d 627, 661-63 (S.D. Tex.

2014), *vacated and rev'd in part on other grounds sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).) Dr. Barreto compared Catalist's estimates of voter race from the District's 2017 elections with his own results and found both methodologies produced similar results, which gave him more confidence in his conclusions. (PX 242A ¶ 18; Tr. at 254:21-24, 291:15-24.)

- Second, he used a different data set – citizen voting age population data from the Census Bureau ("CVAP data") – to perform King's EI and RxC analyses, both of which also showed racially polarized voting with white voters always voting cohesively for the winning candidate (and a combined "non-white" group of voters always voting for the loser). (Tr. at 291:25-292:20, 293:16-294:9; PX 242B at 25-26.)[25]

- Third, Dr. Barreto generated white voter estimates using CVAP and subtracted those estimates from the total votes for each candidate to estimate nonwhite votes, (Tr. at 296:16-25), which also showed voter cohesion, (*id.* at 300:14-22; PX 242B at 16-25).[26]

- Fourth, Dr. Barreto examined the 2012 U.S. presidential election and concluded that it was also highly racially polarized, with whites and minorities "voting in opposite directions," (Tr. at 306:17-307:17), which further supported his conclusions.

***387** - Fifth, as additional backup for his results, he analyzed the surnames from nomination petitions and found that white voters supported the winning candidates and black and Latino voters supported the losing candidates. (*Id.* at 357:20-358:15.)

In sum, by performing ecological inference on BISG-generated data, Dr. Barreto proved consistent white voting cohesion for the winning candidates and consistent minority voting cohesion for the losing candidates, and the other methods he employed supported these conclusions. (*Id.* at 352:23-353:14.)

29. There is also anecdotal evidence of minority cohesion under the second *Gingles* precondition that supports Dr. Barreto's conclusions.[27] Witnesses called by both sides perceive a large white voting bloc of Orthodox and Hasidic people whose children attend private schools voting for the "private school community" slate, and black and Latino people whose children attend public schools voting for the "public school community" slate. (*Id.* at 1238:11-14, 1849:1-4, 2560:11-14; PX 243 ¶ 55 n.71; *id.* ¶¶ 58-65; PX 257 at 191:18-192:2; PX 286 ¶ 12.) Many witnesses referred to the private and public school communities and testified that the public school community's slate always loses. (*See* PX 279 ¶ 11; PX 280 ¶¶ 7-9; PX 281 ¶¶ 9, 60-62; PX 282 ¶¶ 11-15; PX 283 ¶¶ 67, 69-70; PX 288 ¶ 6; Tr. at 1818:5-9; *see also* ¶ 5 above.)

30. Defendant concedes that whether Plaintiffs have satisfied the second and third *Gingles* preconditions hinges on whether BISG is a good data input. (Doc. 555 ¶ 99 ("[T]he Court's main task is to decide whether it agrees with Dr. Barreto that using BISG generated race estimates as the demographic data input for an EI:RxC analysis is better than using ... CVAP.").) I find that, given the unique characteristics of the District, BISG is a better data set than CVAP for use as an input for ecological inference, and Dr. Barreto therefore used the superior methodology. Defendant's expert Dr. Alford relied on CVAP, which is less reliable here for three reasons.

31. First, CVAP is less precise. BISG begins with the actual voter file – that is, the names of the individuals who actually voted – whereas a CVAP data set contains all eligible voters in the District, whether they voted or not. In addition, CVAP data come from the American Community Survey. (Tr. at 255:15-21.) Because that Survey only accounts for 2% of the population over each of five years, CVAP requires an inference to apply the 10% sample to the whole population, which can introduce bias. (*Id.* at 256:23-257:7, 282:7-18.) Using CVAP data, Dr. Alford was not able to draw definitive conclusions about minority voter cohesion or the existence of racially polarized voting. (*Id.* at 2271:17-19 (Alford could neither conclude nor rule out that minorities were voting cohesively); *see id.* at 2158:2-2166:17, 2268:13-16.)

32. Second, there is a misalignment between the voter precincts analyzed and the census block-group data from which the CVAP data set is pulled. To analyze voters in a given precinct, experts would want data from that specific precinct. But CVAP data provide racial proportions within census block groups, which almost never correspond to the voter precincts. Because the BISG data set begins with the voter ***388** file, it contains the actual voters within in each precinct. (*Id.* at 257:8-259:11.) "CVAP has ... 'geographic misalignment' between census boundaries and precinct boundaries, whereas BISG has the exact same alignment." (*Id.* at 257:16-18.)

33. Third, because CVAP data sets do not contain information on actual voters, voter turnout must be estimated, which

fails to reliably produce the precinct-by-precinct estimates required for EI analysis. (*Id.* at 264:11-19.) Although the District has 60,000 eligible voters, only about 13,000 to 14,000 people actually vote, so using CVAP introduces "noise ... influencing who is in a precinct." (*Id.* at 259:20-260:1.) Both King's EI and RxC can estimate turnout and incorporate it into the choice percentage, (PX 242B at 18), but such estimations do not produce results that are as reliable as the results produced by BISG.

- As to King's EI, Dr. Barreto testified that a double-equation approach is necessary to help account for "turnout issues," (Tr. at 2707:13-15), such as "substantial difference in turnout across racial groups," (PX 364 at 611 (article by Dr. Barreto and Dr. Bernard Grofman explaining that double regression can mitigate turnout problem)), as there is in the District.[28] Such an approach would estimate voter turnout and make adjustments to CVAP data before estimating voter choice. (Tr. at 2708:19-24.) But even using a double-equation approach would not "solve[ ] the problem CVAP has," and the voter file would still be the better data source. (Tr. at 2711:8-2712:20; *see* PX 364 at 607-08.). In other words, the turnout estimated by EI is not as accurate without a double-equation approach, and even with such an approach, is not as accurate as using the voter file, which BISG uses.

- The experts disagree about precisely how turnout is estimated by RxC. Dr. Alford testified that RxC estimates turnout "simultaneously," (Tr. at 2209:22-2210:6), by including "a category that didn't vote," which "estimate[s] for each racial group at each precinct ... the proportion that are not voting," (*id.* at 2208:17-22).[29] Dr. Barreto testified that the software package that runs RxC can be programmed to estimate turnout by race at the precinct level, (*id.* at 2715:1-8), but that it would require "a formula or a model that just predicted voter turnout" using a different set of commands and specifications before candidate choice can be estimated, (*id.* at 2715:9-21).

In any event, it does not appear that Dr. Alford properly accounted for turnout. It seems that he did not perform a double-equation regression, (*id.* at 2711:3-7), or include a voter turnout model in his RxC script, (*id.* at 2716:2-16, 2717:25-2718:5). He variously claimed that he performed a double regression on the CVAP data before running EI analysis, (*id.* at 2292:2-9), and that the double regression was happening ***389** automatically within RxC to estimate turnout at the precinct level, (*id.* at 2208:4-15). But Dr. Barreto testified that Dr. Alford's scripts used a single-equation approach that introduced error by mixing turnout estimates with candidate choice estimates. (*Id.* at 2717:25-2720:17.) Thus, although Dr. Alford suggested that inclusion of a no-vote (or abstained) category in RxC, rather than just estimating votes for candidate 1 and candidate 2, would solve the problem of CVAP not accounting for turnout, Dr. Barreto explained that turnout by racial group should be estimated first, without "mixing it with the candidate choice," (*id.* at 2720:2), and then used to adjust the input variable in the voter-choice model, (*id.* at 2720:8-11). But Dr. Alford did not do a separate calculation. He used unadjusted CVAP as the input variable to estimate votes for candidate 1, candidate 2, and no-vote, and then calculated the percentage of votes for candidate 1 and candidate 2 as a percentage of all votes. (*Id.* at 2714:2-2723:11.) He did not "chang[e] the input variable ... to account for the turnout rate. [He] just transform[ed] it into a share." (*Id.* at 2721:17-19.) For all these reasons, Dr. Alford's conclusions based on CVAP, (*see id.* at 2158:2-2166:17), are not as reliable as Dr. Barreto's conclusions based on BISG.

34. Indeed, in criticizing the methodology of Plaintiffs' previous expert, Dr. Alford also admitted that CVAP was not a "good data set" for EI because it did not use "the number of *actual voters* from each racial group," (DX 62 ¶ 24 (emphasis in original); *see* Tr. at 2335:4-17), and opined (citing the Imai and Khanna article) that BISG-like analysis could correct for CVAP's flaws, (DX 62 ¶ 26 & n.17; *see* Tr. at 2236:14-2337:13). He acknowledged that CVAP "assumes, without justification, that racial groups vote in proportion to their size," but black and Latino voters typically have significantly lower turnout than white voters. (DX 62 ¶ 24.)

35. The District's criticisms of Dr. Barreto and of BISG are unpersuasive. First, Dr. Alford testified that the accepted practice for political scientists is to reject results that do not report a 95% confidence interval. (Tr. at 2169:22-2170:15.) Dr. Alford testified that where a result has a wide confidence interval (for example, 11% to 88% support for a candidate), the likelihood of the point estimate (for example, 52%), is lower than it would be were the confidence interval narrower. (*Id.* at 2167:6-2168:19.)[30] He contends that such an interval means that he "can't reject the possibility that ... the actual value [of support for a candidate] might have been 49 percent" because the confidence interval goes below 50%. (*Id.* at 2168:4-12.) But Dr. Barreto credibly explained why reliance on confidence intervals is not required and, moreover, why the

confidence intervals he did report, (*see* PX 242B at 34-42, PX 242A at 40-47), do not undermine his conclusions.[31] The use of 95% ***390** confidence intervals "depends entirely on the type of question you're asking and the type of research inquiry you're doing" and is more helpful when testing samples of data rather than using the voter file. (Tr. at 347:14-348:19.) He testified that there is no consensus around their use, and while some scholars rely on them, others provide point estimates, examine patterns, and draw conclusions from those. (*Id.* at 348:20-349:2.) Because Dr. Barreto's BISG scripts calculated racial probabilities rather than race predictions and error rates, based on instruction from the academic literature, (*id.* at 218:14-25), using probability terminology rather than "strict confidence interval testing" was more appropriate, (*id.* at 1683:10-1684:5).[32] Drawing conclusions "about patterns of point estimates," as in BISG analysis, "does not require a 95 percent statistical test." (*Id.* at 347:16-18.) Accordingly, Defendant's argument that voters' preference cannot be determined with 95% confidence where a confidence interval goes below 50%, (*see* Doc. 555 ¶ 65; Tr. at 2167:4-2168:3), is unavailing. Further, the reported confidence intervals for the CVAP analyses, the presidential election, and the 2017 BISG analysis do not undermine Dr. Barreto's conclusions. None of the confidence intervals for white voters crossed 50%. (Tr. at 1683:3-9; *see* PX 242A at 40-47; PX 242B at 34-42.) The intervals for black voters did not cross 50% for twelve of the fourteen races, and for the other two races, the lower "tail" of the distribution that could fall below 50% is still very close to 50%, indicating that the outcome of voter support below 50% is unlikely to occur. (Tr. at 350:20-351:2, 1679:2-21, 1681:24-1682:10; PX 242 B at 41; PX 242A at 42.) The point estimate patterns of Latino voting show preference for the losing candidate in all contests, and in the "handful of elections where the confidence intervals for Latinos did cross below 50 percent," in no instance "was there a majority probability that this event would occur," and "the most likely outcome for all of our data ... was cohesiveness in support of the candidate who lost." (Tr. at 351:3-14; *see id.* at 1684:12-1685:9.) As Dr. Barreto explained, the better practice would be to determine the probability that any results would cross the 50% threshold rather than to reject the results out of hand. (*See id.* at 341:11-24, 343:4-11.) Indeed, Dr. Alford admitted that point estimates are the most likely outcomes, that "similar results repeating year after year" would constitute a "pattern," and that in another case, he did not rely on confidence intervals where voting patterns were consistent. (*Id.* at 2351:20-23, 2354:6-8, 2357:12-2358:9.) Dr. Barreto's results were all consistent with each other and with the anecdotal evidence year after year. For all of these reasons, I find Dr. Barreto's analyses credible and reliable.

36. The District also contends that Dr. Barreto did not use BISG the way the literature instructs. It offered the testimony of Dr. Morrison, who contributed to the 2009 article about BISG, but his main purpose was to ensure that the demography was correct, and he did not perform any statistical analysis in connection with that article. (*Id.* at 68:19-21, 69:2-4.) Dr. Morrison ***391** is not a political scientist. (*See id.* at 10:8-17.) Accordingly, his criticism that Dr. Barreto misused BISG rings hollow because Dr. Barreto credibly explained that he applied BISG the way political scientists use it: to generate probabilities, aggregate them to the precinct level, and use those estimates as the input for EI, not to assign a race to an individual person. (*Compare id.* at 21:17-25 (Morrison's description), *with id.* at 187:13-21 (Barreto's description)).)[33] Dr. Morrison also opined that BISG would not work well in the District because "one's immediate neighborhood location does little to improve an estimate of one's race/ethnicity." (DX 70 ¶ 35.) To whatever extent that could be true in some localities, it is not true in the District, in which housing is highly racially segregated, even at the block-to-block level, as discussed above. In sum, Dr. Morrison's critiques do not undermine Dr. Barreto's credibility or the accuracy of his results.

37. In an attempt to attack Dr. Barreto's results based on Catalist data, the District pointed to a small percentage – about 1.4% – of names that were anomalies or appear to have been miscoded. Assuming those names were all coded in error, they would be well within validation rates for Catalist's model. (Tr. at 1685:18-1686:4.) This criticism, as well as the criticism that two people with the same last name and address were coded with different race probabilities, (*id.* at 2255:6-2257:5),[34] amount to cherry-picking and do not undermine the evidence that Catalist's database is highly reliable – as evidenced by, among other things, its success in the commercial marketplace. In any event, Dr. Barreto's Catalist-based results are a helpful cross-check that lend confidence to his conclusions, but his opinion does not rise and fall with the fidelity of every individual entry in Catalist's database.

38. Finally, the District argues that there were problems with Dr. Barreto's scripts. As an initial matter, both Dr. Alford and Dr. Barreto relied on someone else to run the scripts – neither performed the technical analysis himself – and neither side called those individuals. As Dr. Barreto explained, Dr.

Collingwood programmed the scripts according to Imai and Khanna's instructions and the code from their WRU package. (*Id.* at 237:8-19.) Drs. Barreto and Collingwood did not manipulate the scripts. (*Id.* at 1675:20-1676:17.) Dr. Alford claimed that his assistant had difficulty getting the scripts to run, but did not offer a clear explanation of why or what happened and did not undermine Dr. Barreto's credible testimony that Defendant had "everything ... needed to run the replication." (*Id.* at 234:15-17.) Moreover, Dr. Alford testified that his colleague Dr. Randy Stevenson said he was able to get the scripts to run, (*id.* at 2348:4-2349:14), and the District produced the results, (*id.* at 233:19-234:6). Accordingly, these criticisms are unpersuasive.

***392** 39. This may be the first time that voter-preference estimates based on BISG have been admitted into evidence at a VRA trial. But that is no reason to reject a recently developed, reliable method of analysis. There must always be a first time. The method has been endorsed by respected social scientists in leading publications. At least one other court has found such evidence reliable enough to be admitted in a bench trial involving a Section 2 challenge to an at-large voting system, *see United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 612-13 (E.D. Mich. 2019), although the case settled before trial, *see* No. 17-CV-10079, 2019 WL 2647355 (E.D. Mich. June 6, 2019), *motion for relief from judgment denied*, 2020 WL 127953 (E.D. Mich. Jan. 10, 2020). And the Court is convinced that in the circumstances of this case, it is a strong and reliable method for estimating voter preference, minority-group cohesion, bloc voting, and racial polarization. Using that method, as confirmed by a variety of other methods, Plaintiffs have proven that black and Latino voters are politically cohesive within and across those groups and that the white majority votes as a bloc to routinely defeat the minority's preferred candidates.

40. Thus, Plaintiffs have satisfied the *Gingles* preconditions.

III. THE TOTALITY OF THE CIRCUMSTANCES

A. Senate Factor 1

[15] 41. The first Senate Factor examines "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37, 106 S.Ct. 2752 (internal quotation marks omitted). There is no evidence of official discrimination in the District. Accordingly, this factor favors Defendant.

B. Senate Factor 2

[16] **[17]** **[18]** 42. Senate Factor 2 "requires the Court to consider 'the extent to which voting in the elections of the State or political subdivision is racially polarized.' " *Pope*, 94 F. Supp. 3d at 342 (quoting *Goosby*, 180 F.3d at 491). Whether a white voting bloc may be explained as "an expression of political partisanship" is properly considered under this factor, *Goosby*, 180 F.3d at 493, but "[t]he fact that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry, nor does it require plaintiffs to prove racial bias in community," *Pope*, 94 F. Supp. 3d at 342 (internal quotation marks omitted).

> [E]ven if proof of a race-neutral cause of divergent voting patterns is forthcoming, the defendant does not automatically triumph. Instead, the court must determine whether, based on the totality of the circumstances, the plaintiffs have proven that the minority group was denied meaningful access to the political system on account of race.

Goosby v. Town Bd. of Hempstead, 956 F. Supp. 326, 355 (E.D.N.Y. 1997) (internal quotation marks and alterations omitted), *aff'd*, 180 F.3d 476. Even where Senate Factor 2 favors a municipality because of a "strong correlation between political partisanship and the voting behavior of blacks and whites," plaintiffs can still prevail under the totality of the circumstances where minority voters' "failure to elect representatives of their choice ... is not best explained by partisan politics." *Id.* At least one court has held that where the influence of race and of political affiliation on voting patterns "are too closely related to isolate and measure for effect ... the evidence fails to demonstrate that race-neutral ***393** factors explain the voting polarization" in the locality. *United States v. Charleston County*, 316 F. Supp. 2d 268, 304 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004).[35]

[19] 43. The District cites cases that hold that "[u]nless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution." *Nipper v. Smith*, 39 F.3d 1494, 1523-24 (11th Cir. 1994); *see Solomon*, 221 F.3d at 1225. But that does not mean that a possible race-neutral explanation for racial polarization is dispositive. As described above, the Second Circuit has not followed such an all-or-nothing approach but instead considers possible explanations other than race as one

aspect of the totality of the circumstances. *See Goosby*, 180 F.3d at 493.

44. Plaintiffs have shown high levels of racially polarized voting in the District, as described above in connection with the Court's *Gingles* analysis. (*See* ¶¶ 26-27 above.) That showing is confirmed by witness testimony. For example:

- Sabrina Charles-Pierre is a black woman who was appointed to fill a vacancy on the Board after the Board came under pressure from a state-imposed monitor of the District[36] to appoint a public school parent, (*see* Tr. at 2576:14-24; PX 81_0047 (Grossman told Charles-Pierre that Weissmandl said, "The only reason [Charles-Pierre] is there and ran unopposed is because the board wants to do what [the state-appointed monitor] said," which was to "[h]ave at least one [public] school parent."); *see also* PX 156_0014-15 (monitor report recommending that all candidates for at least one Board seat must be parents of public school students and selected by other public school parents)), and was thereafter re-elected with the support of the private school community, (*see* PX 81_0016-18, 29, 35, 40). According to Charles-Pierre, between 2015 and 2018, in every single contested Board election, the preferred candidates of black and Hispanics lost to the other candidates. (Tr. at 2572:15-22.) She also agreed that the white majority had all of the electoral power, (*id.* at 2579:11-14, 2670:12-24), which was obvious because a candidate supported by the overwhelming majority of black and Hispanic voters could still lose by 4,000 votes, (*id.* at 2571:16-22). Other Board members ***394** and private school community leaders corroborate Charles-Pierre's observations and confirm that the white bloc is determinative of electoral success. Former Board member Yonah Rothman wrote in a WhatsApp group chat called "School Board Support Group" that included private school advocates, "If private school really wanted [Charles-Pierre's] seat she would have lost the election like the rest of them." (PX 80 at 427.) Hersh Horowitz, an influential rabbi, wrote in the same chat, "I hear we had over 9000 [votes] and they under 5000." (*Id.* at 774.) Board President Harry Grossman repeatedly reminded Charles-Pierre that the white community could easily replace her, texting her, "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3," (PX 81_0035), and, "[I]f people wanted you off the board they just would have run a candidate against you and you would have lost as [other public school candidates] Fields, Foskew, and Morales did," (*id.* at _0040; *see* Tr. at 1534:13-21, 1536:5-1539:20, 1546:5-19).

- Private school community leaders have also acknowledged more generally that the white bloc vote holds all the power and controls election outcomes. Former Board member Bernard Charles, who is black, agreed that the Orthodox and Hasidic community "has the voting power to place anyone they want on the Board," and "the leaders in the Orthodox and Hasidic community could replace [him] if they wanted to." (Tr. at 1816:22-1817:3.) In a text with Grossman, Horowitz wrote that the public school community is "getting weaker," and Grossman said, "They feel disempowered because they are." (PX 88_0002; *see* Tr. at 990:23-991:11.)[37] Grossman said in the private school group chat that the outcome of the 2016 election would be "whatever we want it to be." (PX 80 at 279.) He also told Charles-Pierre, "Nothing can pass without [O]rthodox support." (PX 81_0050.)

45. Plaintiffs have made a strong showing of racially polarized voting and a white bloc vote that controls the outcome of elections, which gives rise to an inference that the targeted electoral process dilutes their votes, and that inference "will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system." *Pope*, 94 F. Supp. 3d at 343 (internal quotation marks omitted). The District contends that the polarization is best explained by policy preferences, but the record lacks sufficient credible evidence to support such a conclusion.

46. In this unique community, policy preferences are not "unconnected" to race. As described above, the so-called private and public school communities in the District are essentially the white and minority communities, respectively.[38] There is nearly ***395** perfect concordance between race and the populations of public and private schools that cannot be ignored. In the District, policies benefitting private schools or reducing expenditures on public education benefit the white community, and policies benefitting public schools or reducing expenditures on private education benefit the black and Latino communities. Put differently, if the white community votes down a budget

because the budget increases taxes, minority children lose access to services. (*See, e.g.*, PX 76_0024-26 (Grossman advocating for voting down budget); Tr. at 1548:22-1554:2 (Grossman admitting voting down budget would result "massive cuts to the public schools"); *id.* at 1811:19-25 (Charles admitting that the Board's cuts to certain programs predominantly affected the black and Latino community); *id.* at 1177:23-25 (Former Board member Aron Wieder admitting that budget cuts for public schools primarily impact black and Latin students); *see also* PX 218A (ads in Jewish magazine telling readers to "vote no" on the budget); Tr. at 644:13-645:18 (former student explaining that policy and race are "intersectional," not "distinctive buckets," and that people supporting cuts to public schools and voting down the budget are white, and people attending public schools are black and Latino).) At the same time that public school cuts almost exclusively affect black and Latino children, any services for private schools beyond what is mandated by New York State almost exclusively benefit white children.[39]

47. Accordingly, race and policy cannot be isolated in a community where public school students are almost all black or Latino (92%), and students attending private schools located in the District are almost all white (98%). (*See* JPTO at 4; PX 372 ¶ 24.) This makes it all but impossible to untangle race and policy, and thus for Defendant to show that the voting discrepancies are based on the latter and not the former. *See Charleston County*, 316 F. Supp. 2d at 304.

48. The District argues that the private school community supports candidates who advocate for lower property taxes and maintaining and increasing mandated services for private schools, while the public school community supports candidates who advocate for policies supporting public education. (*See* Doc. 555 ¶¶ 154, 157.) But the record evidence to that effect came from past and present Board members, (*see* DX 174 ¶ 70; DX 176 ¶ 68; DX 172 ¶ 41; DX 177 ¶ 68; DX 251 ¶ 56; DX 175 ¶ 31), each of whom had credibility problems. The following is a nonexhaustive list of examples showing why their testimony is not credible.

- Grossman testified that he was not aware of any slating organization in the District, (DX 174 ¶ 34), but he clearly participated in slating with Hersh Horowitz, Yehuda Oshry, and private school advocate Shaya Glick, (*see* Tr. at 1411:8-1412:6, 1412:11-18, 1413:6-12, 1427:22-1428:6, 1436:13-19, 1437:12-1438:4, 1438:13-22, 1444:15-1446:16, ***396** 1446:18-1447:7, 1447:12-21, 1451:5-1452:19, 1453:14-1454:13, 1458:24-1459:17, 1465:24-1466:7, 1468:15-1469:2, 1477:17-25, 1485:1-5, 1485:15-1486:8, 1515:16-20, 1516:5-16, 1517:6-10). He seems to have no compunction about compromising his legal obligations when it suits his purposes, as evidenced by actions that would seem to conflict with his obligations as President or Board member and harm the Board, including writing the text for a petition to be presented to the Board protesting a proposal of the Superintendent, (*id.* at 1525:23-1529:9; PX 80 at 1451-52), and advocating for, among other things, lawsuits against the District, voting down the school budget, and voting out "non-frum" Board members, (Tr. at 1549:17-1554:8; *see* PX 76_0024).[40] He also lied to Board members of color about the purpose of a settlement conference in this case. (*See* Tr. at 2675:23-2676:23; *see also* note 58 below.) Plaintiffs impeached him at least three times with his prior sworn deposition testimony. (*See id.* at 1433:1-1434:2, 1510:1-1511:12, 1511:14-1512:2; *see also PX* 339 at 8-9.)[41] I found Grossman to be one of the more incredible witnesses I have encountered.

- In his written testimony, Weissmandl testified that "there is no 'slating' organization within the Orthodox and Hasidic Jewish communities in the District that recruits, vets or endorses candidates." (DX 176 ¶ 16.) Later, when confronted with evidence that he texted the private school group chat saying that he "personally got the blessing for [their] slate" for the past three years through the son of an influential Rabbi, (Tr. at 1073:1-4), he testified unconvincingly that he did not know what he was talking about, that he may have been talking about some slate other than the school board slate, and that he never went to get support from any Rabbi for Board elections, (*id.* at 1073:8-1074:25). When asked at trial whether he went with Horowitz to get the "blessing" that he had mentioned in the group chat, he answered "I guess." (*Id.* at 1076:7-19.) Another chat shows that Weissmandl told Grossman to connect an interested Board candidate with Horowitz, (PX 75_0035), and when asked at trial whether that Horowitz was Hersh Horowitz, he said "[p]robably" and "I know many Horowitzes, but I would assume in this context it's ..." before answering "I think so," (Tr. at 1077:20-1078:11). In 2016, Weissmandl forwarded an email regarding filling a Board vacancy only to the white Board members with the note, "Please respond ASAP as we discussed[. O]ne choice." (PX 73_0001.) The candidate ultimately chosen to fill the vacancy

was Joe Chajmovicz, a white person with no relevant experience for the position whose application was riddled with spelling and grammatical errors. (*See* PX 167 (Chajmovicz statement); Tr. at 1853:16-1856:6 (Charles).) Weissmandl testified that he did not know what "one choice" meant, did not ***397** remember the discussion, and "might have been referring to anything." (Tr. at 1125:7-15.) He said that he did not know whether he ever spoke to the white Board members about filling the vacancy with Chajmovicz. (*Id.* at 1126:7-10.) Weissmandl also testified that he did not recall soliciting suggestions for Board candidates in 2018, (*id.* at 1079:21-1080:12), but then later admitted to doing so, (*id.* at 1081:8-14). Plaintiffs impeached him twice with his prior sworn deposition testimony. (*See id.* at 1056:10-1057:19, 1107:14-1108:14, *see also* PX 339 at 4-6.) In sum, Weissmandl's claimed lack of memory on critical topics such as slating and Board appointments was utterly unconvincing.

- Former Board member Aron Wieder submitted written testimony that he was not aware of any recognized slating organization in the Orthodox and Hasidic communities, (DX 172 ¶ 25), but then testified that a group of people in the Orthodox and Hasidic community select people to run for the Board, he was asked to run for the Board in 2007 by Yakov Horowitz (a leader in the Orthodox community), and community leaders selected him as the candidate to endorse, (Tr. at 1155:6-11, 1162:8-14, 1167:15-20). His written testimony said that endorsement was not a guarantee of electoral success, (DX 172 ¶ 26), but he then testified at trial that Orthodox and Hasidic Jewish voters usually supported candidates based on community leaders' endorsement, (Tr. at 1173:6-12).

- Former Board member Yonah Rothman also submitted written testimony that "there is no 'slating' organization within the Orthodox and Hasidic Jewish communities," (DX 177 ¶ 122), but his other testimony raises the opposite inference. A private school advocate named Shimmy Walfish asked Rothman to run for the Board in 2012. (*Id.* ¶ 12.) He told Walfish that he did not have time to campaign, (*id.* ¶ 17), and Walfish told him not to worry because he would "talk to people who help organize signatures," (Tr. at 1386:6-22). Thereafter, he was introduced to Wieder, Oshry, and Glick. (*Id.* at 1387:13-25.) Rothman then denied knowing the first thing about how he was elected. In 2012 he ran on a slate with two other candidates, (*id.* at 1388:8-19), but said he did not meet them until after the election, did not collect any signatures for his petition or submit it, did not know who did, could not explain how lawn signs bearing the three candidates' names appeared in the community, and did not know how he came to run for a particular seat against JoAnne Thompson, a black woman. (*Id.* at 1381:21-1383:12, 1383:19-1384:8, 1384:12-1385:10, 1388:1-4.) Rothman testified that in 2015, Wieder either took care of Rothman's nominating petition or spoke to someone who did and, as in 2012, Rothman did nothing to get elected and knew virtually nothing about how he got elected. (*Id.* at 1391:1-1392:20, 1393:3-5.)

- Charles denied running on a private school slate, (DX 251 ¶ 26), yet admitted that "when it comes to running for the school board ... you're either working with the white community or you're working with the other community," (Tr. at 1849:1-4). His written testimony states that, although he and the other candidates on his slate met with "members of the Orthodox and Hasidic community," ***398** he was not aware of any slating organization, and that he was not "vetted" by leaders, and did not need the approval of a local Rabbi to become part of the private school slate. (DX 251 ¶¶ 22, 27.) Then, at trial, he admitted that he asked the Rabbi for his approval to add two people to the slate, and the Rabbi "indicated that he would like to vet [them] like he did me." (Tr. at 1819:4-1820:13.)

- Germain, another black former Board member, also contradicted himself with respect to whether he received or needed the approval of private school leaders to win an election. (DX 175 ¶¶ 18-19; Tr. at 1242:3-4, 1243:1-11.) He swore that no one told him he needed approval to run, and that he sought out Orthodox and Hasidic leaders only to receive support, yet he admitted that he had to meet with Rabbis and receive their approval before formally joining the slate with Charles. (Tr. at 1243:1-6.) He averred that he did not know what the South East Ramapo Taxpayers Association ("SERTA") is or what it might have done to support his candidacy, (DX 175 ¶ 21), but then spoke about its activities and admitted that the organization made the only contribution to his "campaign," (Tr. at 1248:17-24).

The Court will not attempt to apportion fault between the witnesses and Defendant's counsel for the extent to which the witnesses' affidavits – especially Charles's and Germain's – were contradicted by their live testimony, but regardless of who is to blame, their testimony overall was so rife with dissembling that it offered scant, if any, value.

49. The argument that private school candidates were elected because of their policy platforms is also unavailing because it is unrefuted that those candidates did not advocate policies, campaign, or spend money. (*See id.* at 1381:12-1385:10 (Rothman did not do "anything" to get elected); *id.* at 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich did not campaign); *id.* at 1835:3-16 (Charles did not spend any of his own money on campaign); *id.* at 384:18-23 (no campaign expenditures filed by winning candidates for 2015, 216, or 2017 elections).)[42] The Rabbis who slated private school candidates did not ask about their policies. (*See id.* at 2578:3-23; 2587:20-2588:12 (Charles-Pierre); *id.* at 1787:20-1788:10 (Charles); DX 175 ¶ 16 (Germain).) Although some witnesses testified that voters in the private school community wanted lower taxes, (Tr. at 725:5-8, 1012:19-1013:14), there is little evidence that the private school candidates ran on any particular platforms. As for the policies of minority-preferred candidates, no minority-preferred candidate ran on a platform that promoted raising taxes or reducing services to private schools, although two (Young-Mercer and Dos Reis) supported a budget that would have affected taxes. (*See* PX 343 ¶ 12 (Young-Mercer); Tr. at 1889:12-1890:14, 1891:22-1892:6 (same); PX 279 ¶¶ 32, 37, 39-41 (Dos Reis); Tr. at 661:2-662:8 (same); PX 283 ¶ 52 (Fields); Tr. at 861:19-862:3, 944:20-946:1 (same); PX 281 ¶¶ 32-36 (Goodwin); PX 286 ¶ 9 (Price); Tr. at 1208:3-11, 1211:15-22 (same); DX 253 ¶¶ 3-4, 7 (Charles-Pierre).) Nevertheless, minority-preferred candidates – who did campaign – did not do much campaigning in white neighborhoods because they knew such efforts would be fruitless or they felt unwelcome there. (*See* PX 283 ***399** ¶ 60 (Fields); PX 281 ¶ 54 (Goodwin); Tr. at 801:3-14, 812:5-11 (same); *id.* at 1174:6-8 (Wieder admitting that he told Mr. Goodwin, a black man, "that the best use of his time was to campaign in his own community").) One candidate, Jean Fields, who is black, explained that sometime in the 1990s a group of white men in New Square stopped and surrounded her car and told her, "[Y]ou don't belong here, you need to leave," which is why she did not feel comfortable campaigning in white neighborhoods. (Tr. at 950:12-951:8.)

[20] 50. The District contends that "[t]he consistent success of minority candidates, with the unvaried support from the majority of White voters, conclusively demonstrates that ... if there is polarization in District elections, it must be driven by policy or political differences – not by racial animus." (Doc. 555 ¶ 137.) But this theory is unavailing for several reasons.

- First, the District cites *Goosby* as providing that "where 'it could be said that white voters [have] supported minority candidates ... at levels equal to or greater than those of white candidates, it [is] proper to conclude in that case "that divergent voting patterns among white and minority voters are best explained" ' by factors other than race, such as partisanship or policy preferences." (Doc. 555 ¶ 132 (alterations in original) quoting *Goosby*, 180 F.3d at 496 (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements (LULAC)*, 999 F.2d 831, 861 (5th Cir. 1993))). But this quotation, as presented by Defendant, is misleading. It substitutes an ellipsis for the phrase "elected by their parties." *Goosby*, 180 F.3d at 496. *LULAC* dealt with partisan elections in which minority candidates were nominated by both sides. *See* 999 F.2d at 861. *Goosby* explained that *LULAC* did not control because there, "white voters, both Democrat and Republican, supported minority candidates elected by their parties," so party affiliation best explained divergent voting patterns among white and minority voters. *Goosby*, 180 F.3d at 496. *Goosby*, too, involved partisan elections, where Republicans were overwhelmingly white and won elections and Democrats were overwhelmingly black and lost elections, and black voters had no access to the Republican party's slating process. *See id.* at 482, 496-97. Accordingly, black Republicans were "unable to advance their preferred candidates as nominees." *Id.* at 497. *LULAC* does not control here because these are not partisan elections, and because (as discussed below) minority voters have no access to the slating process of the overwhelmingly white private school community that wins elections. *Goosby* is also not controlling for same reasons, but this case is more like *Goosby* than *LULAC* because the white community's tight control of the slating process of the dominant bloc prevents black and Latino voters from electing their preferred candidates.

- Next, the District argues *that Reed v. Town of Babylon*, 914 F. Supp. 843 (E.D.N.Y. 1996), compels its conclusion. But that case is readily distinguishable. First, here, the public and private school communities are proxies for race, which was found not to be the case in *Reed*. *See* 914 F. Supp. at 883. Second, *Reed was* decided before *Goosby* separated the *Gingles* preconditions analysis from the Senate Factor analysis, and the point Defendant cites is now analyzed as ***400** part of the third *Gingles* precondition.

- Further, as discussed below in connection with Senate Factors 4 and 7, it is proper to explore whether white support for minority candidates can be explained as "manipulating the election of a 'safe' minority candidate," *Gingles*, 478 U.S. at 75, 106 S.Ct. 2752, or by other special circumstances, *Pope*, 94 F. Supp. 3d at 345-46. The issue is not simply whether a candidate is a member of a minority community, but whether the candidate is minority preferred. *Cf. Goosby*, 956 F. Supp. at 340-41, 344 (black appointee "safe" where, among other things, he was appointed over local black interest group's recommended appointee). If, as here, a successful minority candidate is not minority preferred, that is evidence of racial polarization, not the lack thereof.

Accordingly, the success of minority candidates does not prove that elections were policy driven for purposes of this factor.

51. To the extent it is fair to infer that parents who send their children to private schools (and other like-minded individuals) want lower taxes, and parents who send their children to public schools (and other like-minded individuals) want more spending on public education, that inference is not enough to tilt this factor in favor of Defendant in light of the high racial polarization in voting, the paucity of evidence of policy-driven campaigns, and the identity between race and politics in this community. Cases crediting a "better explanation" defense tend to look to something structural, like party affiliation or a superior ground organization. *See, e.g.*, *Uno*, 72 F.3d at 983 & n.4 (defendant must prove "detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system," such as "organizational disarray [and] want of campaign experience"); *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 216-17 (E.D.N.Y. 2019) (party affiliation predicted outcomes better than race did). Nothing comparable is present here. This is not to say that the white bloc voters harbor conscious racial animus. But if we assume that the white "private school community" votes as it does to reduce taxes, it would deny reality to pretend that its members were unaware that the students to be negatively affected by their votes are overwhelmingly children of color. Where that is the case; where it is difficult, if not impossible, to disentangle race from school affiliation; and where the evidence supporting the District's race-neutral explanation for divergent voting patterns is weak, Defendant's attempt to show that policy preferences best explain divergent voting patterns is, on balance, not sufficient to undermine Plaintiffs' strong showing of racial polarization, and thus Senate Factor 2 favors Plaintiffs.[43]

C. Senate Factor 3

52. Senate Factor 3 examines "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority ***401** group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting." *Gingles*, 478 U.S. at 37, 45, 106 S.Ct. 2752.[44] "Where members of a racial minority group vote as a cohesive unit, ... at-large electoral systems can reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice." *Shaw v. Reno*, 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (internal quotation marks omitted). In districts where candidates run for specific seats (that is, numbered posts), dilution is enhanced because that practice "prevents a cohesive political group from concentrating [all of their votes] on a single candidate." *Montes*, 40 F. Supp. 3d at 1411. Other dilutive practices include few, inconveniently located polling places with limited hours, *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1222-23 (S.D. Tex. 1997), *aff'd*, 165 F.3d 368 (5th Cir. 1999), and staggered elections and off-cycle voting, *United States v. Village of Port Chester*, No. 06-CV-15173, 2008 WL 190502, at *28 (S.D.N.Y. Jan. 17, 2008).

53. The District holds at-large, staggered, off-cycle elections with numbered posts, all of which have the effect of diluting minority votes. (PX 242A ¶¶ 20-35; Tr. at 364:12-20, 366:6-367:19, 369:25-371:14.) The numbered posts and one-vote-per-seat requirement prevent minorities from casting all of their votes for one candidate. (PX 242A ¶¶ 32-33; Tr. at 369:25-371:1.) As to off-cycle elections, Dr. Barreto explained that awareness and information is lower, (Tr. at 366:19-21 ("[T]here's just less awareness and information surrounding 'election day,' which is very high in November of even-numbered years.")), and voters who feel disenfranchised tend to stay home during off-cycle elections, so minority turnout is even lower in District elections, (PX 242A ¶¶ 25-28; Tr. at 366:6-368:19).

54. State and federal elections have twenty-four polling places, but the District uses only thirteen for the same geographic area, which increases confusion and enhances discrimination. (PX 242A ¶ 29; Tr. at 368:20-369:24.)[45] The District has also failed to produce critical voting and election materials in a language other than English, although 37% of

the District's public school students are English Language Learners and 53.6% of Latinos and 21.9% of blacks in the District speak English "less than very well." (JPTO at 4-5; PX 244A ¶ 51; Tr. at 371:2-372:18.) The District admitted that it has failed to make many of its election materials – including ballots, ballot applications, absentee ballots, information on voter registration, nominating petitions, and information on polling locations – available in the primary languages of many of the District's black ***402** and Latino voters, such as Creole or Spanish. (PX 257 at 22:2-24, 41:18-20; 42:20-43:3, 105:16-25, 106:11-22, 148:17-149:4, 150:12-151:10, 152:14-153:4; PX 243 ¶¶ 49-51; PX 288 ¶ 34; Tr. at 1266:7-19.)

55. Defendant argues that any election-practice issues that might exist were not intentional. (*See, e.g.*, Doc. 555 ¶ 163 (at-large system required by state law); *id.* ¶ 172 (District uses fewer polling places because of lack of staffing); *id.* ¶¶ 173-174 (new polling places selected by committee that did not consider race, and preferred plan could not be implemented because fire department would not allow use of its building).) But the third Senate Factor does not examine intent; rather, it asks whether the subdivision has used election practices "that tend to enhance the opportunity for discrimination." *Gingles*, 478 U.S. at 37, 45, 106 S.Ct. 2752. Here, Plaintiffs have offered ample evidence showing that the District employs such practices. Thus, Senate Factor 3 weighs in favor of Plaintiffs.

D. Senate Factor 4

[21] [22] [23] [24] [25] 56. Under Senate Factor 4 courts ask, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (internal quotation marks omitted).[46] "[A] system that provides only a theoretical avenue for minority ... candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate ... contribute[s] to a violation of Section 2 of the Voting Rights Act." *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 444-45 (S.D.N.Y. 2010). Slating organizations can be formal or informal. *See Westwego Citizens for Better Gov't*, 946 F.2d at 1116 & n.5; *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984), *United States v. City of Euclid*, 580 F. Supp. 2d 584, 608 (N.D. Ohio 2008). Where minority voters do not "have any choice in determining what issues or candidates should or should not be endorsed" by the slating organization, the slating process is racially exclusive. *See Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1123 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987). The process is not made inclusive by the selection and election of a few minority candidates who may not be "true representatives of the minority population." *Velasquez v. Abilene*, 725 F.2d 1017, 1022-23 (5th Cir. 1984); *see Goosby*, 180 F.3d at 496-97; *McNeil v. Springfield*, 658 F. Supp. 1015, 1031 (C.D. Ill. 1987), *appeal dismissed sub nom. In re City of Springfield*, 818 F.2d 565 (7th Cir. 1987). Thus, the question is not simply whether minority candidates get on the ballot, but whether minorities have any "substantial input into the slating process." *Harper v. City of Chicago Heights*, No. 87-CV-5112, 1997 WL 102543, at *9 (N.D. Ill. Mar. 5, 1997).

57. Influential members of the white, private school community in the District participate in a slating process by which they select, endorse, promote, and secure the election of their preferred candidates, and minorities have no input into this process. (Tr. at 372:19-374:5; *see* PX 242A ¶ 37.)[47] There is abundant evidence of this ***403** slating process. Witnesses for both sides testified that an informal organization slates the white community's candidates. Wieder admitted that "there is a group of people in the Orthodox and Hasidic community who select people to run for School Board." (Tr. at 1155:6-9.) Freilich admitted that Grossman connected him with Glick and Oshry, who were "looking for somebody to run." (*Id.* at 706:23-708:8.) Weissmandl explained that the signatures on his required nominating petition were collected by Rabbi Rosenfeld, who was his "go-to guy" for election assistance, that Weber supported his election (discussed further below), and that he never raised or spent any money in an effort to get elected. (*Id.* at 1035:4-25, 1067:12-1068:18.)[48] Rothman testified to a similar lack of campaigning and to getting approval to run from Oshry and Glick. (*Id.* at 1381:12-1382:19, 1383:10-1388:4.) As noted earlier, Weissmandl testified unconvincingly, to be charitable, that he did not remember what he was talking about when he texted a private school group chat saying, "I personally got the blessing for our slate every year last three years through the son [of an influential Rabbi]." (*Id.* at 1072:9-1076:19.) Grossman also did not collect signatures or spend any money, and ran on a slate with Weissmandl. (*Id.* at 1420:8-1424:4.) Charles, who is black, was connected to Rabbi Rosenfeld through a friend, met with Rosenfeld twice, and said that Rosenfeld told him that Charles's proposed running mates would have to be interviewed and vetted to "see if [Rosenfeld would] accept them as part of what [he] wanted to do." (*Id.* at 1787:2-1789:16, 1819:4-1820:13.) Charles testified that he

met with other Orthodox people, but could not remember their names, and that Weber spent money on his campaign and distributed lawn signs and posters. (*Id.* at 1790:7-1792:10.) He also admitted that "leaders in the Orthodox and Hasidic community could replace [him] in an election if they wanted to." (*Id.* at 1816:25-1817:3.) Germain, who is also black, testified that he had to meet with and get the approval of six Rabbis before he could formally become Charles's running mate. (*Id.* at 1241:5-1243:11.)

58. The slating organization made no open calls for candidates, and only people with some kind of connection to the organization were introduced, vetted, and selected. Horowitz admitted that he was not aware of any public notices welcoming candidates to meet religious leaders in open forums, and that he never introduced a public school candidate to Orthodox leaders. (*Id.* at 1025:23-1026:7.) Charles admitted that "when it comes to running for the school board ... you're either working with [the] white community or you're working with the other community." (*Id.* at 1849:1-4.) Young-Mercer, who is black, testified that the Orthodox and Hasidic voters let her win in 2007. (*Id.* at 1894:19-21.) Candidates of color who lost their elections were never approached by anyone connected to the slating organization. (PX 279 ¶ 60 (Dos Reis); PX 281 ¶ 55 (Goodwin).)

59. The roles of the leaders of the slating organization are as follows.

***404** • Rabbi Oshry selects and approves candidates, controls access to the slating process, and submits petitions on behalf of candidates. He testified that he, Glick, Rosenfeld, Weber, and/or Horowitz selected candidates and that he met with and endorsed several white-preferred candidates; that he met with some non-Jewish people, but he could not remember their names; that he submitted nominating petitions; and that he "okayed" candidates. (Tr. at 2468:23-2469:16, 2474:3-2477:13, 2479:10-24, 2483:15-21, 2487:14-2488:16, 2493:11-2494:6, 2495:12-2497:16, 2500:18-2501:24, 2502:9-2506:18; *see* PX 88_0004 (Horowitz writes regarding the 2017 candidates: "Oshry has been busy with it, and he has 4 people for the 2 other seats. Last I spoke he hadn't decided yet."); *id.* (Grossman: "I know somebody who would like to run for one of the seats. Who should I connect him to?" Horowitz: "Give me his number and Rabbi Oshry will call him.").)[49]

• Glick helps select candidates, publicizes their candidacy, and organizes get-out-the-vote efforts. (*See* Tr. at 2503:15-2506:23 (Oshry); *id.* at 1410:6-1413:15, 1427:24-1428:6, 1430:10-1431:1, 1438:13-22, 1441:3-13, 1451:12-1454:13, 1455:6-1458:12, 1458:24-1461:4, 1464:13-21, 1466:1-1467:23, 1468:15-1470:15 (Grossman);[50] *id.* at 1736:2-10 (Russell); *id.* at 1792:2-10, 1836:13-24 (Charles); *id.* at 993:9-24, 996:17-999:2 (Horowitz).)

• Horowitz connects potential candidates to Oshry and approves candidates. (*See id.* at 1424:23-25, 1432:14-1434:2, 1436:1-19, 1437:16-1438:4, 1444:1-1447:21, 1477:8-1479:24 (Grossman); PX 339 at 8 (same).) Charles-Pierre testified that Grossman told her that Horowitz was key to her being unopposed in 2016. (Tr. at 2575:11-14 (Charles-Pierre).) During the course of this litigation, ***405** Grossman texted Horowitz, "Spoke to [Defendant's counsel] David Butler today. He asked me to convey message that it would be good for the case to have a [m]inority to run against Sabrina [Charles-Pierre] that [the] community could support. Message conveyed." (PX 88_0010; Tr. at 972:24-975:2 (Horowitz); *id.* at 1477:17-1479:24 (Grossman).)[51]

• SERTA, Weber's organization, places ads in a local magazine and works to get out the vote. (Tr. at 991:16-992:10 (Horowitz); *id.* at 1063:18-1067:11 (Weissmandl).)

60. In each contested election, the slating organization helped to secure the white-preferred candidate's election.

• In 2008, the slating organization created a phone script urging support "for our Heimishe candidates." (PX 188.)[52]

• In 2011, Rabbi Rosenfeld handled Weissmandl's nominating petitions. (Tr. at 1035:4-25 (Weissmandl).)

• In 2012, Glick and Walfish handled everything for Rothman's election including getting all signatures on his nominating petition, and Rothman did not do anything to get elected or even meet the two other candidates on his slate. (*Id.* at 1381:12-1389:5.)

• In 2013, Charles, Germain, and Maraluz Corado were supported by SERTA, Glick, and Horowitz,

(*id.* at 1010:19-24 (Horowitz); *id.* at 1243:21-1245:6, 1247:1-1249:18, 1251:25-1252:14 (Germain); *id.* at 1791:3-15, 1836:13-24 (Charles)), and vetted and approved by Rabbi Rosenfeld, (*id.* at 1782:2-1791:19, 1818:20-1819:21 (Charles); *see id.* at 1242:9-1243:11 (Germain); *id.* at 2503:16-2505:13 (Oshry)).

- In 2015, Rabbi Rosenfeld vetted Juan Pablo Ramirez, (*id.* at 1820:22-1821:17 (Charles)), and Weissmandl and Horowitz assisted. (Tr. at 1024:20-1025:11 (Horowitz); *see* PX 80 at 1532.) Rothman, who was also elected, did nothing to campaign. (Tr. at 1391:23-1393:5.)

- In 2016, Charles, Germain, and Weissmandl, were approved and endorsed by SERTA, Oshry, Horowitz, and Glick. (*Id.* at 1242:9-1243:11, 1246:11-1251:2 (Germain); *id.* at 1010:19-24 (Horowitz); *id.* at 1836:13-1838:6, 1846:4-1847:8 (Charles); *id.* at 1513:14-21 (Grossman); *see* PX 80 at 1532.) The private school slating organization arranged for Charles-Pierre to run unopposed, securing her win. (Tr. at 1395:17-1396:6 (Rothman).)[53]

- In 2017, Horowitz and Oshry endorsed Freilich at Grossman's recommendation. (*Id.* at 706:23-709:7 (Freilich); *id.* at 1432:14-1434:2, 1434:8-15, 1436:1-19 (Grossman); PX 339 at 8 (same).) Oshry, Glick, and SERTA supported his election. (***406** Tr. at 1410:6-1413:15, 1420:8-1421:22, 1427:24-1428:6, 1430:10-1431:1 (Grossman); *id.* at 994:18-995:5, 996:17-999:2 (Horowitz); *id.* at 706:23-709:7, 709:12-713:17, 720:13-724:7 (Freilich); PX 339 at 3 (same).) Freilich did nothing in support of his own candidacy beyond once announcing at a synagogue that he was running. (Tr. at 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich); PX 339 at 3 (same).)

- In 2018, Ephraim Weissmandl and Yoel Trieger were assisted by Glick, Grossman, and Oshry. (PX 74_0005; Tr. at 2487:14-2488:16.) The slating organization again arranged for Charles-Pierre to run unopposed. (*See* Tr. at 2569:10-2570:2 (Charles-Pierre).)

- In 2019, as discussed in detail at paragraph 76 below in connection with Senate Factor 7, the white slating organization engineered a minority-versus-minority race and a victory for the public school community candidate Ashley Leveille, (DX 12), along the lines of what Grossman told Horowitz would be "good for the case."[54]

61. To the extent minority candidates have been elected with the support of the white community, they have been chosen by the white slating mechanism (as described above), they are often not minority-preferred, (*see* Tables 1-2 above), or special circumstances exist, (as described below in connection with Senate Factor 7). Accordingly, their election does not undermine the Court's finding of the existence of a white slating mechanism into which minorities have no significant input. *See* *Velasquez*, 725 F.2d at 1022 n.1.

62. The witness testimony corresponds with Dr. Barreto's testimony about and the academic literature on slating. The presence of slating is indicated by a pattern of two-candidate elections as well as nearly identical vote totals in every contest, which are present here. (PX 242A ¶¶ 43-44; Tr. at 377:4-383:25.) Dr. Barreto discussed a leading article on exclusive slating organizations and testified that, as here, such organizations refuse minority participants access to the nominating process by "vesting authority in a handful of community leaders who were largely unaccountable to others in the organization" and not "maintain[ing] consistent procedures from year to year." (PX 242A ¶ 38; *see* Tr. at 374:6-375:12.) All slating groups in the seminal study described in the article included " 'some minority group members, but they were often described by minority leaders not involved in the slating process as tokens, and in some cases the minority nominees were not the choice of minority voters.' " (PX 242A ¶ 38 (quoting Chandler Davidson & Luis Ricardo Fraga, *Slating Groups as Parties in a "Nonpartisan" Setting*, 41 W. Pol. Q. 373, 382 (1988)) (PX 271)).

63. In sum, it is clear that a slating organization exists in the white, private school community and that it consistently guarantees election outcomes. The organization may not be formal or official, but it need not be. *See* *Euclid*, 580 F. Supp. 2d at 608; *Gretna*, 636 F. Supp. at 1123. There is little evidence that any private school candidates created platforms or shared their views, or that the public school candidates, who did have platforms and positions, were heard within the white community. Rather, the evidence is that blacks and Latinos did not have the opportunity to participate in the private school slating process, which was tightly controlled by a few white individuals. ***407** Further, it is irrelevant whether there is a public school slating process. Even though the public school community engages in traditional electioneering, its candidates always lose. (Tr. at 2133:21-2134:6 (White); PX 279 ¶¶ 34-57 (Dos Reis); PX 281 ¶¶ 30-50 (Goodwin); PX 283 ¶¶ 53-58 (Fields); *see* PX 242A ¶ 39.) The public school community's process

is open to the public, and candidates do not need any insider information or special access to decision makers to participate. As Dr. Barreto testified, the literature explains that frustrated communities who are "locked out" of the dominant winning slate try to form their own slates, but because they represent "a numeric minority," as here, they can never "overcome the more powerful slate" and win. (Tr. at 379:8-14.) For all these reasons, this factor favors Plaintiffs.[55]

E. Senate Factor 5

[26] 64. Senate Factor 5 considers "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). "[W]here minority group members suffer effects of prior discrimination" and "the level of minority participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation." *Village of Port Chester*, 704 F. Supp. 2d at 445 (internal quotation marks and alteration omitted). Rather, "the burden falls to Defendant to show that the cause is something else." *Id.*

65. In the District, blacks and Latinos have higher unemployment rates than whites, and a higher percentage of whites work in management or professional jobs, whereas blacks and Latinos are more likely than whites to work in service occupations. (PX 244H_0051-56.) Blacks and Latinos also trail whites in earning high school diplomas and bachelor's degrees. (Tr. at 743:25-744:17 (Cooper).)

66. By some measures, including poverty rates, median income, and *per capita* income, the data seem to show that blacks are doing better than whites. (*See* PX 244A ¶ 44.) But as Plaintiffs' demographer William Cooper explained, these figures do not accurately reflect the white community's wealth, because even if income is lower, a larger percentage of whites have opted out of the labor force, (Tr. at 750:23-751:1; PX 244H_0053), and the white population "has a lot of wealth built up into ... their homes," (Tr. at 748:21-749:1; *see id.* at 745:23-747:12), which are located in higher value areas, (*see* PX 244A ¶¶ 47-48). *See Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1073 (E.D. Mo. 2016) (noting "wealth gap" in home ownership is a key driver of disparities), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 826, 202 L.Ed.2d 579 (2019). Further, the unusually large average household size of whites in the District serves to depress household financial statistics. (PX 244A ¶ 43.) Latinos lag behind blacks and whites "across most of these same key socioeconomic measures." (*Id.* ¶ 44; *see* Tr. at 532:4-6 (Cooper).)

67. Defendant contends that blacks and Latinos in the District do better than ***408** blacks and Latinos statewide, (*see* Doc. 555 ¶¶ 201-202), which is not relevant here. This factor concerns how blacks and Latinos are doing socioeconomically compared to whites in the District. Even though blacks may be doing well by some measures, the lags they experience in education and employment are consistent with their lower (and declining) turnout rates compared with whites, (PX 242A ¶ 57 & tbl.7; *see id.* ¶¶ 58-59), and their feelings of "election futility," which is one of the strongest factors correlated with low minority voter turnout rates, (Tr. at 398:10-19 (Barreto)).[56] There is also demonstrated religious and housing segregation in the District, and those separations, along with social and economic separations, "make[ ] it especially difficult for [minority] candidates ... to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win an at-large elections." *Charleston County*, 316 F. Supp. 2d at 291. As Dr. Barreto explained, in the District, "there's ample evidence of election hindrance in the [m]inority community; that they don't have equal access to slating organizations and mobilizing groups which turn out the vote for candidates" and are thereby "hindered," which "limits their ability to participate in the political process." (Tr. at 1631:2-12.) Accordingly, Plaintiffs need not prove any further causal nexus. *See Village of Port Chester*, 704 F. Supp. 2d at 445.

68. Although both sides can point to statistics in their favor on this factor, Plaintiffs have shown that blacks and Latinos in the District lag behind whites socioeconomically, and these conditions have resulted in a depressed level of participation by the minority community in the political process. Thus, Senate Factor 5 weighs in Plaintiffs' favor, although not heavily.

F. Senate Factor 6

[27] **[28]** 69. Senate Factor 6 looks to "the use of overt or subtle racial appeals in political campaigns." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). Appeals can be racial when they operate on "heightened racial tension," *id.* at 488, or when a candidate sends campaign materials to

white constituents that suggest that an opponent is a person of color, *see Charleston County*, 316 F. Supp. 2d at 295. Racial appeals need not be permanent or pervasive. *See Euclid*, 580 F. Supp. 2d at 610.

70. Plaintiffs have offered little evidence showing the use of racial appeals in political campaigns in the District. Plaintiffs suggest that white candidates' targeted messaging to white voters constitutes a racial appeal, (*see* Doc. 556 ¶ 187 (citing Tr. at 719:6-17 (Freilich); *id.* at 1061:1-9 (Weissmandl))), but there is no evidence that this activity suggested that opponents were people of color or sought to capitalize on heightened racial tension. The only evidence of a campaign activity that comes close to a racial appeal is a Yiddish phone script given to private school volunteers that translated to "the fate of Jewish money and Jewish children is in your vote." (*See* Tr. at 1169:14-1170:8 (Wieder); PX 188.) But there is no evidence that the script was ever used, and in any event, it hardly shows that racial appeals have ***409** formed a part of campaigns. Accordingly, this factor favors Defendant.

G. Senate Factor 7

[29] **[30]** 71. Senate Factor 7 examines "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). "[T]he election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote ...." *Gingles*, 478 U.S. at 75, 106 S.Ct. 2752 (internal quotation marks omitted). "[I]f it did, the possibility exists that the majority citizens might evade § 2 by manipulating the election of a safe minority candidate." *Id.* (internal quotation marks and alteration omitted). "Safe" candidates have included a black man who, once elected as a town officer, was unresponsive to the needs of black constituents, *see Goosby*, 956 F. Supp. at 339-45, and a minority candidate who won an election having received only about 30.7% of the minority vote, *see Charleston County*, 316 F. Supp. 2d at 278-79, 279 n.14. The election of a minority candidate is also discounted where whites preferred the minority candidate, engineered the election of a minority to evade a VRA challenge, or provided unusual political support to the minority candidate or otherwise campaigned to ensure that candidate's election. *See Aldasoro*, 922 F. Supp. at 375-76. Special circumstances surrounding minority elections, such as unopposed races and appointment prior to election, likewise weigh against a finding of minority success in elections. *See Pope*, 94 F. Supp. 3d at 345-46.

72. Minority candidates have won seven out of thirty-two contested races from 2005 through 2018. (PX 242A ¶ 61.)[57] Of the eighteen of those races in which the candidates were of different races, minority candidates won three. (*Id.*) Defendant argues that these victories indicate that divergent voting is best explained by policy differences rather than vote dilution. (Doc. 555 ¶ 233.) But from 2008 to 2018, no minority-preferred candidate won a contested Board election, (PX 242A ¶ 64; *see* Table 1 above), and every candidate of color who won was either perceived as "safe" by the white slating organization or affected by special circumstances.

73. Without deciding whether any particular Board member was "safe," I find that the white slating organization was certainly looking for and supporting candidates believed to be "safe." Charles and Germain, black men who won four of the six contested elections analyzed, both admitted that they were vetted by the white slating organization, (Tr. at 1819:4-1820:3 (Charles); *id.* at 1243:1-6 (Germain)), and elected because the white community approved of their candidacy. (*see id.* at 1846:4-1847:8, 1849:1-4 (Charles's campaign materials were created and distributed by members of Orthodox and Hasidic community, with whom he was working); *id.* at 1242:9-1243:11, 1250:2-1251:2 (Germain had to meet with Orthodox and Hasidic community leaders before formally joining Charles's slate and members of that community collected signatures for his nominating petition); *id.* at 1487:20-1488:6 (Grossman referring to Charles and Germain as members of the private school slate)). They apparently had no interest in or need for campaigning in or appealing to any other community because they knew they would win by virtue of the white slating organization's support. (*See* Tr. at 1847:9-1848:15 (Charles admitting that he ***410** never attended public NAACP candidate forum and felt he had no reason to attend, and that in 2013, he chose to attend a campaign event with all white attendees); *id.* at 1814:10-1815:14 (Charles acknowledging that he won with support of Orthodox and Hasidic leaders); PX 339_0010 (Charles stating that support of the Orthodox and Hasidic community was necessary to win an election); PX 288 ¶ 37 (Trotman stating that Germain did not attend 2013 NAACP forum and attended 2016 forum only briefly), Tr. at 1254:18-21 (Germain testifying that he believed he received approximately 90 percent of his votes from the Jewish community).) And, once elected, Charles and Germain appeared to join with the white majority. For example, they did not seem to support the addition of minority Board members and appeared determined to maintain the *status quo*. (*See* Tr. at 1849:5-1851:19 (Charles did not support

appointment of Charles-Pierre, a black woman whom he perceived to be "on the opposing side," and in an email to Grossman called her the "lamb who will certainly lead to a slaughter of this board"); *id.* at 1264:18-1265:21 (Germain supported Charles-Pierre only because he believed Board could "have better control of [her]" because she is "not ... aggressive" like another candidate, whom he called "the Spanish girl"); *id.* at 1853:16-1856:6 (Charles "went along" with other Board members and voted for appointment of Joe Chajmovicz, an inexperienced white man with a poor command of written English, over a retired District principal with two master's degrees who is black); *see* PX 167-168 (Chajmovicz and Fields statements).) Members of the public school community did not support Charles and Germain, (*see* PX 280 ¶ 9 (Clerveaux); PX 279 ¶¶ 12-15 (Dos Reis); PX 283 ¶¶ 43, 62, 70 (Fields); PX 281 ¶¶ 9-10, 12-13 (Goodwin); Tr. at 2565:14-23, 2567:21-24, 2598:4-7 (Charles-Pierre); *id.* at 1858:12-14 (Charles describing calls for his resignation); *id.* at 1260:25-1261:14 (Germain describing protest in front of his house that resulted in another Board member's resignation)), and some were of the view that Charles and Germain were identified with the private school community, (*see* Tr. at 841:10-25, 842:8-19 (Miller); *id.* at 1927:24-1928:10 (Cohen)). On this evidence, I need not reach a conclusion about whether Charles or Germain were "safe" candidates to conclude that the white slating organization believed that they would go along with the white community's wishes.

74. Other successful minority candidates won under unusual circumstances. Corado and Ramirez won with the support of the white community in 2013 and 2015, respectively, (PX 242A ¶¶ 8-9, 14; *see* Table 1 above), and resigned from the Board shortly thereafter, (Tr. at 1252:5-7, 1261:2-6 (Germain); *id.* at 1113:17-23 (Weissmandl)), leaving the Board to appoint Grossman and Charles-Pierre, (*see id.* at 1110:11-1111:1, 1115:7-9 (Weissmandl); PX 172). Charles and Germain were incumbent in three races, which gives an electoral advantage. (PX 242A ¶ 62.) Young-Mercer and Thompson were unopposed incumbents, but Thompson lost to Rothman the next year and Young-Mercer resigned in frustration and because she was confident she would not be re-elected. (*See* PX 234; PX 242A at 34-35; Tr. at 1876:2-1877:12, 1880:14-1881:15 (Young-Mercer).)

75. Charles-Pierre was initially appointed to the Board in 2015 as a result of pressure on the Board from the state-imposed monitor to appoint a public school parent. (*See* PX 81_0047 (Grossman told Charles-Pierre that Weissmandl said, "The only reason [Charles-Pierre] is there and ran unopposed is because the board wants to do what [the state-appointed monitor] said," which was to "[h]ave at least one [public] school parent."); ***411** Tr. at 2576:14-2577:2 (same); PX 156_0014-15 (monitor report recommending that all candidates for at least one Board seat must be parents of public school students and selected by other public school parents).) She ran unopposed and won in 2016 because she had the imprimatur of the white slating organization. (*See* PX 81 at 16-18; Tr. at 1009:9-1010:15, 1024:23-1025:11 (Horowitz supported Charles-Pierre in 2016 "[i]f it's the year she won"); *id.* at 2565:17-2566:23 (Charles-Pierre campaigned with other public school candidates who "worked just as hard" as she did but lost, while she won because she met with slating organization and got the majority of the white vote); *id.* at 2567:11-16 (Grossman told Charles-Pierre that he and Weissmandl convinced Horowitz that they would support Charles-Pierre and she would run unopposed).) After she won, Grossman repeatedly reminded her that her continued presence on the Board depended on the white slating organization's support. (Tr. at 2582:22-2583:16 (Charles-Pierre); *see* PX 81_0029 (Grossman texted Charles-Pierre, "When you look at the vote totals from last night, you know you are on the board because the Jewish community trusted me and Yehuda [Weissmandl] not to run another candidate."); *id.* at _0035 (Grossman texted Charles-Pierre, "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3 .... Orthodox community could just have voted you out in May. WE told them that you were good and not to run a candidate."); *id.* at _0040 (similar statements from Grossman to Charles-Pierre).) She believed that she was kept out of important discussions and that the Board tried to placate the monitor without giving her any real power or clout. (Tr. at 2595:17-23, 2639:14-2640:9 (Board members said they believed they could control Charles-Pierre and that she had "zero control or influence on direction"); *id.* at 2626:25-2527:7 (Charles-Pierre believed Board members were making her look "stupid" and "keeping [her] in the dark").) Indeed, Board members limited certain discussions to white members only, including discussions on important matters such as the settlement of this litigation, (*see* Doc. 533), and the appointment of a new Board member, (*see* Tr. at 1530:24-1533:24 (Grossman testifying that Weissmandl forwarded resumes of Board candidates to white Board members with message, "Please respond ASAP as we discussed. One choice.")).[58]

76. Further, Leveille's election in 2019 appears to have been engineered by the white slating organization, as mentioned above, after Defendant's counsel had suggested the previous year that "it would be good for the case to have a minority to run against Sabrina [Charles-Pierre] that the community could support." (Tr. at 2648:22-2649:6 (Charles-Pierre); PX 88_0010.) In 2019, Pastor Joselito Cintron, who is Latino, ran for a seat to be vacated by Weissmandl, who is white. (Tr. at 1772:8-11, 1773:9-21 (Leveille); *id.* at 2590:8-12 (Charles-Pierre).) Cintron agreed to run on a ticket with Leveille and Goodwin, both of whom are black and public school advocates. (*See id.* at 792:21-24 (Goodwin); ***412** *id.* at 1773:17-20 (Leveille); PX 281 ¶¶ 3, 20, 23 (Goodwin).) Leveille was running for a different vacant seat. (*Id.* at 1773:21-1774:1.) Then, abruptly, Weissmandl apparently decided to run after all, and Cintron, rather than opposing him, chose to run for the same seat as his former ticket-mate Leveille, leaving Weissmandl rather than Leveille to run unopposed. (*Id.* at 1774:17-19 (Leveille); *id.* at 2592:9-12 (Charles-Pierre).) Because Cintron was now running for a different seat, he needed a new nominating petition. All the signatures for that petition were collected on a single day – the day petitions were due – and were collected almost exclusively from voters residing in the white areas of the District, showing that the white slating organization wanted the switch. (PX 314; PX 330; PX 341; Tr. at 1748:10-1750:10 (Russell); *see id.* at 1515:21-1516:16, 1517:6-12 (Grossman).) Cintron told Leveille that "they" were giving him the seat if he ran against her and that "the rabbis" said that that was the only way he could win.[59] (Tr. at 1775:19-1776:18 (Leveille).) On election day, to her surprise, Leveille unexpectedly defeated Cintron. (*Id.* at 1779:15-1780:2 (Leveille).) Turnout was inordinately low at the polling places in the white areas of the District, (*see id.* at 1742:19-1743:1 (Russell); DX 252 ¶ 62(1); DX 12), suggesting that the white slating organization had pulled its support from Cintron and engineered the victory of a candidate favored by the public school community over another minority candidate. Grossman had discussed with an activist named Rivke Feiner that it would be desirable to have two minority candidates running against one another. (Tr. at 1520:18-21 (Grossman).) This engineering of Leveille's win, complete with double-cross by and then of Cintron, shows not only the power of the white slating organization, but also that Leveille's victory was (without any participation on her part) at least a "special circumstance," if not a naked attempt to manipulate the outcome of this case.

77. Even before Leveille's engineered victory, the white slating organization was cognizant of appearances and aware that the white, private school community would be better off if it included minority candidates on the slate, whether to placate the monitor or the minority voters of the District. This awareness is supported by the white slating organization's selection and endorsement of Charles and Germain, who they believed would not stand in the way of what they wanted. Thus, the mere fact that there were some minority candidates, a few of whom were elected, does not carry a lot of weight in light of the evidence that victories were arranged for appearance's sake and/or occurred in unusual circumstances, especially considering how few people of color were ultimately elected. Senate Factor 7 therefore weighs in Plaintiffs' favor.

***413 H. Additional Factor 8**

[31] 78. In some cases, "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group" has probative value. *Goosby*, 180 F.3d at 491-92 (internal quotation marks omitted). Unresponsiveness includes failure to respond to complaints of racial discrimination, *Goosby*, 956 F. Supp. at 346; failure to identify concerns of the minority community, *see McDaniels v. Mehfoud*, 702 F. Supp. 588, 595-96 (E.D. Va. 1988), *denying amendment*, 708 F. Supp. 754 (E.D. Va. 1989), *appeal dismissed*, 927 F.2d 596 (4th Cir. 1991); scarcity of outreach sessions in the minority community, *Conn. Citizen Action Grp. v. Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *12-13 (D. Conn. Sept. 27, 1984); failure to respond to unequal school resources and disparate discipline and educational opportunities, *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1073; and failure to provide bilingual translations of official forms, *Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *13.

79. Defendants can introduce evidence of responsiveness, but overall the Second Circuit pursues the responsiveness/unresponsiveness "inquiry with some reluctance, as it entails ... deciphering what policy steps qualify as responses to the needs of members of the minority community," and is therefore less objective than other factors. *See Niagara Falls*, 65 F.3d at 1023 n.24 (internal quotation marks omitted). Accordingly, I do not give this factor as much weight as I give other factors. *See Village of Port Chester*, 704 F. Supp. 2d at 446.

80. Plaintiffs have put forth ample evidence of the Board's lack of responsiveness to particularized needs of the black

and Latino communities since 2008. The Board has ignored concerns and numerous requests from the NAACP and others in the public school community. (*See* PX 342 ¶¶ 18-19 (Cohen); PX 288 ¶¶ 12-14, 16-18, 25, 36 (Trotman); PX 228 (letter from NAACP); PX 40 (same); Tr. at 2665:22-2266:7 (Charles-Pierre); PX 279 ¶¶ 21-24 (Dos Reis).) One former public school student of color – an impressive and thoughtful young woman – testified that when she approached the Board as a student, she was ignored or accused of lying. (PX 278 ¶¶ 21-28 (Castor); Tr. at 590:11-24 (same).) In an apparent effort to prevent public school parents' voices from being heard, the Board for a time moved the public comment period to the end of its meetings, and often held such long executive sessions beforehand that public comments began after 10 or 11 p.m., when most members of the public had already had to leave. (PX 152 at 35; PX 342 ¶ 13 (Cohen); PX 283 ¶ 44 (Fields); PX 286 ¶ 30 (Price).) At times, Board members left the room to destroy a quorum and delay public comment, (PX 286 ¶ 31 (Price)), or became obviously absorbed in their phones or in side conversations while public school advocates were speaking, (Tr. at 590:17-22 (Castor); *id.* at 786:20-787:9 (Goodwin); *id.* at 820:14-16 (Miller)). Some were so disengaged while public school advocates were expressing concerns that "[i]t looked like they were sleeping." (*Id.* at 820:16-18 (Miller).) The Board also enacted a rule prohibiting its members from responding when community members voiced concerns during Board meetings. (*See id.* at 734:25-735:9 (Freilich).) Together, these policies stifled public school advocates' ability to articulate concerns and enabled Board members to not respond.

81. In one incident, former District Superintendent Joel Klein was discussing an influx of older students who had little education in their native Latin American countries. He said that "we know every[ ]one of these kids are dropping out" and that, to avoid having them skew the graduation ***414** rate, the District would set up an "alternate transitional program" for students who, he said, "want to learn the language, they want free lunch, breakfast and whatever else they can get." (DX 171 at 2:9-3:15; DX 180.) The state monitors characterized these remarks as a "failure to understand the background and needs of [the District's English Language Learner] community," (PX 217 at 9-10); one of Plaintiffs' witnesses called them "disgusting," (Tr. at 1337:11-1338:3); and Plaintiffs call them "racially insensitive," (Doc. 556 ¶ 140). Regardless of whether Klein was merely responding to a crisis, or intentionally hostile, or somewhere in the middle, the Board's lack of response is what matters. Despite "numerous unfortunate comments" by Klein that "contributed to an ongoing distrust between the District leadership and the public school community," (DX 35 at 9), Klein remained in place for a year, (*see* DX 180 (comments made on August 20, 2014); DX 35 at 9 (Klein replaced in 2015); Tr. at 2410:21-25 (Wortham replaced Klein in November 2015)). Defendant points out that Klein was replaced by Deborah Wortham, who has overseen "remarkable and steady improvement," (Doc. 555 ¶ 247), but the Board hired her only after pressure from the state monitors to replace Klein, (DX 35 at 9), so her appointment does little to show District responsiveness. In other incidents, lawyers retained by the Board treated students and parents in a bizarrely hostile fashion but remained as Board counsel even after the public school community protested. (PX 286 ¶ 24 (Price); PX 343 ¶ 27 (Young-Mercer); PX 278 ¶ 29 (Castor); PX 140 (letter from parent who said her son was harassed); PX 283 ¶ 47 (Fields); PX at 152 at 28 (monitor presentation).)

82. Current and former Board members who support public schools felt marginalized and harassed, (*see* PX 343 ¶¶ 35-38 (Young-Mercer); PX 286 ¶ 33 (Price); Tr. at 1184:8-1186:22 (same); *id.* at 2664:5-20 (Charles-Pierre)), while white Board members acknowledged that they had all the power, (PX 342 ¶ 16 (former Board President told Cohen that the Board had "all of the power"); PX 80 at 427 (Grossman: "If private school really wanted [Ms. Charles-Pierre's] seat she would have lost the election like the rest of them."); PX 81_0050 (Grossman: "Nothing can pass without [O]rthodox support."); PX 88_0002 (Grossman: public school advocates "feel disempowered because they are"); PX 8 at 279 (Grossman: the outcome of the 2016 election "will be whatever we want it to be"); *see* Tr. at 2670:12-24 (Charles-Pierre agreeing that the "white majority" "had all the real power")). It is therefore unsurprising that the Board refused to participate in a reconciliation process with public school community leaders. (PX 342 ¶ 16 (Cohen); PX 288 ¶ 9 (Trotman).)

83. This lack of concern regarding the views of the public school community seems to have allowed for numerous Board decisions privileging private school interests and/or harmful to public education.

- From 2009 to 2014, budgets were cut dramatically, and the Board eliminated hundreds of public school teaching, staff, and administrative positions and eliminated classes and programs. (PX 152 at 30-32.) The public school buildings fell into disrepair and custodial services were reduced. (PX 279 ¶ 19 (Dos Reis); PX 278 ¶¶ 18-20 (Castor); PX 283 ¶ 36 (Fields); PX 288 ¶ 18 (Trotman).)

Students were given academically deficient schedules full of free time and filler. (PX 278 ¶¶ 15-16 (Castor); Tr. at 582:12-584:25, 638:9-24 (same); PX 3B at 2, 4.) The Board closed two public schools over minority opposition and tried to sell one of them to a ***415** yeshiva at a sweetheart price, a sale the New York State Commissioner of Education annulled. (PX 286 ¶¶ 26-27 (Price); PX 212.) Graduation rates and test scores sank. (PX 283 ¶¶ 30-35 (Fields); *see* PX 204A-I.) The Board made "no meaningful effort ... to distribute [the] pain of deep budget cuts fairly among private and public schools." (PX 152 at 33.)

- In the 2010-2011 and 2011-2012 school years, so many special education placements were improperly given to white children that the state refused to fully reimburse the District. (PX 211; PX 286 ¶ 18 (Price); PX 289.)

- The state monitor found that in 2013 the Board turned down $3.5 million in advanced lottery funds that could have been used to restore programs, but which would have required the District to form an advisory committee including parents and teachers that would direct how the money would be spent. (*Id.* at 22, 45.)

- While the public school cuts have yet to be restored in full, (PX 108 at 5-6), nonmandated private school services have increased. For example, the budget for the 2017-2018 school year included funds for five nonmandated days of private school transportation, and as a result, the Commissioner of Education did not approve the budget. (PX 170.) The Board approved six days of nonmandated private school busing for the 2019-2020 school year. (PX 262.) In November 2019, the New York State Comptroller found that, over the preceding two school years, the District paid yeshiva private contractors to bus 1,172 more students than were registered, totaling $832,584 in unsubstantiated expenses. (PX 214 at 1.)

- The Board appointed new members seemingly without concern for candidates' qualifications or lack thereof. (PX 172; PX 283 ¶¶ 65-66 (Fields); Tr. at 2666:21-2667:17 (Charles-Pierre).) It also made accommodations for Yiddish-speaking parents and students that were not made for Spanish speakers. (PX 157 at 8-9; PX 217 at 1-2.) It remains under a corrective action plan by the New York State Education Department Office of Bilingual Education and World Languages. (Tr. at 2418:19-2419:6 (Wortham).)

Accordingly, that cuts may, as Defendant suggests,[60] have been necessitated by the financial crisis or a state funding formula that is unfair to the District does not undermine the conclusion that the Board has not been responsive to the concerns of black and Latino persons.

84. Since 2015, the District has seen improvements, which are commendable, but the positions that have been restored have not been restored in full, (*see* PX 208 at 5-6), and have not kept up with a significant increase in enrollment, (*id.*). Further, all improvements have occurred under state supervision and with the help of a lot of state money. For example, the District's budgets, developed in consultation with the state monitors, must be approved by the Commissioner before being submitted to a vote in the District, (Tr. at 2404:22-2405:4 (Wortham)), and an annual $3 million grant recommended by the monitors must be spent on public schools, (PX 206_0007-08; ***416** PX 203; Tr. at 2431:23-2432:13 (Wortham); PX 207_0009-10; PX 208_0010-11). The District cannot maintain its public school program restorations without the grant money. (PX 206_0019.) There is every reason to believe that the improvements are because of the state monitors, and in spite of the machinations of some Board members. (*See, e.g.*, Tr. at 1525:23-1529:9, 1550:7-1554:8, 2675:23-2676:23 (Grossman urging petitions against Board, suggesting removal of non-Orthodox Board members, and interfering with settlement of this lawsuit).) Even Superintendent Wortham, who has overseen many of the positive changes, was hired by the Board in collaboration with the state monitors, who helped to "identify, recruit, and hire" her. (PX 156_0010.) Accordingly, the improvements to public education in the District do not show responsiveness by the Board, or change the facts above, which show a lack thereof. For these reasons, this factor favors Plaintiffs.

I. Additional Factor 9

85. Under Senate Factor 9, courts consider "whether the policy underlying the ... political subdivision's use of ... [the contested] practice or procedure is tenuous." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (internal quotation marks omitted).

86. Defendant contends that it is required to use an at-large voting system because under New York law, "[e]ach vacancy upon the board of education to be filled shall be considered a separate specific office," N.Y. Educ. Law § 2018(a), and all qualified voters are "entitled to vote at any school meeting or election for the election of school district

officers," *id.* § 2012. Defendant's interpretation is reasonable, and may even be correct, and on this record, there is no basis for concluding that the at-large elections are a cover for intentional discrimination or a desire for discriminatory effect. But although the District has a legitimate basis for running the elections the way that it does, there is evidence that the dominant Board members and the white slating organization have a desire to adhere to the current system despite its discriminatory effect and went to extraordinary lengths to preserve that system to maintain political power. The evidence shows that, in the course of this proceeding, Board members outright lied or disingenuously claimed lack of memory;[61] the Board President and others failed to provide the Board's members of color with complete or accurate information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money,[62] (*see* Tr. at 2672:10-2674:1, 2675:23-2677:1 (Charles-Pierre); Doc. 553-1 ¶ 9 (Leveille)); and one leader of the white slating organization went so far as to go into contempt of court, (*see* Doc. 530; note 49 above). The District also knew, at least as of January 30, 2020, when the Court ruled on the parties' motions *in limine*, that even if state law requires at-large elections, the ***417** Court has the power to impose a remedy if the challenged voting practice violates Section 2 and, therefore, that it would have been possible to resolve this case. Further, as discussed above, the slating organization appears to have been so desperate to maintain the at-large system that it engineered Leveille's 2019 victory for purposes of appearances after Defendant's counsel suggested it would be "good for the case" to have an additional minority candidate. (Tr. at 2648:22-2649:6 (Charles-Pierre); PX 88 at 10.) All of these machinations show that, even if the District is justified in its belief that state law requires at-large elections, some Board members had tenuous, if not illegitimate, reasons for wanting to maintain the *status quo*. Accordingly, this factor weighs in Plaintiffs' favor.

IV. FINAL CONCLUSIONS & REMEDY

87. Balancing all of the relevant factors, I find that Plaintiffs have convincingly proven their case of vote dilution. The three *Gingles* factors are met, and the Senate Factors weigh firmly in Plaintiffs' favor. The at-large system of electing the Board of Education of the East Ramapo Central School District affords black and Latino residents "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," *Gingles*, 478 U.S. at 36, 106 S.Ct. 2752 (internal quotation marks omitted), in that it "thwarts a distinctive minority vote by submerging it in larger white voting population," *Growe*, 507 U.S. at 40, 113 S.Ct. 1075. I do not address whether this result was intentional, as no such finding is required under Section 2. The case is made by showing that people of color feel the deleterious impact of the at-large scheme employed for Board elections and white people do not, such that the challenged practice "has operated to invidiously exclude blacks [and Latinos] from effective participation in political life in violation of Section 2." *Goosby*, 956 F. Supp. at 356.

[32] 88. Plaintiffs have proven that the at-large method of electing Board members in the District violates Section 2 of the VRA and that they are thus entitled to full relief. This Court enjoins the District from holding any further elections under its at-large system, including the elections currently scheduled for June 9, 2020. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 361 F. Supp. 3d 1296, 1305-06 (M.D. Ga. 2018) (enjoining election pending redistricting), *modified on other grounds*, No. 14-CV-42, 2018 WL 7366461 (M.D. Ga. June 21, 2018), *reconsideration denied*, 2018 WL 7366501 (M.D. Ga. July 23, 2018); *Arbor Hill*, 281 F. Supp. 2d at 457 (same); *cf. Reynolds v. Sims*, 377 U.S. 533, 585-86, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (court not required to enjoin imminent election where apportionment scheme found invalid, but "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"). The District shall propose a remedial plan that fully complies with the VRA within thirty days of the date of this Order. *See Goosby*, 981 F. Supp. at 755 ("Where a court has struck down a voting system, it must give the appropriate elected body an opportunity to propose a remedial plan."); *see also Pope*, 94 F. Supp. 3d at 351 (affording defendant municipality "the first opportunity to create a remedial plan"). Such a remedial plan shall divide the District into nine voting wards – one for each Board seat – and require that only those residents living in a voting ward may vote for that ward's seat. The Court will not prescribe further details at this time except to note that as many as four majority-minority wards appear to be possible, (*see* ¶ 13 above), and ***418** that a special election would appear to be necessary once the remedial plan is adopted. Plaintiffs shall respond within thirty days of the date of Defendant's proposal.[63] This Court shall retain jurisdiction to ensure that the District complies fully with the VRA and implements all steps to cure its violation. *See New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2003).

89. Finally, Plaintiffs are entitled to attorney's fees and costs, including expert fees, pursuant to 52 U.S.C. § 10310(e). *See Pope*, 94 F. Supp. 3d at 351-52. Within thirty days of the entry of this Order, Plaintiffs shall file a motion for the award of such fees and costs, unless the parties can come to an agreement on that subject. Defendant will thereafter have thirty days to respond.

* * *

This ruling may or may not change the way the schools in the District are run. But the purpose of Section 2 is not to produce any particular policy outcome. Rather, it is to ensure that every voter has equal access to the electoral process. For too long, black and Latino voters in the District have been frustrated in that most fundamental and precious endeavor. They, like their white neighbors, are entitled to have their voices heard.

SO ORDERED.

All Citations

462 F.Supp.3d 368, 382 Ed. Law Rep. 631

Footnotes

1 "PX" refers to an exhibit offered by Plaintiffs and received at trial. "DX" refers to an exhibit offered by Defendant and received at trial. "Tr." refers to the transcript of the bench trial. "JPTO" refers to the Joint Pretrial Order. (Doc. 458.) For clarity and ease of reference, some record citations include the last name of the testifying witness.

2 On November 5, 2018, Washington Sanchez voluntarily withdrew as a Plaintiff. (Doc. 195.) Plaintiff Jose Vitelio Gregorio passed away on April 30, 2020. (*See* Doc. 566.) Plaintiffs designated Plaintiff Hillary Moreau as a witness, (JPTO at 18), but she did not testify, and no information about her is in the record.

3 William S. Cooper is Plaintiffs' expert in demography and redistricting, (*see* Tr. at 498:5-10), and the author of the expert report at PX 244A through PX 244X.

4 The District provides certain services to both public and private schools including transportation, special education, and textbooks. (Tr. at 2380:21-2381:9, 2381:24-2382:19 (Wortham).) Deborah Wortham is the Superintendent of the District. (DX 173 ¶ 1.)

5 The District's citizen voting age population ("CVAP") is 61.4% white, 24.1% black, 9.1% Latino, and 4.5% Asian. (PX 244A ¶ 4; Tr. at 510:5-17 (Cooper).)

6 Dr. Matthew Barreto is Plaintiffs' political science and statistical analysis expert, (*see* Tr. at 154:5-11), and the co-author of the expert report at PX 242A and the preliminary expert report at PX 242B.

7 Defendant contends that a "non-trivial" percentage of black families in the District send their children to private schools, (*see* Doc. 555 ¶ 78 n.2), and while it is obvious that some black and Latino students attend private schools, (PX 278 ¶¶ 9-10 (Castor); Tr. at 1237:23-24 (Germain)), there is no evidence that it is more than an insignificant number, (*see* PX 372_0009 (New York State Education Department data show that 571 nonwhite students both reside and attend private schools in the District); *id.* at _0010 (no more than 813 nonwhite students reside in the District and attend private schools in New York State but outside of the District)); *id.* at _0030-31 (it is not possible to calculate the number of black and Latino students residing in the District and attending private schools outside of New York State).

8 As of January 6, 2020, Board members were Harry Grossman (President), Sabrina Charles-Pierre (Vice-President), Mark Berkowitz, Bernard L. Charles Jr., Joel Freilich, Ashley Leveille, Yoel T. Trieger, Ephraim Weissmandl, and Yehuda Weissmandl. (JPTO at 6.) On February 6, 2020, Charles resigned from the Board after pleading guilty to a misdemeanor in state court. (Tr. at 1783:21-1784:22.) Thereafter, Carole Anderson was appointed on an interim basis until the next election, currently scheduled for June 9, 2020. (*See* Doc. 567; *Board Members*, E. Ramapo Cent. Sch. District, https://www.ercsd.org/Page/90 (last visited May 25, 2020).)

9 In an at-large system, all voters vote in all contests. In a ward system, also called a single-member district system, political subdivisions are divided into "compact, contiguous and essentially equipopulous" geographical areas, commonly referred to as wards. *See Goosby v. Town Bd.*, 981 F. Supp. 751, 757 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999). Under

a single-member district system, candidates run for a seat associated with a particular ward, and only residents of that ward vote in that contest. *See, e.g.*, N.Y. Town Law § 85.

10 A summary of Mr. Cooper's redistricting experience is available at PX 244C. Although his testimony may have been shaky on unrelated matters such as the location of private schools attended by District residents and the number of students of color attending private schools, (*see* Tr. at 555:2-15, 561:1-17), his testimony and conclusions regarding redistricting – upon which he is eminently qualified to opine – were convincing and essentially unchallenged by Defendant.

11 Rather, Defendant contends that Plaintiffs may not assert a VRA claim on behalf of a combined minority group because such a group would be a political rather than racial coalition. (*See* Doc. 555 ¶ 24 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) ("[A]ny construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined.")).) But Defendant's argument is disingenuous because in *Hall*, plaintiff sought to combine black and white voters to show vote dilution. *See* 385 F.3d at 424-25. The Fourth Circuit held that black and white voters combined would form a political coalition, not a minority group. *Id.* at 431. *Hall* does not stand for the proposition that minority groups cannot be combined. To the contrary, courts "recognize the permissibility of coalition claims under § 2, as long as plaintiffs are able to demonstrate the political cohesiveness of the coalition." *Ga. State Conference of the NAACP v. Gwinnett Cty. Bd. of Registrations & Elections*, No. 16-CV-2852, 2017 WL 4250535, at *1 (N.D. Ga. May 12, 2017) (collecting cases); *see Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir.), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

12 I need not reach whether the District's Latino voters alone are sufficiently large and geographically compact to constitute a majority, (*see* Doc. 555 ¶¶ 22-23), because I conclude that they vote cohesively with black voters.

13 All references to PX 242B are to the page numbers stamped at the top-center of each page.

14 I refer to Dr. Barreto alone throughout because he provided live expert testimony in this case, but Drs. Barreto and Collingwood "work[ed] together on all of the reports and analyses," with Dr. Collingwood serving as lead programmer. (Tr. at 164:23-165:13.)

15 "Generally speaking, both methods take ecological data in the aggregate – such as precinct vote totals – and use Bayesian statistical methods to find voting patterns by regressing candidate choice against racial demographics within the aggregate precinct." (PX 242B at 11.)

16 For every surname that occurs at least 1,000 times, demographers at the Census Bureau have created a race probability estimate based on census respondents' self-reported race. (Tr. at 168:16-24.)

17 The Census Bureau collects data at various geographic levels, the smallest being a "block," which is about one city block in size, and the next smallest being a "block group," which is a collection of several blocks. (PX 244 ¶¶ 3-4, 29.) That data can then be aggregated to the precinct (or polling place) level. (*See* Tr. at 2200:16-21.)

18 In 2016, Imai and Khanna published an article in the leading political science statistics and methods journal proposing the use of surname and geocoding analysis to estimate voter preference and turnout. (PX 269; *see* Tr. at 190:3-8.) They validated their statistical package WRU by comparing its results to the self-reported race of 9 million Florida voters. (PX 269 at 267.) They concluded that BISG "enables academic researchers and litigators to conduct more reliable ecological inference in states where registered voters are not asked to report their race." (*Id.* at 271.)

19 Dr. Barreto did not purport to have expertise on how the equation underlying Imai and Khanna's software package functions, and it appears he may not have fully understood it, (*see* Tr. at 1597:11-1607:20 (Barreto); *id.* at 2227:15-2228:21 (Alford)), but he used the software as published by Imai and Khanna without alteration, (*id.* at 1598:3, 1598:25-1599:1, 1599:20-22, 1600:7-9, 2727:23-2728:6), and his understanding of the results produced is manifest, (*see, e.g.*, *id.* at 167:3-10, 168:9-170:10, 170:24-175:8, 185:11-18).

20 Dr. Barreto explained that Imai and Khanna's validation in particular supports the use of BISG in the District because Florida and the District have similar demographics, including large Latino, Haitian, and Hasidic populations. (Tr. at 194:4-11.)

21 Dr. Morrison testified that Dr. Barreto should not have used BISG, (Tr. at 23:15-19), but this testimony was not consistent with his earlier published statement that BISG could be used in vote dilution analysis, (*see* DX 99 at 12 n.21).

22 In other words, black voters tended to vote for the same candidates as each other, Latino voters tended to vote for the same candidates as each other, and both groups supported the same candidates; "it wasn't as though blacks were voting for one candidate and Latinos are voting for a third. Black and Latino voters were also voting cohesively with each other." (Tr. at 289:16-24.)

23 The 2014 election was not analyzed because all candidates that year ran unopposed. (*See* JPTO at 8-9; *see also* Table 1 above.)

24 Both sides agree that white voters have supported black and Latino candidates to the same extent as white candidates, but contrary to Defendant's suggestion, (Doc. 555 ¶ 73), that does not show the absence of racial polarization or a Section 2 violation. A minority candidate is not necessarily preferred by minority voters. *See* *Goosby*, 180 F.3d at 497 (acknowledging that black candidate was not minority preferred); *see also* *Niagara Falls*, 65 F.3d at 1018 (cautioning against "degenerat[ing] into racial stereotyping"). And the election of a minority candidate is discounted where whites preferred the minority candidate, manipulated the election of a "safe" minority candidate, engineered the election of a minority to evade a VRA challenge, or provided unusual political support to the minority candidate or otherwise campaigned to ensure that candidate's election, *see* *Aldasoro*, 922 F. Supp. at 375-76, all of which occurred here (as discussed below).

25 In this CVAP analysis Dr. Barreto combined black and Latino voters into a single "non-white" category. Dr. Barreto testified that he did not believe "the CVAP data was appropriate or precise" and so he "did not attempt to make CVAP estimates for Blacks or Latinos" but rather performed a white/non-white analysis of CVAP to "start to understand voting patterns. (Tr. at 420:20-25, 421:24-422:8.) While this might not be a reliable methodology in the first instance, (*see id.* at 2184:22-2185:11 (Alford testifying that if Barreto were concerned with reliability, he should have reported black/white/Latino results and explained them); *id.* at 2751:19-2752:4 (Barreto admitting that he was aware of Alford's CVAP results)), it is appropriately considered here because grouping the minority voters increased the sample size being analyzed, (*id.* at 284:1-14), and helped to mitigate the turnout problem, (*see id.* at 284:1-3), described below, and because Dr. Barreto used this method just as a cross-check of his BISG analysis, (*id.* at 283:20-24).

26 Dr. Barreto used Dr. Alford's own method and conclusions in this analysis. (Tr. at 294:20-295:14, 306:204.) The results showed that even if every black and Latino voter voted for the losing candidate, that candidate would still lose by thousands of votes because the white voting bloc was too powerful to overcome. (*Id.* at 304:6-19, 306:2-8.)

27 As noted in paragraph 15 above, anecdotal evidence is not considered in determining which candidates are minority preferred under the third *Gingles* precondition. As to whether white voters vote as a bloc under that precondition, courts likewise rely on statistical analysis. *See* *Niagara Falls*, 65 F.3d at 1012; *Pope*, 94 F. Supp. 3d at 336-37; *Rodriguez*, 308 F. Supp. 2d at 422-26.

28 The turnout problem is amplified in the District. Dr. Barreto's testimony confirms that the CVAP data set used in this case overestimates black and Latino turnout and underestimates white turnout. (*See* Tr. at 272:11-274:10, 274:14-275:8, 275:17-276:14.) Accordingly, EI estimates of voter preference relying on CVAP underestimate the extent of racially polarized voting. (*Id.* at 281:15-24.)

29 In so opining, Dr. Alford contended that PX 364 – Dr. Barreto and Dr. Grofman's article – claimed that RxC can also account for turnout, (*see* Tr. at 2208:4-15), but the article covered King's EI, not RxC, (*see id.* at 2707:21-2708:7).

30 A point estimate is the most likely outcome as generated by a statistical model such as King's EI or RxC. (*See* Tr. at 336:5-10, 336:22-25, 337:23-338:4 (Barreto).) The confidence interval is the rest of the distribution and shows the probability of other estimates. (*Id.* at 336:18-21.)

31 In his expert report, Dr. Barreto reported confidence intervals using CVAP data for the contested races in 2013, 2016, 2017, and 2018, (PX 242A at 40-44, 46-47), and 2017 King's EI and RxC analysis using Catalist data, (*id.* at 44-46). He did not analyze the 2015 election in that report because the data contained incorrect precinct assignments. (*Id.* ¶ 7.) In his preliminary report, Dr. Barreto reported confidence intervals using CVAP data for the contested races in 2013, 2015, 2016, and 2017; the 2012 presidential election; and the 2017 races using BISG. (PX 242B at 34-42.) At the time of the preliminary report, Dr. Barreto was able to apply BISG only to the 2017 voter file, which had been produced in discovery by that point. (*Id.* at 9, 12-13.)

32 Dr. Barreto explained that "the error rate in BISG is built into the model, ... it is part of the probability. And so it's not an otherwise published statistic." (Tr. at 1578:19-21.) In other words, "when [BISG] spits out estimates, what is the error rate on that specific estimate, and my answer to that is that it is baked into that estimate, and that's why it gives us a probability instead of an assignment. It gives you a .83 White and a .07 Black and .05 Hispanic." (*Id.* at 1580:6-11.)

33 As noted, elsewhere Dr. Morrison appeared to understand how political scientists use BISG in voting analysis. A 2017 paper co-authored by Dr. Morrison cited the Imai and Khanna article in support of the contention that "one could assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct" and then use that as an EI input, (DX 99 at 12 n.21) – exactly what Dr. Barreto did, (Tr. at 201:1-12). I did not find persuasive Dr. Morrison's attempt to backtrack at trial by suggesting that he did not intend for readers to rely on the footnote where this statement was made. (*Id.* at 29:3-30:4.)

34 This anomaly could be explained by the fact that the Catalist database incorporates first name and self-reported data, (*see* PX 258 at 52:6-21, 61:19-63:7; Tr. at 245:15-246:9, 250:8-9, 479:11-16), not just surname and geolocation data.

35 Defendant contends that " '[P]laintiffs cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus.' " (*See* Doc. 555 ¶ 127 (alteration in original) (quoting *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995)).) But this approach is at best an oversimplification because "it ignores language in the Senate Report which expressly states that such an inference of racial animus is unnecessary." *See Solomon v. Liberty County*, 957 F. Supp. 1522, 1548 n.55 (N.D. Fla. 1997), *aff'd*, 221 F.3d 1218 (11th Cir. 2000); *accord Charleston County*, 316 F. Supp. 2d at 299 n.35.

36 On June 10, 2014, the New York State Commissioner of Education appointed a fiscal monitor to oversee the District due to "the District's history of and continued signs of fiscal distress," (PX 210), and to ensure that the District provide "appropriate educational programs and services for all its students and properly manage[ ] and account[ ] for State and federal funds received," (PX 169_0001). Thereafter, and to this day, the Commissioner has continued to appoint monitors not only to oversee District finances, but also to address the educational decline, community rifts, failures of accountability, and need for planning in the District. (*See* PX 152; PX 156; PX 169; PX 206; PX 207; PX 208.)

37 In that same text exchange Horowitz seemed to call public school advocates "haters." (PX 88_0002.) He testified unconvincingly at trial that he was probably talking about a few individuals but did not know who they were. (Tr. at 962:16-963:12.)

38 The Court does not mean to suggest that there are no white voters in the District who support public education or that there are no minority voters whose interests correspond to those of Orthodox or Hasidic voters. But the racial polarization in voting and in the populations attending the public and private schools is so strong that the observation in the text – shared by witnesses from both communities – holds.

39 School services required under state law are called "mandated" services. For example, state law requires the District to provide busing services to private schools on certain days, called "mandated" days. The District is not required to provide private school busing on days when public school is not in session, or "nonmandated days." (*See* Tr. at 805:25-806:8 (Goodwin); *id.* at 2380:21-2384:3 (Wortham).)

40 "Frum" describes an observant Jew.

41 At trial, Plaintiffs used video clips showing portions of certain witnesses' depositions to impeach those witnesses, and the content of those videos is not reflected in the trial transcript. PX 339 contains excerpts of the deposition transcripts that correspond to those videos.

42 Ads placed in a Yiddish newspaper by a private school advocate warn of a tax hike, (*see, e.g.*, PX 218A_0002, 0004, 0005, 0009), but this is little support for the notion that policies advocated by the candidates drove election results.

43 The outcome of the case would be the same even if Defendant had provided sufficient evidence to show that Senate Factor 2 was a wash or tilted in its favor. As noted, even if divergent voting patterns may be explained by a factor other than race, the court must still assess the totality of the circumstances and may find – as I do – that the minority citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to the slating and election of candidates are not equally open to them. *See* *Goosby*, 956 F. Supp. at 355.

44 Bullet, or single-shot, voting refers "to a voting practice in which a voter is allowed to cast fewer than all of his or her votes." *Reed*, 914 F. Supp. at 849. "An anti-single-shot provision prohibits this practice" and may "force[ ] minority voters to vote for white candidates whom the minority voters may not favor, thereby increasing the vote totals of those white candidates." *Id.* at 849 n.2 (internal quotation marks omitted). Plaintiffs here do not allege that there is an anti-single-shot-voting practice in the District, but, as discussed below, elections for numbered posts – which the District does have – effectively "neutralize[ ] the single-shot voting strategy." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1411 (E.D. Wash. 2014).

45 In 2018, the District increased the number of polling places from ten to thirteen. Grossman solicited input on the location of the new polling places from white, private school activist Shaya Glick, who suggested two locations in overwhelmingly Orthodox Jewish neighborhoods, (Tr. at 1473:6-19), and said, "Great opportunity to help ourselves," to which Grossman responded, "Bingo," (*id.* at 1475:24-1476:8).

46 Slating is "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991).

47 Slating group members include current and former Board members Aron Wieder, Harry Grossman and Yehuda Weissmandl, community activists Shaya Glick and Kalman Weber (who runs SERTA, an association that organizes private school voters), and influential Rabbis Yehuda Oshry, Hersh Horowitz, and the late Rabbi Beryl Rosenfeld, as discussed further below.

48 Candidates must submit nominating petitions with the signatures of 2% of the actual voters from the previous election to get on the ballot. (JPTO at 5.) While public school candidates find the process "daunting" and time consuming, (Tr. at 785:20-786:2 (Goodwin); *see* PX 283 ¶ 56), candidates backed by the private school slating organization could have all their signatures collected "in one morning in the synagogue," (Tr. at 2505:15-17 (Oshry)).

49 In the weeks leading up to and during trial, Rabbi Oshry went to great lengths to avoid testifying. He ignored repeated attempts by Plaintiffs to serve a subpoena *ad testificandum.* On February 13, 2020, Plaintiffs' agent accomplished service by alternative means ordered by the Court. (Doc. 517.) Rabbi Oshry did not appear as instructed on February 18, 19, 20, or 21. On February 20, Plaintiffs filed a motion for a finding of civil contempt, (Doc. 522), which they served, along with a new subpoena, commanding Oshry to appear on February 24. When he did not appear, the Court found him to be in contempt of court for his failure to appear and testify at trial and ordered a warrant for his arrest. The Court issued an Order indicating that Oshry would be subject to arrest by the U.S. Marshals at any time and that, should he not appear on February 26 or 27, he risked being incarcerated for some period of time pending his testimony. (*See* Doc. 530.) Oshry finally appeared to testify on February 27 and, accordingly, the contempt was purged and the warrant vacated. (Tr. at 2508:25-2509:12.) Oshry's defiance, along with his attempts at evasion in his testimony, betray a remarkable reluctance – shared by several other witnesses associated with the private school community – to admit the obvious existence of the slating process.

50 On the topic of slating, Grossman at times testified unconvincingly that he did not know what he was talking about in certain text messages, (*see, e.g.*, Tr. at 1448:3-1449:21, 1458:8-12), gave glib responses, (*see, e.g., id.* at 1431:2-6,

1446:23-1447:7), and seemed to have a selective memory when it came to conversations he had as recently as 2019, (*see id.* at 1517:6-16). He and several other Board members and white witnesses associated with the private school community were not credible in their claimed lack of knowledge of the slating process, and the sometimes absurd lengths to which they went to feign ignorance suggests their understanding of how that process excludes blacks and Latinos. (*See* ¶ 48 above.)

51 Grossman claimed that he inaccurately conveyed Butler's message, (Tr. at 1482:20-21), but he was impeached with his deposition testimony, in which he admitted that the text accurately conveys what Butler told him to convey, (*see* Tr. at 1511:14-1512:2; *see also* PX 339 at 9), and he never explained what was supposedly inaccurate about his text.

52 "Heimishe" is a Yiddish term meaning homey, homegrown, or one of the group.

53 That year, the minority-preferred candidates in contested races – Fields, Morales, and Foskew – lost. (*See* Tables 1-2 above.) Charles-Pierre admitted that "if [she] didn't have the support of the majority of the white community, [she had] basically no chance to win." (Tr. at 2566:11-15.)

54 The parties did not introduce expert testimony on the 2019 election.

55 Plaintiffs made a motion for sanctions seeking an adverse inference against the District for what they argue was Defendant's failure to preserve and produce certain documents relevant to Senate Factor 4. (*See* Docs. 518, 521 at 1.) The motion is denied as moot, in that Plaintiffs have adduced sufficient evidence to decisively establish Senate Factor 4 without the adverse inference.

56 The testimony of Charles, NAACP of Spring Valley President Willie J. Trotman, and Grossman confirms the election futility faced by the District's black and Latino voters. Charles explained that minority voters do not turn out to vote in Board elections. (Tr. at 1818:13-16.) Trotman testified that the NAACP works to encourage minorities to vote, even though they feel that "they don't have a voice," and if "[they] can't win[,] why bother?" (*Id.* at 1282:14-1283:6.) Grossman texted Horowitz that public school voters "feel disempowered because they are." (PX 88_0002.)

57 Dr. Barreto analyzed the voting patterns in six of the seven races. Data for 2007 were unavailable. (PX 242A ¶ 63.)

58 As to the settlement discussions, Grossman affirmatively misled Charles-Pierre by telling her that the reason for a settlement conference was "Judge wants to talk/yell at" the Board "for not doing what N.A.A.C.P. wants." (Tr. at 2675:23-2677:1; DX 233 at 382-83.) He sent similar messages to Ashley Leveille, another black Board member, (*see* Doc. 553-1 ¶ 9; *id.* Ex. 1), who was also not included on emails about settlement proposals, (*see* Docs. 545-2, 553-1 ¶¶ 6-8).

59 I received this testimony not for its truth but for the fact that it was said. It is not evidence that "the rabbis" in fact said what Cintron attributed to them, but it is relevant to show that Cintron and Leveille found it entirely plausible that the white slating organization had the power to dictate who ran for what seat as well as the outcome of the election, as shown by Leveille's belief that she would lose, (*see* Tr. at 1779:17-18), and Cintron's apparent belief that he would win, (*id.* at 1778:25-1779:4 (Cintron told Leveille there was "no point" in her running); *id.* at 1779:21-1780:5 (Leveille observed Cintron on election day "walking around greeting everyone, smiling, happy, [and] cheerful" before results were announced, and she saw him sink into his seat and then leave after he lost)). This testimony also goes to minority election futility in that, once Leveille heard that Cintron had the support of the white slating mechanism, she believed that she would lose.

60 During discovery, Defendant invoked legislative privilege to shield testimony about the reasons for Board actions, so – while state funding and the financial crisis might explain certain Board actions to a certain extent – the Board's actual reasoning remains unknown.

61 Throughout this Decision and Order, I discuss credibility determinations with respect to each witness as appropriate. In the interest of brevity, I also find accurate and incorporate the details set forth in Part IV of Plaintiffs' Proposed Findings of Fact and Conclusions of Law. (Doc. 556 ¶¶ 209-216.)

62 Plaintiffs' counsel offered to waive their fees as part of a settlement. (*See* Doc. 553.) A defendant obviously has no obligation whatsoever to settle a case, and the Court does not hold it against Defendant in any way that it put Plaintiffs to their proof. But the failure to provide Board members of color with updated and accurate information about the case,

and the false, misleading, or evasive testimony of present and former Board members and their allies at trial, reveal a disturbing win-at-all-costs attitude that suggests bad motives for adhering to the challenged voting practice.

63 As noted, before and during trial certain Board members' actions and positions taken by the District seemed to stymie resolution of this matter, but I also observed some apparently sincere attempts at agreement. In hopes that the former will not be repeated, and encouraged by the latter, the Court urges the parties to reach agreement on the proposed remedial plan if possible.

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New York Official Reports

59 N.Y.2d 343, 452 N.E.2d 316, 465
N.Y.S.2d 502, 33 Empl. Prac. Dec. P 34,243

The People of the State
of New York, Appellant,
v.
New York City Transit Authority, Respondent.

Court of Appeals of New York
Argued June 2, 1983;

decided July 12, 1983

CITE TITLE AS: People v
New York City Tr. Auth.

SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 1, 1982, as, by a divided court, modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Gerald Adler, J.), entered in Kings County, (1) denying a motion by defendant to dismiss the complaint on the ground of the Statute of Limitations and for failure to state a cause of action, and (2) denying a cross motion by plaintiff for partial summary judgment. The modification consisted of granting the motion by defendant to dismiss the complaint.

The Attorney-General brought this action on behalf of women bus drivers employed by the New York City Transit Authority. The complaint avers that use of seniority as a driver as a criterion for provisional and permanent appointment to the position of dispatcher discriminates on the basis of sex against female bus drivers and that it disproportionately disqualifies female drivers and perpetuates prior discriminatory practices of the Transit Authority in violation of the State Human Rights Law and the New York Constitution. The Supreme Court denied the People partial summary judgment on the provisional appointment issue and denied the Transit Authority's motion to dismiss the complaint. The Appellate Division modified, by granting the Transit Authority's motion to dismiss the complaint.

The Court of Appeals modified the Appellate Division order by reinstating the statutory cause of action of the complaint and, as modified, affirmed, without prejudice to an application by the People for leave to amend the cause of action based upon the constitutional claim, holding, in an opinion by Judge Meyer, that the complaint states a valid cause of action for violation of the Human Rights Law based on allegations that subject employment practices have a disparate impact upon a protected class of persons and that said statutory cause of action cannot be ***344** found to be time barred, even though the women's lack of seniority results from their exclusion from employment at a time in the past beyond the limitation period, but that the complaint does not sufficiently allege a cause of action under the equal protection clause of the New York Constitution, as it alleges no present intent to discriminate.

People v New York City Tr. Auth., 90 AD2d 766, modified.

HEADNOTES

Civil Rights
Discrimination in Employment
Discrimination Based on Sex

(1) A complaint which alleges that women are being discriminated against by defendant Transit Authority by the use of a facially neutral seniority system as the basis for provisional promotions and by giving seniority disproportionate weight as compared to performance in determining permanent promotional appointments, which practices have a disparate impact on women as a class, states a valid cause of action for violation of the Human Rights Law (Executive Law, art 15); further, on respondent's motion to dismiss the complaint, the statutory cause of action cannot be found time barred, even though the women's lack of seniority results from their exclusion from employment at a time in the past beyond the limitation period. However, since the complaint alleges no present intent to discriminate, it does not sufficiently allege a cause of action under the equal protection clause of the New York Constitution (art I, § 11) and, accordingly, the constitutional claim should be dismissed without prejudice to an application by plaintiff for leave to amend (CPLR 3211, subd [e]) said cause of action.

POINTS OF COUNSEL

Robert Abrams, Attorney-General (*Deborah Bachrach, Peter H. Schiff* and *Sheila Abdus-Salaam* of counsel), for appellant. I. The Transit Authority's use of seniority in making promotions discriminates on the basis of sex in violation of the Human Rights Law (§ 296, subd 1). (Matter of Sontag v Bronstein, 33 NY2d 197; Matter of Trans World Airlines v State Human Rights Appeal Bd., 46 AD2d 138, 38 NY2d 810; State Div. of Human Rights v Kilian Mfg. Corp., 35 NY2d 201; Cullen v Nassau County Civ. Serv. Comm., 53 NY2d 492; City of Schenectady v State Div. of Human Rights, 37 NY2d 421; Griggs v Duke Power Co., 401 US 424; Connecticut v Teal, 457 US 440; Matter of Board of Educ. v New York State Div. of Human Rights, 56 NY2d 257; Robinson v Lorillard Corp., 444 F2d 791, 404 US 1006; United States v Bethlehem Steel Corp., 446 F2d 652.) II. Appellants state a cause of action under the equal protection clause of the New York State Constitution. (Matter of 303 West 42nd St. Corp. v Klein, 46 NY2d 686; ***345** Personnel Administrator of Mass. v Feeney, 442 US 256; Washington v Davis, 426 US 229; Arlington Hgts. v Metropolitan Housing Corp., 429 US 252.) III. Appellants are entitled to summary judgment on their claim that the Transit Authority's use of seniority in making provisional dispatcher appointments violates subdivision 1 of section 296 of the Human Rights Law. (Andre v Pomeroy, 35 NY2d 361; Barrett v Jacobs, 255 NY 520; Gelb v Bucknell Press, 69 AD2d 829; Connecticut v Teal, 457 US 440; Grant v Bethlehem Steel Corp., 635 F2d 1007; New York City Tr. Auth. v Beazer, 440 US 568; League of United Latin Amer. Citizens v City of Santa Ana, 410 F Supp 873; Dothard v Rawlinson, 433 US 321; Albermarle Paper Co. v Moody, 422 US 405; Blake v City of Los Angeles, 595 F2d 1367, 446 US 928.)

Eugene Freidus and *Richard K. Bernard* for respondent. I. The cause of action of appellants is beyond any relevant Statute of Limitations. (United Air Lines v Evans, 431 US 553; Franks v Bowman Transp. Co., 424 US 747; Cates v Trans World Airlines, 561 F2d 1064; Freude v Bell Tel. Co. of Pa., 438 F Supp 1059; State Div. of Human Rights v University of Rochester, 53 AD2d 1020, 40 NY2d 917; Berni v Leonard, 32 NY2d 933, 414 US 1045; Matter of Pell v Board of Educ., 34 NY2d 222; Matter of Mize v State Div. of Human Rights, 33 NY2d 53; New York State Div. of Human Rights v Nationwide Mut. Ins. Co., 74 AD2d 16, 53 NY2d 1008; Personnel Administrator of Mass. v Feeney, 442 US 256.) II. Appellants fail to state a cause of action for which relief can be granted. (Personnel Administrator of Mass. v Feeney, 442 US 256; American Tobacco Co. v Patterson, 456 US 63; Trans World Airlines v Hardison, 432 US 63; Pettway v American Cast Iron Pipe Co., 576 F2d 1157, 439 US 1115; Williams v New Orleans S.S. Assn., 673 F2d 742; Johnson v Ryder Truck Lines, 575 F2d 471; Richards v United States, 369 US 1; Consumer Prod. Safety Comm. v GTE Sylvania, 447 US 102; Matter of 303 West 42nd St. v Klein, 46 NY2d 686; Dandridge v Williams, 397 US 471.) III. Appellants are not properly before this court on the denial of summary judgment below. (H & M Heating Utilities v Teplitz, 16 NY2d 1043; Falcone v Falcone, 23 NY2d 738; O'Reilly v Evans, 106 Misc 2d 959; ***346** Boyd v Ozark Air Lines, 419 F Supp 1061, 568 F2d 50; Smith v Troyan, 520 F2d 492, 426 US 934, 429 US 933; United Air Lines v Evans, 431 US 553; State Div. of Human Rights v University of Rochester, 53 AD2d 1020, 40 NY2d 917; Matter of Russell Sage Coll. v State Div. of Human Rights, 45 AD2d 153, 36 NY2d 985; California Brewers Assn. v Bryant, 444 US 598; Porter Co. v NLRB, 397 US 99.)

OPINION OF THE COURT

Meyer, J.

A complaint which alleges that women are being discriminated against through the use of a facially neutral seniority system as the basis for provisional promotions and by giving seniority weight disproportionate to performance in determining permanent promotional appointments states a valid cause of action for violation of the Human Rights Law (Executive Law, art 15) but since it alleges no present intent to discriminate does not sufficiently allege a cause of action under the equal protection clause of the New York State Constitution (art I, § 11). Moreover, on this motion to dismiss the complaint the statutory cause of action cannot be found time barred even though the women's lack of seniority results from their exclusion from employment at a time in the past beyond the limitation period. The order of the Appellate Division dismissing the complaint should, therefore, be modified to reinstate the first cause of action of the complaint and, as so modified, affirmed, with costs, without prejudice, however, to an application pursuant to CPLR 3211 (subd [e]) by the People to Supreme Court for leave to amend the second cause of action.

I

The action is by the Attorney-General on behalf of women bus drivers employed by the New York City Transit Authority (TA). The complaint alleges that the position of surface line dispatcher (dispatcher) is an entry level management position, that to qualify to take the dispatcher examination

an applicant need only have one year's experience as a bus operator (driver), that in June, 1981 the TA announced that provisional appointments as dispatcher would be based on seniority as a bus operator ***347** and that all of the 30 provisional appointments made in August, 1981 went to men, the least senior of whom had 18 years as a driver. It alleges further that because the TA excluded women from taking the driver examination until 1971 and appointed no woman driver until 1978, no woman driver had more than three years' experience, that until 1976 the TA additionally discriminated against women by imposing a 5-foot 4-inch height requirement for drivers which disqualified 54.8% of adult females but only 3.7% of adult males from such employment. Use of seniority as a driver as a criterion for provisional and permanent appointment to the position of dispatcher, it avers, discriminates on the basis of sex against female bus operators in that it disproportionately disqualifies female drivers and perpetuates prior discriminatory practices of the TA, in violation of section 296 (subd 1, par [a]) of the Executive Law and of section 11 of article I of the State Constitution.

On September 30, 1981, Supreme Court, Kings County, granted a preliminary injunction enjoining the TA pending determination of the action from using seniority as a factor, in part or in whole, in making further provisional appointments, finding that on the papers presented the TA had not established that seniority, in the manner used, bore a rational relationship to job performance.

The September 30, 1981 order also directed an immediate trial of the question whether the TA could continue to use seniority as a factor in determining eligibility for permanent appointment and ordered a new examination and the establishment of an eligibility list for the position of dispatcher. In compliance with the order a new examination was held on January 9, 1982, but the trial ordered has not taken place because, before joining issue by answering, the TA moved pursuant to CPLR 3211 (subd [a], pars 5, 7) to dismiss the complaint as untimely and for failure to state a cause of action. In their opposition papers the People asked for partial summary judgment pursuant to CPLR 3211 (subd [c]) with respect to the provisional appointment issue. Supreme Court, by order dated December 11, 1981, deemed the People's application to be a cross motion but denied it because there was a triable issue as to what degree, if any, seniority could be used in making ***348** provisional appointments. It also denied the TA's motion to dismiss. On cross appeals, the Appellate Division, one Justice dissenting, dismissed the appeal from the September 30, 1981 order as moot, modified the December 11, 1981 order by deleting the provision denying the motion to dismiss and substituting a provision granting the motion, and, as so modified, affirmed the latter order. The People appeal from so much of the Appellate Division order as modified the order of December 11, 1981, but not from the dismissal of the appeal from the order of September 30, 1981. Before us, the People argue both that the complaint was improperly dismissed and that they were improperly denied partial summary judgment on the provisional appointment issue. We conclude, though for a reason other than that given by Supreme Court, that partial summary judgment was properly denied,[*] but that the first cause of action was improperly dismissed.

II

What we determine on a motion to dismiss is whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated (219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509). For the reasons that follow, we conclude that there is such a view of the facts as to (a) the cause of action under the Human Rights Law but (b) not as to the cause of action under the equal protection clause of the Constitution and (c) that on the complaint alone the first cause of action cannot be held barred by limitations.

A

As we made clear in Matter of Sontag v Bronstein (33 NY2d 197, 201), an employment practice neutral on its face and in terms of intent which has a disparate impact upon a protected class of persons violates the Human Rights Law unless the employer can show justification for ***349** the practice in terms of employee performance. The complaint alleges that provisional appointments as dispatcher were based upon seniority and resulted in all of the provisional appointments going to males to the exclusion of females qualified except as to seniority for the position. It alleges also that seniority is used by the TA as a criterion for permanent appointment as dispatcher. Although it does not specify the value assigned by the TA to seniority in the permanent employment decision, it does allege that female drivers are disproportionately disqualified by its use. A standard or practice "fair in form but discriminatory in operation" as to employment or promotional opportunity is within the reach of the Human Rights Law (State Div. of Human Rights v Kilian Mfg. Corp., 35 NY2d 201, 209; cf. Connecticut v Teal, 457 US 440, 446-447, 454- 456). The complaint states a disparate

impact cause of action under the Human Rights Law as to both provisional and permanent appointments, which the TA must meet, if it can, by showing business necessity or justification relating to the work of a dispatcher.

That section 52 of the Civil Service Law provides that "due weight" is to be given seniority and that subdivision (h) of section 703 of the Civil Rights Act of 1964 (US Code, tit 42, § 2000e-2, subd [h]) immunizes "bona fide " seniority systems does not detract from that conclusion. What constitutes " due weight" is inextricably intertwined with the relationship between job performance and the value assigned to seniority as a factor in promotion. To promote solely on the basis of seniority, as the People allege was done with provisional appointments, appears prima facie to give undue weight to seniority, although the TA may be able to justify even that great weight. Whether as to permanent appointments the weight given is more than "due" will have to await evidentiary development of exactly what weight is given to seniority in the making of such appointments as well as the claimed justification for it.

As for the "bona fide" seniority provision of the Civil Rights Act, assuming without deciding that it applies at all to an action under New York statute and Constitution (cf. Civil Rights Act, §§ 708, 1104 [US Code, tit 42 §§ 2000e-7, ***350** 2000h-4]), it does no more than raise an issue of fact -- whether the TA seniority system is bona fide -- which cannot be decided on the complaint alone. "*Bona fides,* in the context of the statute requires, at least in part, that the seniority system be applied fairly and impartially to all employees, that it not have its 'genesis in [unlawful] discrimination', and that it be maintained free from illegal purposes" (Acha v Beame, 570 F2d 57, 64 [brackets in original]), which is an issue for the trial court (id.).

As the Attorney-General's brief notes, our conclusion that a valid cause of action has been stated on the theory of disparate impact makes it unnecessary for us to consider whether the seniority standard is also illegal because it continues the effect of the TA's past discriminatory practices in excluding women entirely until 1971 and in imposing a height requirement.

B

With respect to the equal protection cause of action, purposeful discrimination is a necessary element (Matter of 303 West 42nd St. Corp. v Klein, 46 NY2d 686; see Personnel Administrator of Mass. v Feeney, 442 US 256). The complaint contains no specific allegation of a present intent to discriminate and is, therefore, insufficient in that respect. The order, insofar as it affirmed dismissal of the second cause of action, is affirmed, without prejudice, however, to the right of the People, if so advised, to apply at Special Term for leave to amend (CPLR 3211, subd [e]; see Sanders v Schiffer, 39 NY2d 727).

C

The limitations provisions upon which the TA relies are subdivision 5 of section 297 of the Executive Law, CPLR 214 (subd 2) and CPLR 213 (subd 1). The first deals with a complaint filed with the Division of Human Rights and requires that such a complaint be "filed within one year after the alleged unlawful discriminatory practice." Although it is a generally accepted principle that the time fixed in a statute which creates a cause of action unknown to the common law is to be treated as a qualification of the newly created right (Romano v Romano, 19 NY2d 444, 448-449), that rule has no application to the present action ***351** which is not a complaint filed with the division seeking administrative relief but one for a judicial remedy (Murphy v American Home Prods. Corp., 58 NY2d 293, 306- 307.)

For several reasons, the Supreme Court's decision in United Air Lines v Evans (431 US 553), relied upon in the plurality opinion below, does not require a contrary conclusion. Although *Evans* construed provisions of title VII of the Civil Rights Act of 1964 closely parallel to section 296 (subd 1, par [a]) of the Human Rights Law, the Supreme Court in reaching its decision relied heavily on the bona fide seniority provision (US Code, tit 42, § 2000e-2, subd [h]) of the Civil Rights Act for which there is no Human Rights Law parallel provision and as to which, as already noted, section 52 of the Civil Service Law does not fill the gap. Moreover, the Congress has expressed its intention not to occupy the entire field of discrimination to the exclusion of State laws (US Code, tit 42, §§ 2000e-7, 2000h-4) except as a State law requires or permits the doing of an act inconsistent with the basic objective of title VII to cause employment to be based only on job qualifications (Burns v Rohr Corp., 346 F Supp 994, 997). Thus, Congress has demonstrated its intent "to preserve the effectiveness of state antidiscrimination laws " (Rosenfeld v Southern Pacific Co., 444 F2d 1219, 1226). The *Evans* decision, therefore, although entitled to respectful consideration in view of the similarity of the underlying provisions, is not binding upon us (Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 NY2d 84, 86, n 1; Massachusetts Elec. Co. v Massachusetts Comm. Against Discrimination, 375 Mass 160, 167; Anderson v Upper Bucks

County Area Vocational Tech. School, 30 Pa Comm Ct 103, 108; cf. American Tobacco Co. v Patterson, 456 US 63, 64).

Nor do the other cited Statutes of Limitations affect the sufficiency of the first cause of action because they are but statutes of repose which must be affirmatively pleaded (CPLR 3018, subd [b]).

For the foregoing reasons, the order of the Appellate Division should be modified in accordance with this opinion and, as so modified, affirmed, with costs.

Chief Judge Cooke and Judges Jasen, Jones, Wachtler and Simons concur. ***352**

Order modified, with costs to appellant, by reinstating the first cause of action of the complaint and, as so modified, affirmed, without prejudice to an application by appellant for leave to amend the second cause of action in accordance with the opinion herein. ***353**

Footnotes

* The TA was not made aware until receipt of the order of December 11, 1981 that the motion Judge would deem the informal application in the People's answering papers to be a cross motion and, therefore, replied only on the procedural ground that summary judgment was inappropriate before joinder of issue except on a defendant's motion. It would, therefore, have been improper to grant the People's cross motion without "adequate notice " to the TA that the court intended to entertain the partial summary judgment application (CPLR 3211, subd [c]; Rovello v Orofino Realty Co., 40 NY2d 633; cf. Wein v City of New York, 36 NY2d 610, 620-631).

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117 S.Ct. 1491
Supreme Court of the United States

Janet RENO, Attorney General, Appellant,
v.
BOSSIER PARISH SCHOOL BOARD et al.
George PRICE, et al., Appellants,
v.
BOSSIER PARISH SCHOOL BOARD et al.

Nos. 95–1455, 95–1508.
|
Argued Dec. 9, 1996.
|
Decided May 12, 1997.

Synopsis
Louisiana parish school board sought preclearance under Voting Rights Act for its

proposed redistricting plan. The United States District Court for the District of Columbia, Silberman, Circuit Judge, 907 F.Supp. 434, granted request. Attorney General appealed. The Supreme Court, Justice O'Connor, held that: (1) preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color; (2) evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account or race or color under Voting Rights Act preclearance section; and (3) whether district court considered relevant proffered evidence showing that board's redistricting plan diluted minorities' voting power was unclear.

Vacated and remanded.

Justice Thomas, concurred and filed opinion.

Justice Breyer, concurred in part and in judgment and filed opinion in which Justice Ginsburg joined.

Justice Stevens, dissented in part and concurred in part and filed opinion in which Justice Souter joined.

West Headnotes (14)

[1] **Election Law** In general; covered jurisdictions

Preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

16 Cases that cite this headnote

[2] **Election Law** Bailout suits; judicial preclearance

To obtain judicial preclearance under Voting Rights Act, covered jurisdiction bears burden of proving that electoral change does not have purpose and will not have effect of denying or abridging right to vote on account of race. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

7 Cases that cite this headnote

[3] **Election Law** In general; covered jurisdictions

Voting Rights Act preclearance section focuses on freezing election procedures, and thus, plan has impermissible "effect" under section only if it would lead to retrogression in position of racial minorities with respect to their effective exercise of electoral franchise. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

21 Cases that cite this headnote

[4] **Election Law** In general; covered jurisdictions

Under Voting Rights Act preclearance section, proposed voting practice is measured against existing voting practice to determine whether retrogression would result from proposed

change. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

23 Cases that cite this headnote

[5] **Election Law** In general; covered jurisdictions

Under Voting Rights Act preclearance section, covered jurisdiction's existing voting plan is benchmark against which "effect" of voting changes is measured. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

19 Cases that cite this headnote

[6] **Election Law** Dilution of voting power in general

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must initially establish the following: racial group is sufficiently large and geographically compact to constitute majority in single member district; group is politically cohesive; and white majority votes sufficiently as bloc to enable it usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

21 Cases that cite this headnote

[7] **Election Law** Dilution of voting power in general

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must demonstrate that totality of circumstances supports finding that voting scheme is dilutive. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

20 Cases that cite this headnote

[8] **Election Law** Dilution of voting power in general

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must postulate reasonable alternative voting practice to serve as benchmark undiluted voting practice. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

32 Cases that cite this headnote

[9] **Constitutional Law** Fifteenth Amendment

Election Law Discriminatory practices proscribed in general

Election Law Dilution of voting power in general

Violation of Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color is not a fortiori violation of Fourteenth or Fifteenth Amendment to Constitution; plaintiff bringing constitutional vote dilution challenge must establish that state or political subdivision acted with discriminatory purpose, which Act section does not require. U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

43 Cases that cite this headnote

[10] **Election Law** Discrimination; Voting Rights Act

Although Supreme Court normally accords Attorney General's construction of Voting Rights Act great deference, Supreme Court only does so if Congress has not expressed its intent with respect to question, and then only if administrative interpretation is reasonable. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

5 Cases that cite this headnote

[11] **Equity** Constitutional and statutory provisions

Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.

5 Cases that cite this headnote

[12] **Election Law** Evidence

Evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account of race or color under Voting Rights Act preclearance section. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

12 Cases that cite this headnote

[13] **Federal Courts** Particular cases

Whether district court considered relevant proffered evidence showing that parish school board's reapportionment plan diluted minorities' voting power in determining whether to grant board preclearance under Voting Rights Act was unclear, requiring remand of that aspect of district court's holding. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

2 Cases that cite this headnote

[14] **Constitutional Law** Intentional or purposeful action

Important starting point for assessing discriminatory intent under *Arlington Heights*, which sets forth framework for analyzing whether invidious discriminatory purpose was motivating factor in government body's decision making, is impact of official action, whether it bears more heavily on one race than another; other relevant considerations include historical background of jurisdiction's decision, specific sequence of events leading up to challenged decision, departures from normal procedural sequence, and legislative or administrative history, especially any contemporary statements by members of decision making body.

64 Cases that cite this headnote

**1493 *Syllabus* [*]

***471** Appellee Bossier Parish School Board (Board) is subject to the preclearance requirements **1494 of § 5 of the Voting Rights Act of 1965 (Act) and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." Based on the 1990 census, the Board redrew its 12 single-member districts, adopting the redistricting plan that the Attorney General had recently precleared for use in elections of the parish's primary governing body (the Jury plan). In doing so, the Board rejected a plan proposed by the National Association for the Advancement of Colored People (NAACP), which would have created two majority-black districts. The Attorney General objected to preclearance, finding that the NAACP plan, which had not been available when the Jury plan was originally approved, demonstrated that black residents were sufficiently numerous and geographically compact to constitute a majority in two districts; that, compared with this alternative, the Board's plan unnecessarily limited the opportunity for minority voters to elect their candidates of choice and thereby diluted their voting strength in violation of § 2 of the Act; and that the Attorney General must withhold preclearance where necessary to prevent a clear § 2 violation. The Board then filed this action with the District Court, and appellant Price and others intervened as defendants. A three-judge panel granted the preclearance request, rejecting appellants' contention that a voting change's failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5 and their related argument that a court must still consider evidence of a § 2 violation as evidence of discriminatory purpose under § 5.

Held:

1. Preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2. This Court has consistently understood § 5 and § 2 to combat ***472** different evils and, accordingly, to impose very different duties upon

the States. See *Holder v. Hall,* 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (plurality opinion). Section 5 freezes election procedures in a covered jurisdiction until that jurisdiction proves that its proposed changes do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race. See *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629. It is designed to combat only those effects that are retrogressive. Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan, see *Holder, supra,* at 883, 114 S.Ct., at 2587 (plurality opinion), and necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. Section 2, on the other hand, applies in *all* jurisdictions and uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan. Making compliance with § 5 contingent upon compliance with § 2, as appellants urge, would, for all intents and purposes, replace the standards for § 5 with those for § 2, thus contradicting more than 20 years of precedent interpreting § 5. See, *e.g., Beer, supra.* Appellants' contentions that their reading of § 5 is supported by the *Beer* decision, by the Attorney General's regulations, and by public policy considerations are rejected. Pp. 1496–1501.

2. Evidence showing that a jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to establish a jurisdiction's "intent to retrogress" under § 5, so there is no need to decide today whether such evidence is relevant to establish other types of discriminatory intent or whether § 5's purpose inquiry ever extends beyond the search for retrogressive intent. Because this Court cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, this aspect of that court's holding must be vacated. Pp. 1501–1503.

(a) Section 2 evidence may be "relevant" within the meaning of Federal Rule of Evidence 401, for the fact that a plan has a dilutive impact makes it "more probable" that the jurisdiction adopting that plan acted ****1495** with an intent to retrogress than "it would be without the evidence." This does not, of course, mean that evidence of a plan's dilutive impact is dispositive of the § 5 purpose inquiry. Indeed, if it were, § 2 would be effectively incorporated into § 5, a result this Court finds unsatisfactory. In conducting their inquiry into a jurisdiction's motivation in enacting voting changes, courts should look for guidance to *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, which sets forth a framework for examining discriminatory purpose. Pp. 1501–1503.

(b) This Court is unable to determine whether the District Court deemed irrelevant all evidence of the dilutive impact of the redistricting ***473** plan adopted by the Board. While some language in its opinion is consistent with today's holding that the existence of less dilutive options was at least relevant to the purpose inquiry, the District Court also appears to have endorsed the notion that dilutive impact evidence is irrelevant even to an inquiry into retrogressive intent. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction to remedy any remaining vestiges of a dual school system. P. 1503.

907 F.Supp. 434, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined in full, and in which GINSBURG and BREYER, JJ., joined except insofar as Part III is inconsistent with the views expressed in the concurrence of BREYER, J., THOMAS, J., filed a concurring opinion, *post,* p. 1503. BREYER, J., iled an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post,* p. 1505. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, J., joined, *post,* p. 1507.

Attorneys and Law Firms

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Opinion

***474** Justice O'CONNOR delivered the opinion of the Court.

Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 439, as amended, 42 U.S.C. §§ 1973, 1973c. Specifically, we decide two questions: (i) whether preclearance must be denied under § 5 whenever a covered jurisdiction's new voting "standard,

practice, or procedure" violates § 2; and (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose ... of denying or abridging the right to vote on account of race or color" under § 5. We answer both in the negative.

I

Appellee Bossier Parish School Board (Board) is a jurisdiction subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." The Board has 12 members who are elected from single-member districts by majority vote to serve 4–year terms. When the 1990 census revealed wide population disparities among its districts, see App. to Juris. Statement 93a (Stipulations of Fact and Law ¶ 82), the Board decided to redraw the districts to equalize the population distribution.

During this process, the Board considered two redistricting plans. It considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier ****1496** Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which also contained 12 districts. *Id.,* at 88a (Stipulations ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. *Id.,* at ***475** 93a (Stipulations ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively); *id.,* at 85a (Stipulations ¶ 59) (population statistics for the Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive." *Id.,* at 141a (Stipulations ¶ 252) ("The ... plan is not retrogressive to minority voting strength compared to the existing benchmark plan ..."). Appellant George Price, president of the local chapter of the National Association for the Advancement of Colored People (NAACP), presented the Board with a second option —a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. *Id.,* at 98a (Stipulations ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own, reasoning that the Jury plan would almost certainly be precleared again and that the NAACP plan would require the Board to split 46 electoral precincts.

But the Board's hopes for rapid preclearance were dashed when the Attorney General interposed a formal objection to the Board's plan on the basis of "new information" not available when the Justice Department had precleared the plan for the Police Jury—namely, the NAACP's plan, which demonstrated that "black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.,* at 155a–156a (Attorney General's August 30, 1993, objection letter). The objection letter asserted that the Board's plan violated § 2 of the Act, 42 U.S.C. § 1973, because it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice," App. to Juris. Statement, at 156a, as compared to the new alternative. Relying on 28 CFR § 51.55(b)(2) (1996), which ***476** provides that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended Section 2 [42 U.S.C. § 1973]," the Attorney General concluded that the Board's redistricting plan warranted a denial of preclearance under § 5. App. to Juris. Statement 157a. The Attorney General declined to reconsider the decision. *Ibid.*

The Board then filed this action seeking preclearance under § 5 in the District Court for the District of Columbia. Appellant Price and others intervened as defendants. The three-judge panel granted the Board's request for preclearance, over the dissent of one judge. 907 F.Supp. 434, 437 (1995). The District Court squarely rejected the appellants' contention that a voting change's alleged failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5: "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of section 5 cannot be denied preclearance because of an alleged section 2 violation." *Id.,* at 440–441. Given this holding, the District Court quite properly expressed no opinion on whether the Jury plan in fact violated § 2, and its refusal to reach out and decide the issue in dicta does not require us, as Justice STEVENS insists, to "assume that the record discloses a 'clear violation' of § 2." See *post,* at 1508 (opinion dissenting in part and concurring in part). That issue has yet to be decided by any court. The District

Court did, however, reject appellants' related argument that a court "must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5." *Id.,* at 445. We noted probable jurisdiction on June 3, 1996. 517 U.S. 1232, 116 S.Ct. 1874, 135 L.Ed.2d 171.

II

[1] The Voting Rights Act of 1965(Act), 42 U.S.C. § 1973 *et seq.,* was enacted by Congress in 1964 to "attac[k] the blight of ****1497** voting discrimination" across the Nation. S.Rep. No. 97–417, ***477** 2d Sess., p. 4 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 180; *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). Two of the weapons in the Federal Government's formidable arsenal are § 5 and § 2 of the Act. Although we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall,* 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (1994) (plurality opinion) (noting how the two sections "differ in structure, purpose, and application"), appellants nevertheless ask us to hold that a violation of § 2 is an independent reason to deny preclearance under § 5. Unlike Justice sTEVENS, *post,* at 1509–1510, and n. 5 (opinion dissenting in part and concurring in part), we entertain little doubt that the Department of Justice or other litigants would "routinely" attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

[2] **[3]** Section 5, 42 U.S.C. § 1973c, was enacted as

> "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.... Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976) (quoting H.R.Rep. No. 94–196, pp. 57–58 (1970)).

In light of this limited purpose, § 5 applies only to certain States and their political subdivisions. Such a covered jurisdiction ***478** may not implement any change in a voting "qualification, prerequisite, standard, practice, or procedure" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U.S.C. § 1973c. To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.; City of Rome v. United States,* 446 U.S. 156, 183, n. 18, 100 S.Ct. 1548, 1565, n. 18, 64 L.Ed.2d 119 (1980) (covered jurisdiction bears burden of proof). Because § 5 focuses on "freez[ing] election procedures," a plan has an impermissible "effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer, supra,* at 141, 96 S.Ct., at 1364.

[4] **[5]** Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. See *Holder, supra,* at 883, 114 S.Ct., at 2587 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change"). It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. In *Beer,* for example, we concluded that the city of New Orleans' reapportionment of its council districts, which created one district with a majority of voting-age blacks where before there had been none, had no discriminatory "effect." 425 U.S., at 141–142, 96 S.Ct., at 1364 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5"). Likewise, in *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), we found that the city's new charter had no retrogressive "effect" even though it maintained ***479** the city's prior ****1498** practice of electing its council members at-large from numbered posts, and instituted a new practice of electing two of the city's four council members every year (instead of electing all the council members every two years). While each practice could "have a discriminatory effect under some circumstances," *id.,* at 135, 103 S.Ct., at 1004, the

fact remained that "[s]ince the new plan did not *increase* the degree of discrimination against [the city's Mexican–American population], it was entitled to § 5 preclearance [because it was not retrogressive]," *id.,* at 134, 103 S.Ct., at 1004 (emphasis added).

[6] **[7]** **[8]** Section 2, on the other hand, was designed as a means of eradicating voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups," S.Rep. No. 97–417, at 28, U.S.Code Cong. & Admin.News 1982 pp. 177, 205. Under this broader mandate, § 2 bars *all* States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a). A voting practice is impermissibly dilutive within the meaning of § 2

> "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a class defined by race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A plaintiff claiming vote dilution under § 2 must initially establish that: (i) "[the racial group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the group is "politically cohesive"; and (iii) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." ***480** *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–2767, 92 L.Ed.2d 25 (1986); *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993). The plaintiff must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994); see *Gingles, supra,* at 44–45, 106 S.Ct., at 2762–2764 (listing factors to be considered by a court in assessing the totality of the circumstances). Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. *Holder v. Hall,* 512 U.S., at 881, 114 S.Ct., at 2586 (plurality opinion); *id.,* at 950–951, 114 S.Ct., at 2621–2622 (Blackmun, J., dissenting).

Appellants contend that preclearance must be denied under § 5 whenever a covered jurisdiction's redistricting plan violates § 2. The upshot of this position is to shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.

But § 5, we have held, is designed to combat only those effects that are retrogressive. See *supra,* at 1497–1498. To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5. See, *e. g., Beer, supra; City of Lockhart, supra.* This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect. See, *e.g., Elkins v. United States,* 364 U.S. 206, 218, 80 S.Ct. 1437, 1445, 4 L.Ed.2d 1669 (1960) ("[A]s a practical matter it is never easy to prove a negative"). To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive "result" before it can implement that plan—even if the Attorney General bears the burden of proving that "result"—is to increase further the serious federalism costs already implicated by § 5. See *Miller v. Johnson,* 515 U.S. 900, 926, 115 S.Ct. 2475, 2493, 132 L.Ed.2d 762 (1995) (noting the "federalism costs exacted by § 5 preclearance").

****1499** ***481** Appellants nevertheless contend that we should adopt their reading of § 5 because it is supported by our decision in *Beer,* by the Attorney General's regulations, and by considerations of public policy. In *Beer,* we held that § 5 prohibited only retrogressive effects and further observed that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364. Although there had been no allegation that the redistricting plan in *Beer* "so ... discriminate[d] on the basis of race or color as to be unconstitutional," we cited in dicta a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive. *Id.,* at 142, n. 14, 96 S.Ct., at 1364, n. 14. Among them was our decision in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), in which we sustained a vote dilution challenge, brought under the Equal Protection Clause, to the use of multimember election districts in two Texas counties. Appellants argue that "[b]ecause vote dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer* ' s discussion meant that practices that violated Section 2 would not be entitled to preclearance under Section 5." Brief for Federal Appellant 36–37.

[9] Even assuming, *arguendo,* that appellants' argument had some support in 1976, it is no longer valid today because the applicable statutory and constitutional standards have changed. Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose. See *City of Mobile v. Bolden,* 446 U.S. 55, 62, 100 S.Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion) ("Our decisions ... have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *id.,* at 66, 100 S.Ct., at 1499 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection ***482** Clause of the Fourteenth Amendment"); see also *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component, see S.Rep. No. 97–417, at 2, U.S.Code Cong. & Admin.News 1982 pp. 177, 178 ("Th[e 1982] amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2"). Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution. Congress itself has acknowledged this fact. See *id.,* at 39 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself").

Justice STEVENS argues that the subsequent divergence of constitutional and statutory standards is of no moment because, in his view, we "did not [in *Beer*] purport to distinguish between challenges brought under the Constitution and those brought under the [Voting Rights] statute." *Post,* at 1510 (opinion dissenting in part and concurring in part). Our citation to *White,* he posits, incorporated *White* 's standard into our exception for nonretrogressive apportionments that violate § 5, whether or not that standard continued to coincide with the constitutional standard. In essence, Justice sTEVENS reads *Beer* as creating an exception for nonretrogressive apportionments that so discriminate on the basis of race or color as to violate any federal law that happens to coincide with what would have amounted to a constitutional violation in 1976. But this reading flatly contradicts the plain language of the exception we recognized, which applies solely to apportionments that "so discriminat[e] on the basis of race or color as to violate *the Constitution.*" *Beer, supra,* at 141, 96 S.Ct., at 1364 (emphasis added). We cited *White,* not for itself, but because it embodied the current ***483** *constitutional* standard for a violation of the ****1500** Equal Protection Clause. See also 425 U.S., at 142, n. 14, 96 S.Ct., at 1364, n. 14 (noting that New Orleans' plan did "not remotely approach a violation of the *constitutional* standards enunciated in" *White* and other cited cases (emphasis added)). When *White* ceased to represent the current understanding of the Constitution, a violation of its standard—even though that standard was later incorporated in § 2—no longer constituted grounds for denial of preclearance under *Beer.*

[10] Appellants' next claim is that we must defer to the Attorney General's regulations interpreting the Act, one of which states:

> "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR § 51.55(b)(2) (1996).

Although we normally accord the Attorney General's construction of the Act great deference, "we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992). Given our longstanding interpretation of § 5, see *supra,* at 1496–1498, 1498–1500, which Congress has declined to alter by amending the language of § 5, *Arkansas Best Corp. v. Commissioner,* 485 U.S. 212, 222, n. 7, 108 S.Ct. 971, 977, n. 7, 99 L.Ed.2d 183 (1988) (placing some weight on Congress' failure to express disfavor with our 25–year interpretation of a tax statute), we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S.Rep. No. 97–417, *supra,* at 12, n. 31, U.S.Code Cong. & Admin.News 1982 pp. 177, 189, does not ***484** change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra,* at 1498, by dropping a footnote in a

Senate Report instead of amending the statute itself. See *Pierce v. Underwood,* 487 U.S. 552, 567, 108 S.Ct. 2541, 2551, 101 L.Ed.2d 490 (1988) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change"). See also *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report).

Nor does the portion of the House Report cited by Justice sTEVENS unambiguously call for the incorporation of § 2 into § 5. That portion of the Report states:

> "[M]any voting and election practices currently in effect are outside the scope of [§ 5] ... because they were in existence before 1965.... Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under § 2] or preclearance [under § 5]." H.R.Rep. No. 97–227, p. 28 (1981).

The obvious thrust of this passage is to establish that pre–1965 discriminatory practices are not free from scrutiny under the Act just because they need not be precleared under § 5: Such practices might still violate § 2. But to say that pre–1965 practices can be reached solely by § 2 is not to say that all post–1965 changes that might violate § 2 may be reached by both § 2 *and § 5* or that "the substantive standards for § 2 and § 5 [are] the same," see *post,* at 1511 (opinion dissenting in part and concurring in part). Our ultimate conclusion is also not undercut by statements found in the "postenactment legislative record," see *post,* at 1511, n. 9, given that "the views of a subsequent Congress form a hazardous ***485** basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). We therefore decline to give these sources controlling weight.

****1501** Appellants' final appeal is to notions of public policy. They assert that if the district court or Attorney General examined whether a covered jurisdiction's redistricting plan violates § 2 at the same time as ruling on preclearance under § 5, there would be no need for two separate actions and judicial resources would be conserved. Appellants are undoubtedly correct that adopting their interpretation of § 5 would serve judicial economy in those cases where a § 2 challenge follows a § 5 proceeding. But this does not always happen, and the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding.

[11] Appellants lastly argue that preclearance is an equitable remedy, obtained through a declaratory judgment action in district court, see 42 U.S.C. § 1973c, or through the exercise of the Attorney General's discretion, see 28 CFR § 51.52(a) (1996). A finding that a redistricting plan violates § 2 of the Act, they contend, is an equitable "defense," on the basis of which a decisionmaker should, in the exercise of its equitable discretion, be free to deny preclearance. This argument, however, is an attempt to obtain through equity that which the law—*i.e.,* the settled interpretation of § 5—forbids. Because "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law,' " *INS v. Pangilinan,* 486 U.S. 875, 883, 108 S.Ct. 2210, 2216, 100 L.Ed.2d 882 (1988) (citing *Hedges v. Dixon County,* 150 U.S. 182, 192, 14 S.Ct. 71, 74–75, 37 L.Ed. 1044 (1893)), this argument must fail.

Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone.

***486** III

[12] **[13]** Appellants next contend that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities is at least *relevant* in a § 5 proceeding because it tends to prove that the jurisdiction enacted its plan with a discriminatory "purpose." The District Court, reasoning that "[t]he line [between § 2 and § 5] cannot be blurred by allowing a defendant to do indirectly what it cannot do directly," 907 F.Supp., at 445, rejected this argument and held that it "will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* Because we hold that some of this "§ 2 evidence" may be relevant to establish a jurisdiction's "intent to retrogress" and cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, we vacate this aspect of the District Court's holding and remand. In light of this conclusion, we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. See *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454,

465, n. 5, 109 S.Ct. 1904, 1911, n. 5, 104 L.Ed.2d 506 (1989) (declining to decide an issue that "is not necessary to our decision"). Reserving this question is particularly appropriate when, as in this suit, it was not squarely addressed by the decision below or in the parties' briefs on appeal. See Brief for Federal Appellant 23; Brief for Appellant Price et al. 31–33, 34–35; Brief for Appellee 42–43. But in doing so, we do not, contrary to Justice sTEVENS' view, see *post,* at 1507-1508 (opinion dissenting in part and concurring in part), necessarily assume that the Board enacted the Jury plan with some nonretrogressive, but nevertheless discriminatory, "purpose." The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand.

Although § 5 warrants a denial of preclearance if a covered jurisdiction's voting change "ha[s] the purpose [or] ... the effect of denying or abridging the right to vote on account ***487** of race or color," 42 U.S.C. § 1973c, we have consistently interpreted this language in light of the purpose underlying § 5—"to insure that no voting-procedure ****1502** changes would be made that would lead to a retrogression in the position of racial minorities." *Beer,* 425 U.S., at 141, 96 S.Ct., at 1364. Accordingly, we have adhered to the view that the only "effect" that violates § 5 is a retrogressive one. *Ibid.; City of Lockhart,* 460 U.S., at 134, 103 S.Ct., at 1004.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. As we observed in *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 563–564, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters—*i.e.,* an intent to retrogress—than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance ... is a liberal one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993), and one we think is met here.

That evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without ***488** more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Shaw v. Hunt,* 517 U.S. 899, 914, n. 6, 116 S.Ct. 1894, 1904, n. 6, 135 L.Ed.2d 207 (1996) ("[W]e doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5"). This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional districting principles, see *Miller v. Johnson,* 515 U.S., at 922, 115 S.Ct., at 2491 (rejecting argument that a jurisdiction's failure to adopt the plan with the greatest possible number of majority black districts establishes that it acted with a discriminatory purpose); *Shaw, supra,* at 912–913, 116 S.Ct., at 1904 (same), or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged. See Part II, *supra.*

As our discussion illustrates, assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 564. In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Ibid.* In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, see, *e. g., Shaw v. Reno,* 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *Mobile,* 446 U.S., at 70–74, 100 S.Ct., at 1501–1503 (same), the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases. See *Pleasant Grove v. United States,* 479 U.S. 462, 469–470, 107 S.Ct. 794, 798–799, 93 L.Ed.2d 866 (1987) (considering city's history

in rejecting annexation of ***489** black neighborhood and its departure from normal procedures when calculating costs of annexation ****1503** alternatives); see also *Busbee v. Smith,* 549 F.Supp. 494, 516–517 (D.C. 1982), summarily aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States,* 517 F.Supp. 987, 1019, aff'd, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982) (same).

[14] The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.' " 429 U.S., at 266, 97 S.Ct., at 564 (citing *Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 2048–2049, 48 L.Ed.2d 597 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." 429 U.S., at 268, 97 S.Ct., at 565.

We are unable to determine from the District Court's opinion in this action whether it deemed irrelevant all evidence of the dilutive impact of the redistricting plan adopted by the Board. At one point, the District Court correctly stated that "the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent." 907 F.Supp., at 450 (emphasis added). This passage implies that the District Court believed that the existence of less dilutive options was at least relevant to, though not dispositive of, its purpose inquiry. While this language is consistent with our holding today, see *supra,* at 1501–1502, the District Court also declared that "we will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* With this statement, the District Court appears to endorse the notion that evidence ***490** of dilutive impact is irrelevant even to an inquiry into retrogressive intent, a notion we reject. See *supra,* at 1501–1502.

The Board contends that the District Court actually "presumed that white majority districts had [a dilutive] effect," Brief for Appellee 35, and "cut directly to the dispositive question 'started' by the existence of [a dilutive] impact: did the Board have 'legitimate, nondiscriminatory motives' for adopting its plan[?]" *Id.,* at 33. Even if the Board were correct, the District Court gave no indication that it was assuming the plan's dilutive effect, and we hesitate to attribute to the District Court a rationale it might not have employed. Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system,' " 907 F.Supp., at 449, n. 18.

* * *

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

Justice THOMAS, concurring.

Although I continue to adhere to the views I expressed in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 2591, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment), I join today's opinion because it is consistent with our vote dilution precedents. I fully anticipate, however, that as a result of today's holding, all of the problems we have experienced in § 2 vote dilution cases will now be replicated and, indeed, exacerbated in the § 5 retrogression inquiry.

I have trouble, for example, imagining a reapportionment change that could not be deemed "retrogressive" under our ***491** vote dilution jurisprudence by a court inclined to find it so. We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number ****1504** of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action *necessarily decreases* the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole. See, *e.g., Hays v. Louisiana,* 936 F.Supp.

360, 364, n. 17 (W.D.La.1996) (three-judge court) (noting that plaintiffs' expert "argues convincingly that our plan, with its one black majority and three influence districts, empowers more black voters statewide than does" a plan with two black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second black-majority district); cf. *Johnson v. De Grandy,* 512 U.S. 997, 1007, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994) (noting that dilution can occur by "fragmenting the minority voters among several districts ... or by packing them into one or a small number of districts to minimize their influence in the districts next door").

Under our vote dilution jurisprudence, therefore, a court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts). A court could presumably even strike down a new reapportionment plan that did not significantly alter the status quo at all, on the theory that such a plan did not measure up to some hypothetical ideal. With such an indeterminate "rule," § 5 ceases to be primarily a prophylactic tool in the important war against discrimination in voting, and instead becomes the means whereby the Federal Government, and particularly the Department of Justice, usurps ***492** the legitimate political judgments of the States. And such an empty "rule" inevitably forces the courts to make political judgments regarding which type of apportionment best serves supposed minority interests —judgments that the courts are ill equipped to make.

I can at least find some solace in the belief that today's opinion will force us to confront, with a renewed sense of urgency, this fundamental inconsistency that lies at the heart of our vote dilution jurisprudence.

Beyond my general objection to our vote dilution precedent, the one portion of the majority opinion with which I disagree is the majority's new suggestion that preclearance standards established by the Department of Justice are "normally" entitled to deference. See *ante,* at 1500.[*] Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may *obtain* preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to *preclude* judicial preclearance). Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Moreover, given our own "longstanding interpretation of § 5," see *ante,* at 1500, deference to the particular preclearance regulation addressed in this action would be inconsistent with another of the Attorney General's regulations, which provides: "In making determinations [under § 5] the Attorney General will be guided by the relevant decisions of the ***493** Supreme Court of the United States and of other Federal courts." 28 CFR § 51.56 (1996). Thus, while I agree with the majority's decision ****1505** not to defer to the Attorney General's standards, I would reach that result on different grounds.

Justice BREYER, with whom Justice GINSBURG joins, concurring in part and concurring in the judgment.

I join Parts I and II of the majority opinion, and Part III insofar as it is not inconsistent with this opinion. I write separately to express my disagreement with one aspect of the majority opinion. The majority says that we need not decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. In my view, we should decide the question, for otherwise the District Court will find it difficult to evaluate the evidence that we say it must consider. Cf. *post,* at 1512 (STEVENS, J ., dissenting in part and concurring in part). Moreover, the answer to the question is that the "purpose" inquiry does extend beyond the search for retrogressive intent. It includes the purpose of unconstitutionally diluting minority voting strength.

The language of § 5 itself forbids a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," where that change either (1) has the "purpose" or (2) will have the "effect" of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. These last few words reiterate in context the language of the Fifteenth Amendment itself: "The right of citizens ... to vote shall not be denied or abridged ... on account of race [or] color...." This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally. And a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan. *Mobile v. Bolden,* 446 U.S. 55, 62–63, 66, 100 S.Ct. 1490, 1497–1498, 1499, 64 L.Ed.2d 47 (1980) (plurality opinion); *ante,* at 1499.

***494** Of course, the constitutional language also applies to § 5's prohibition that rests upon "effects." The Court assumes, in its discussion of "effects," that the § 5 word "effects" does not now embody a *purely* constitutional test, whether or not it ever did so. See *ante,* at 1497; *City of Rome v. United States,* 446 U.S. 156, 173, 177, 100 S.Ct. 1548, 1559–1560, 64 L.Ed.2d 119 (1980). And that fact, here, is beside the point. The separate argument about the meaning of the word "effect" concerns *how far beyond* the Constitution's requirements Congress intended that word to reach. The argument about "purpose" is simply whether Congress intended the word to reach *as far as* the Constitution itself, embodying those purposes that, in relevant context, the Constitution itself would forbid. I can find nothing in the Court's discussion that shows that Congress intended to restrict the meaning of the statutory word "purpose" short of what the Constitution itself requires. And the Court has previously expressly indicated that minority vote dilution is a harm that § 5 guards against. *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 833–834, 22 L.Ed.2d 1 (1969).

Consider a hypothetical example that will clarify the precise legal question here at issue. Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the "effects" test of § 5. See *ante,* at 1497–1498. Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a State where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with "the purpose ... of denying or abridging the right to vote on account of race or color." § 1973c. It is reasonable ***495** to assume that the Constitution would forbid the use of such a plan. See *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (Fourteenth Amendment covers vote dilution claims); *Mobile,* 446 U.S., at 66, 100 S.Ct., at 1499 (plurality opinion) (same). And compare *id.,* at 62–63, 100 S.Ct., at 1497–1498 ****1506** (intentional vote dilution may be illegal under the Fifteenth Amendment) and *Gomillion v. Lightfoot,* 364 U.S. 339, 346, 81 S.Ct. 125, 129–130, 5 L.Ed.2d 110 (1960) (Fifteenth Amendment covers municipal boundaries drawn to exclude blacks), with *Mobile, supra,* at 84, n. 3, 100 S.Ct., at 1509, n. 3 (STEVENS, J., concurring in judgment) (*Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich v. Quilter,* 507 U.S. 146, 159, 113 S.Ct. 1149, 1158, 122 L.Ed.2d 500 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims ..."); *Shaw v. Reno,* 509 U.S. 630, 645, 113 S.Ct. 2816, 2825–2826, 125 L.Ed.2d 511 (1993) (endorsing the *Gomillion* concurrence's Fourteenth Amendment approach); and *Beer v. United States,* 425 U.S. 130, 142, n. 14, 96 S.Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976). Then, to read § 5's "purpose" language to require approval of Plan A, even though the jurisdiction cannot provide a neutral explanation for its choice, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose.

In light of this example, it is not surprising that this Court has previously indicated that the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect. In *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); for example, the Court doubted "that a showing of discriminatory effect under § 2, *alone,* could support a claim of discriminatory purpose under § 5." *Id.,* at 914, n. 6, 116 S.Ct., at 1904, n. 6 (emphasis added). The word "alone" suggests that the evidence of a discriminatory effect there at issue—evidence of dilution—could be relevant to a discriminatory purpose claim. And if so, the more natural understanding of § 5 is that an unlawful purpose includes more than simply a purpose to ***496** retrogress. Otherwise, dilution would either dispositively show an unlawful discriminatory effect (if retrogressive) or it would almost always be irrelevant (if not retrogressive). Either way, it would not normally have much to do with unlawful purpose. See also the discussions in *Richmond v. United States,* 422 U.S. 358, 378–379, 95 S.Ct. 2296, 2307–2308, 45 L.Ed.2d 245 (1975) (annexation plan did not have an impermissible dilutive effect but the Court remanded for a determination of whether there was an impermissible § 5 purpose); *Pleasant Grove v. United States,* 479 U.S. 462, 471–472, and n. 11, 107 S.Ct. 794, 800, and n. 11, 93 L.Ed.2d 866 (1987) (purpose to minimize *future* black voting strength is impermissible under § 5); *Port Arthur v. United States,* 459 U.S. 159, 168, 103 S.Ct. 530, 536, 74 L.Ed.2d 334 (1982) (a plan adopted for a discriminatory purpose is invalid under § 5 even if it "might otherwise be said to reflect the

political strength of the minority community"); *post,* at 1512 (STEVENS, J., dissenting in part and concurring in part).

Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), also implicitly assumed that § 5's "purpose" stretched beyond the purely retrogressive. There, the Justice Department pointed out that Georgia made a choice between two redistricting plans, one of which (call it Plan A) had more majority-black districts than the other (call it Plan B). The Department argued that the fact that Georgia chose Plan B showed a forbidden § 5 discriminatory purpose. The Court rejected this argument, but the reason that the majority gave for that rejection is important. The Court pointed out that Plan B embodied traditional state districting principles. It reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose. *Id.,* at 924, 115 S.Ct., at 2492. If the only relevant "purpose" were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. The Court would have concerned itself only with Georgia's intent to worsen the position of minorities, not with the reasons why Georgia could ***497** have adopted one of two potentially ameliorative plans. Indeed, the Court indicated that an ameliorative plan *would* run afoul of the § 5 purpose test if it violated the Constitution. ****1507** *Ibid.* See also *Shaw v. Hunt, supra,* at 912–913, 116 S.Ct., at 1904.

In sum, the Court today should make explicit an assumption implicit in its prior cases. Section 5 prohibits a covered State from making changes in its voting practices and procedures where those changes have the *unconstitutional* "purpose" of unconstitutionally diluting minority voting strength.

Justice STEVENS, with whom Justice SOUTER joins, dissenting in part and concurring in part.

In my view, a plan that clearly violates § 2 is not entitled to preclearance under § 5 of the Voting Rights Act of 1965. The majority's contrary view would allow the Attorney General of the United States to place her stamp of approval on a state action that is in clear violation of federal law. It would be astonishing if Congress had commanded her to do so. In fact, however, Congress issued no such command. Surely no such command can be found in the text of § 5 of the Voting Rights Act.[1] Moreover, a fair review of the text ***498** and the legislative history of the 1982 amendment to § 2 of that Act indicates that Congress intended the Attorney General to deny preclearance under § 5 whenever it was clear that a new voting practice was prohibited by § 2. This does not mean that she must make an independent inquiry into possible violations of § 2 whenever a request for preclearance is made. It simply means that, as her regulations provide, she must refuse preclearance when "necessary to prevent a clear violation of amended section 2." 28 CFR § 51.55(b)(2) (1996).

It is, of course, well settled that the Attorney General must refuse to preclear a new election procedure in a covered jurisdiction if it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). A retrogressive effect or a retrogressive purpose is a sufficient basis for denying a preclearance request under § 5. Today, however, the Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5, *ante,* at 1496–1501, and it assumes that "the § 5 purpose inquiry [never] extends beyond the search for retrogressive intent." *Ante,* at 1501. While I agree that this action must be remanded even under the Court's miserly interpretation of § 5, I disagree with the Court's holding/assumption that § 5 is concerned only with retrogressive effects and purposes.

Before explaining my disagreement with the Court, I think it important to emphasize the three factual predicates that underlie our analysis of the issues. First, we assume ***499** that the plan submitted by the Bossier Parish School Board (Board) was not "retrogressive" because it did not make matters any worse than they had been in the past. None of the 12 districts had ever had a black majority and a black person had never been elected to the Board. App. to Juris. Statement 67a. Second, because the majority in ****1508** both the District Court and this Court found that even clear violations of § 2 must be precleared and thus found it unnecessary to discuss whether § 2 was violated in this action, we may assume that the record discloses a "clear violation" of § 2. This means that, in the language of § 2, it is perfectly clear that "the political processes leading to nomination or election [to positions on the Board] are not equally open to participation by members of [the African–American race] in that its members have less opportunity than other members of the electorate to ... elect representatives of their choice." 42 U.S.C. § 1973(b).[2] Third, if the Court is correct in assuming that the purpose inquiry under § 5 may be limited to evidence of "retrogressive intent," it must also be willing to assume that the documents submitted in support of the request for

preclearance clearly establish that the plan was adopted for the specific purpose of preventing African–Americans from obtaining representation on the Board. Indeed, for the purpose of analyzing the legal issues, we must assume that Judge Kessler, concurring in part and dissenting in part, accurately summarized the evidence when she wrote:

> "The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory ***500** purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts." 907 F.Supp. 434, 463 (D.C.1995).
>
> If the purpose and the effect of the Board's plan were simply to maintain the discriminatory status quo as described by Judge Kessler, the plan would not have been retrogressive. But, as I discuss below, that is not a sufficient reason for concluding that it complied with § 5.

I

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting. As originally enacted, § 2 of the Act was "an uncontroversial provision" that "simply restated" the prohibitions against such discrimination "already contained in the Fifteenth Amendment," *Mobile v. Bolden,* 446 U.S. 55, 61, 100 S.Ct., at 1496–1497 (1980) (plurality opinion). Like the constitutional prohibitions against discriminatory districting practices that were invalidated in cases like *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), § 2 was made applicable to every State and political subdivision in the country. ***501** Section 5, on the other hand, was highly controversial because it imposed novel, extraordinary remedies in certain areas where discrimination had been most flagrant. See *South Carolina v. Katzenbach,* 383 U.S. 301, 334–335, 86 S.Ct. 803, 821–822, 15 L.Ed.2d 769 (1966).[3] ****1509** Jurisdictions like Bossier Parish in Louisiana are covered by § 5 because their history of discrimination against African–Americans was a matter of special concern to Congress. Because these jurisdictions had resorted to various strategies to avoid complying with court orders to remedy discrimination, "Congress had reason to suppose that [they] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.,* at 335, 86 S.Ct., at 822. Thus Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of "rid[ding] the country of racial discrimination." *Id.,* at 315, 86 S.Ct., at 812 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

In areas of the country lacking a history of pervasive discrimination, Congress presumed that voting practices were generally lawful. Accordingly, the burden of proving a violation of § 2 has always rested on the party challenging the voting practice. The situation is dramatically different in covered jurisdictions. In those jurisdictions, § 5 flatly prohibits the adoption of any new voting procedure unless the State or political subdivision institutes an action in the Federal District Court for the District of Columbia and obtains a declaratory judgment that the change will not have a discriminatory purpose or effect. See 42 U.S.C. § 1973c. The burden of proving compliance with the Act rests on the jurisdiction. A proviso to § 5 gives the Attorney General the authority to allow the new procedure to go into effect, but ***502** like the immigration statutes that give her broad discretion to waive deportation of undesirable aliens, it does not expressly impose any limit on her discretion to refuse preclearance. See *ibid.* The Attorney General's discretion is, however, cabined by regulations that are presumptively valid if they "are reasonable and do not conflict with the Voting Rights Act itself," *Georgia v. United States,* 411 U.S. 526, 536, 93 S.Ct. 1702, 1708, 36 L.Ed.2d 472 (1973). Those regulations provide that preclearance will generally be granted if a proposed change "is free of discriminatory purpose and retrogressive effect"; they also provide, however, that in "those instances" in which the Attorney General concludes "that a bar to implementation of the change is necessary to prevent a clear violation of amended section

2," preclearance shall be withheld.[4] There is no basis for the Court's speculation that litigants would so " 'routinely,' " *ante,* at 1497, employ this 10–year–old regulation as to "make compliance with § 5 contingent upon compliance with § 2," *ibid.* Nor do the regulations require the jurisdiction to assume the burden of proving the absence of vote ***503** dilution, see *ante,* at 1498. They merely preclude preclearance when "necessary to prevent a clear violation of ... section 2." While the burden of disproving discriminatory purpose or retrogressive effect is on the submitting jurisdiction, if the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in ****1510** any § 2 challenge, should rest on the Attorney General.[5]

The Court does not suggest that this regulation is inconsistent with the text of § 5. Nor would this be persuasive, since the language of § 5 forbids preclearance of any voting practice that would have "the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Instead the Court rests its entire analysis on the flawed premise that our cases hold that a change, even if otherwise unlawful, cannot have an effect prohibited by § 5 unless that effect is retrogressive. The two cases on which the Court relies, *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), do hold (as the current regulations provide) that proof that a change is not retrogressive is normally sufficient to justify preclearance under § 5. In neither case, however, was the Court confronted with the question whether that showing would be sufficient if the proposed change was so discriminatory that it clearly violated some other federal law. ***504** In fact, in *Beer*—which held that a legislative reapportionment enhancing the position of African–American voters did not have a discriminatory effect—the Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364.[6] Thus, to the extent that the *Beer* Court addressed the question at all, it suggested that certain nonretrogressive changes that were nevertheless discriminatory should not be precleared.

The Court discounts the significance of the "unless" clause because it refers to a constitutional violation rather than a statutory violation. According to the Court's reading, the *Beer* dictum at most precludes preclearance of changes that violate the Constitution rather than changes that violate § 2. This argument is unpersuasive. As the majority notes, the *Beer* Court cites *White v. Regester,* 412 U.S., at 766, 93 S.Ct., at 2339–2340, which found unconstitutional a reapportionment scheme that gave African–American residents "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Because, in 1976, when *Beer* was decided, the § 2 standard was coextensive with the constitutional standard, *Beer* did not purport to distinguish between challenges brought under the Constitution and those brought under the statute. Rather *Beer* 's dictum suggests that any changes that violate the standard established in *White v. Regester* should not be precleared.[7]

***505** As the Court recognizes, *ante,* at 1499, the law has changed in two respects since the announcement of the *Beer* dictum. In 1980, in what was perceived by Congress to be a change in the standard applied in *White v. Regester,* a plurality of this Court concluded that discriminatory purpose is an essential ****1511** element of a constitutional vote dilution challenge. See *Mobile v. Bolden,* 446 U.S., at 62, 100 S.Ct., at 1497. In reaction to that decision, in 1982 Congress amended § 2 by placing in the statute the language used in the *White* opinion to describe what is commonly known as the "results" standard for evaluating vote dilution challenges. See 96 Stat. 134 (now codified at 42 U.S.C. §§ 1973(a)-(b)); *Thornburg v. Gingles,* 478 U.S. 30, 35, 106 S.Ct. 2752, 2758, 92 L.Ed.2d 25 (1986).[8] Thus Congress preserved, as a matter of statutory law, the very same standard that the Court had identified in *Beer* as an exception to the general rule requiring preclearance of nonretrogressive changes. Because in 1975 *Beer* required denial of preclearance for voting plans that violated the *White* standard, it follows that Congress, in preserving the *White* standard, intended also that the Attorney General should continue to refuse to preclear plans violating that standard.

That intent is confirmed by the legislative history of the 1982 Act. The Senate Report states:

> "Under the rule of *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141 [96 S.Ct., at 1364]; *see also* 142 n. 14 [96 S.Ct., at 1364, n. 14] (citing to the dilution cases from *Fortson v. Dorsey* [379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965),] through *White v. Regester*). In light of the amendment to section

2, it is intended that a section 5 objection also follow if a new voting procedure itself so ***506** discriminates as to violate section 2." S.Rep. No. 97–417, p. 12, n. 31 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 189.

The House Report conveys the same message in different language. It unequivocally states that whether a discriminatory practice or procedure was in existence before 1965 (and therefore only subject to attack under § 2) or is the product of a recent change (and therefore subject to preclearance under § 5) "affects only the mechanism that triggers relief." H.R.Rep. No. 97–227, p. 28 (1981). This statement plainly indicates that the Committee understood the substantive standards for § 2 and § 5 violations to be the same whenever a challenged practice in a covered jurisdiction represents a change subject to the dictates of § 5.[9] Thus, it is reasonable to assume that Congress, by endorsing the "unless" clause in *Beer,* contemplated the denial of preclearance for any change that clearly violates amended § 2. The majority, by belittling this legislative history, abrogates Congress'effort, ***507** in enacting the 1982 amendments, "to broaden the protection afforded by the Voting Rights Act." *Chisom v. Roemer,* 501 U.S. 380, 404, 111 S.Ct. 2354, 2368, 115 L.Ed.2d 348 (1991).

Despite this strong evidence of Congress' intent, the majority holds that no deference to the Attorney General's regulation is warranted. The Court suggests that had Congress wished to alter "our longstanding interpretation" ****1512** of § 5, Congress would have made this clear. *Ante,* at 1500. But nothing in our "settled interpretation" of § 5, *ante,* at 1500, is inconsistent with the Attorney General's reading of the statute. To the contrary, our precedent actually indicates that nonretrogressive plans that are otherwise discriminatory under *White v. Regester* should not be precleared. As neither the language nor the legislative history of § 5 can be said to conflict with the view that changes that clearly violate § 2 are not entitled to preclearance, there is no legitimate basis for refusing to defer to the Attorney General's regulation. See *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992).

II

In Part III of its opinion the Court correctly concludes that this action must be remanded for further proceedings because the District Court erroneously refused to consider certain evidence that is arguably relevant to whether the Board has proved an absence of discriminatory purpose under § 5. Because the Court appears satisfied that the disputed evidence may be probative of an " 'intent to retrogress,' " it concludes that it is unnecessary to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. For two reasons, I think it most unwise to reverse on such a narrow ground.

First, I agree with Justice bREYER, see *ante,* at 1505, that there is simply no basis for imposing this limitation on the purpose inquiry. None of our cases have held that § 5's purpose test is limited to retrogressive intent. In ***508** *Pleasant Grove v. United States,* 479 U.S. 462, 469–472, 107 S.Ct. 794, 798–801, 93 L.Ed.2d 866 (1987), for instance, we found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, we found it was subject to § 5 preclearance. *Ibid.;* see also *id.,* at 474–475, 107 S.Ct., at 801–802 (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Furthermore, limiting the § 5 purpose inquiry to retrogressive intent is inconsistent with the basic purpose of the Act. Assume, for example, that the record unambiguously disclosed a long history of deliberate exclusion of African–Americans from participating in local elections, including a series of changes each of which was adopted for the specific purpose of maintaining the status quo. None of those changes would have been motivated by an "intent to regress," but each would have been motivated by a "discriminatory purpose" as that term is commonly understood. Given the long-settled understanding that § 5 of the Act was enacted to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina v. Katzenbach,* 383 U.S., at 335, 86 S.Ct., at 822, it is inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination.

Second, the Court's failure to make this point clear can only complicate the task of the District Court on remand. If that court takes the narrow approach suggested by the Court, another appeal will surely follow; if a majority ultimately agrees with my view of the issue, another remand will then be necessary. On the other hand, if the District Court does not limit its consideration to evidence of retrogressive intent, and if it therefore rules against the Board, appellees will bring the

action back and the Court would then have to resolve the issue definitively.

***509** In sum, both the interest in orderly procedure and the fact that a correct answer to the issue is pellucidly clear should be sufficient to persuade the Court to state definitively that § 5 preclearance should be denied if Judge Kessler's evaluation of the record is correct.

Accordingly, while I concur in the judgment insofar as it remands the action for further proceedings, I dissent from the decision insofar as it fails to authorize proceedings in accordance with the views set forth above.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* I do not address the separate question, not presented by this action, whether the Department's *interpretation* of the Voting Rights Act of 1965, as opposed to its articulation of standards applicable to its own preclearance determinations, is entitled to deference. The regulation at issue here only purports to be the latter.

1 As originally enacted, § 5 provided:

"Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 U.S.C. § 2284] and any appeal shall lie to the Supreme Court." 79 Stat. 439.

2 Although the majority in the District Court refused to consider any of the evidence relevant to a § 2 violation, the parties' stipulations suggest that the plan violated § 2. For instance, the parties' stipulated that there had been a long history of discrimination against black voters in Bossier Parish, see App. to Juris. Statement 130a–140a; that voting in Bossier Parish was racially polarized, see *id.,* at 122a–127a; and that it was possible to draw two majority black districts without violating traditional districting principles, see *id.,* at 76a, 82a–83a, 114a–115a.

3 Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina v. Katzenbach,* 383 U.S., at 317–318, 86 S.Ct., at 812–813.

4 Title 28 CFR § 51.55 (1996) provides:

"Consistency with constitutional and statutory requirements.

"(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements

of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

"(b) *Section 2.* (1) Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.

"(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."

5 Thus, I agree with those courts that have found that the jurisdiction is not required to prove that its proposed change will not violate § 2 in order to receive preclearance. See *Arizona v. Reno,* 887 F.Supp. 318, 321 (D.D.C.1995). Although several three-judge District Courts have concluded that § 2 standards should not be incorporated into § 5, none has held that preclearance should be granted when there is a clear violation of § 2; rather, they appear simply to have determined that a § 2 inquiry is not routinely required in a § 5 case. See, *e.g., Georgia v. Reno,* 881 F.Supp. 7, 12–14 (D.D.C.1995); *New York v. United States,* 874 F.Supp. 394, 398–399 (D.D.C.1994); cf. *Burton v. Sheheen,* 793 F.Supp. 1329, 1350 (D.S.C.1992) (holding that although courts are not "obligated to completely graft" § 2 standards onto § 5, "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2").

6 In *Lockhart* the Court disavowed reliance on the ameliorative character of the change reviewed in *Beer,* see 460 U.S., at 134, n. 10, 103 S.Ct., at 1004, n. 10. It left open the question whether Congress had altered the *Beer* standard when it amended § 2 in 1982, 460 U.S., at 133, n. 9, 103 S.Ct., at 1003, n. 9, and said nothing about the possible significance of a violation of a constitutional or statutory prohibition against vote dilution.

7 In response to this dissent, the majority contends that, at most, *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), allows denial of preclearance for those changes that violate the Constitution. See *ante,* at 1499–1500. Thus, the majority apparently concedes that our "settled interpretation," *ante,* at 1500, of § 5 supports a denial of preclearance for at least some nonretrogressive changes.

8 The amended version of § 2 tracks the language in *White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973).

9 The postenactment legislative record also supports the Attorney General's interpretation of § 5. In 1985, the Attorney General first proposed regulations requiring a denial of preclearance "based upon violation of Section 2 if there is clear and convincing evidence of such a violation." 50 Fed.Reg. 19122, 19131. Congress held oversight hearings in which several witnesses, including the Assistant Attorney General, Civil Rights Division, testified that clear violations of § 2 should not be precleared. See Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, 99th Cong., 1st Sess., 47, 149, 151–152 (1985). Following these hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a Report in which it concluded "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations, 99th Cong., 2d Sess., Ser. No. 9, p. 5 (Comm. Print 1986). Although this history does not provide direct evidence of the enacting Congress' intent, it does constitute an informed expert opinion concerning the validity of the Attorney General's regulation.

129 S.Ct. 2658
Supreme Court of the United States

Frank RICCI et al., Petitioners,

v.

John DeSTEFANO et al.

Frank Ricci, et al., Petitioners,

v.

John DeStefano et al.

Nos. 07–1428, 08–328
|
Argued April 22, 2009.
|
Decided June 29, 2009.

Synopsis

Background: White firefighters and one Hispanic firefighter sued city and city officials, alleging that city violated Title VII by refusing to certify results of promotional examination, based on city's belief that its use of results could have disparate impact on minority firefighters. The United States District Court for the District of Connecticut, Janet Bond Arterton, J., 554 F.Supp.2d 142, entered summary judgment for city and city officials. Firefighters appealed. The Court of Appeals, 530 F.3d 87, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

[1] city's refusal to certify results was violation of Title VII's disparate-treatment prohibition absent some valid defense;

[2] before employer can engage in intentional discrimination for asserted purpose of avoiding unintentional disparate impact, employer must have strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious action;

[3] city officials lacked strong basis in evidence to believe that examinations were not job-related and consistent with business necessity; and

[4] city officials lacked strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to use of examinations that served city's needs but that city refused to adopt.

Reversed and remanded.

Justice Scalia filed concurring opinion.

Justice Alito filed concurring opinion joined by Justices Scalia and Thomas.

Justice Ginsburg filed dissenting opinion joined by Justices Stevens, Souter, and Breyer.

West Headnotes (22)

[1] **Constitutional Law** Resolution of non-constitutional questions before constitutional questions

Federal Courts Determination and Disposition of Cause

Because decision for firefighters on their statutory Title VII claim would provide relief sought in their action alleging violations of Title VII and their equal protection rights, Supreme Court would consider statutory claim first. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12 Cases that cite this headnote

[2] **Civil Rights** Disparate treatment

Civil Rights Disparate impact

Title VII prohibits both intentional discrimination, known as "disparate treatment," as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, known as "disparate impact." Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

294 Cases that cite this headnote

[3] **Civil Rights** Disparate treatment

Disparate-treatment Title VII cases present the most easily understood type of discrimination, and occur where an employer has treated a particular person less favorably than others because of a protected trait. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

185 Cases that cite this headnote

[4] **Civil Rights** Disparate treatment

A disparate-treatment Title VII plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job-related action. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

229 Cases that cite this headnote

[5] **Civil Rights** Educational requirements; ability tests

Civil Rights Race, color, ethnicity, or national origin

City's refusal to certify results of firefighter promotion examination, based on city's belief that doing so could have disparate impact on minority firefighters because white candidates had outperformed minority candidates, was violation of Title VII's disparate-treatment prohibition absent some valid defense, since, however well intentioned or benevolent city's motivation might have seemed, city made its employment decision because of race. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

53 Cases that cite this headnote

[6] **Civil Rights** Purpose and construction in general

Civil Rights Discrimination by reason of race, color, ethnicity, or national origin, in general

The purpose of Title VII is that the workplace be an environment free of discrimination, where race is not a barrier to opportunity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

93 Cases that cite this headnote

[7] **Statutes** Conflict

When two prohibitions in a statute could be in conflict absent a rule to reconcile them, the Supreme Court must interpret the statute to give effect to both provisions where possible.

9 Cases that cite this headnote

[8] **Civil Rights** Disparate impact

It is not impermissible under Title VII for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

55 Cases that cite this headnote

[9] **Civil Rights** Disparate impact

Civil Rights Defenses in general

An employer is not required to be in violation of Title VII's disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit. Civil Rights Act of 1964, § 703(a)(1), (k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(a)(1), (k)(1)(A)(i).

34 Cases that cite this headnote

[10] **Civil Rights** Purpose and construction in general

Civil Rights Conference, conciliation, and persuasion; settlement

Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

22 Cases that cite this headnote

[11] **Civil Rights** Disparate impact

An employer's good-faith belief that its actions are necessary to comply with Title VII's

disparate-impact provision is not enough to justify race-conscious conduct. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

7 Cases that cite this headnote

[12] **Civil Rights** Purpose and construction in general

Civil Rights Hiring

The purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34 Cases that cite this headnote

[13] **Civil Rights** Disparate impact

Congress has imposed Title VII liability on employers for unintentional discrimination in order to rid the workplace of practices that are fair in form, but discriminatory in operation. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

19 Cases that cite this headnote

[14] **Civil Rights** Educational requirements; ability tests

Civil Rights Race, color, ethnicity, or national origin

An employer does not violate Title VII by making affirmative efforts to use testing to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made, but once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Civil Rights Act of 1964, § 703(j), 42 U.S.C.A. § 2000e–2(j).

5 Cases that cite this headnote

[15] **Civil Rights** Practices prohibited or required in general; elements

Civil Rights Educational requirements; ability tests

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

[16] **Civil Rights** Disparate impact

Civil Rights Race, color, ethnicity, or national origin

Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. Civil Rights Act of 1964, § 703(a)(1), (k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(a)(1), (k)(1)(A)(i).

135 Cases that cite this headnote

[17] **Summary Judgment** Favoring nonmovant; disfavoring movant

On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2279 Cases that cite this headnote

[18] **Summary Judgment** Genuine Issue or Dispute as to Material Fact

Where the record taken as a whole could not lead a rational trier of fact to find for the summary judgment nonmovant, there is no genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1862 Cases that cite this headnote

[19] **Civil Rights** Disparate impact

A prima facie case of disparate-impact liability under Title VII is essentially a threshold showing of a significant statistical disparity and nothing more. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

97 Cases that cite this headnote

[20] **Civil Rights** Educational requirements; ability tests

Civil Rights Race, color, ethnicity, or national origin

City officials lacked strong basis in evidence to believe that city's promotional examinations for firefighters were not job-related and consistent with business necessity, and that use of examination results in which white candidates outperformed minority candidates therefore would have disparate impact on minorities, and, thus, officials failed to establish defense on such basis to liability under Title VII's disparate-treatment provision, where written examinations were devised after painstaking analyses of captain and lieutenant positions, examination's developer drew questions from source material approved by fire department, developer addressed challenges to particular questions, and city turned blind eye to evidence that supported examinations' validity. Civil Rights Act of 1964, § 703(a)(1), (k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(a)(1), (k)(1)(A)(i).

41 Cases that cite this headnote

[21] **Civil Rights** Educational requirements; ability tests

Civil Rights Race, color, ethnicity, or national origin

City officials lacked strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to use of city's promotional examinations that served city's needs but that city refused to adopt because white candidates had outperformed minority candidates, and that use of examination results therefore would have disparate impact on minorities, and, thus, officials failed to establish defense on such basis to liability under Title VII's disparate-treatment provision, where there was no evidence that changing formula for weighing written and oral portions of test was equally valid way of choosing candidates, "banding" alternative would have violated Title VII and thus was not available to city, and isolated statements by industrial/organizational psychologist could not be basis for finding equally valid alternatives. Civil Rights Act of 1964, § 703(a)(1), (k)(1)(A)(ii), (k)(1)(C), (*l*), 42 U.S.C.A. § 2000e–2(a)(1), (k)(1)(A)(ii), (k)(1)(C), (*l*).

32 Cases that cite this headnote

[22] **Civil Rights** Educational requirements; ability tests

Fear of litigation alone cannot justify an employer's reliance on race in rejecting examination results, to the detriment of individuals who passed examinations and qualified for promotions. Civil Rights Act of 1964, § 703(a)(1), (k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(a)(1), (k)(1)(A)(i).

3 Cases that cite this headnote

****2661** *Syllabus*[*]

New Haven, Conn. (City), uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia,*

Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

Held: The City's action in discarding the tests violated Title VII. Pp. 2672 – 2682.

(a) Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin, 42 U.S.C. § 2000e–2(a)(1) (disparate treatment), as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, § 2000e–2(k)(1)(A)(i) (disparate impact). Once a plaintiff has established a prima facie case of disparate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." *Ibid.* If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs. §§ 2000e–2(k)(1)(A)(ii) and (C). Pp. 2672 – 2673.

(b) Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. The Court's analysis begins with the premise that the City's actions would violate Title VII's disparate-treatment prohibition absent some valid defense. All the evidence demonstrates that the City rejected the test results because the higher ****2662** scoring candidates were white. Without some other justification, this express, race-based decisionmaking is prohibited. The question, therefore, is whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. The Court has considered cases similar to the present litigation, but in the context of the Fourteenth Amendment's Equal Protection Clause. Such cases can provide helpful guidance in this statutory context. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 993, 108 S.Ct. 2777, 101 L.Ed.2d 827. In those cases, the Court held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854; see also *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260. In announcing the strong-basis-in-evidence standard, the *Wygant* plurality recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U.S., at 277, 106 S.Ct. 1842. It reasoned that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The same interests are at work in the interplay between Title VII's disparate-treatment and disparate-impact provisions. Applying the strong-basis-in-evidence standard to Title VII gives effect to both provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. It also allows the disparate-impact prohibition to work in a manner that is consistent with other Title VII provisions, including the prohibition on adjusting employment-related test scores based on race, see § 2000e–2(*l*), and the section that expressly protects bona fide promotional exams, see § 2000e–2(h). Thus, the Court adopts the strong-basis-in-evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate-treatment and disparate-impact provisions. Pp. 2673 – 2677.

(c) The City's race-based rejection of the test results cannot satisfy the strong-basis-in-evidence standard. Pp. 2677 – 2681.

(i) The racial adverse impact in this litigation was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. The problem for respondents is that such a prima facie case—essentially, a threshold showing of a significant statistical disparity, *Connecticut v. Teal,* 457 U.S. 440, 446, 102 S.Ct. 2525, 73 L.Ed.2d 130, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That is because the City could be liable for disparate-impact discrimination only if the exams at issue were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt. §§ 2000e–2(k)(1)(A), (C). Based on the record the parties developed through discovery, there is no substantial basis in evidence that the test was deficient in either respect. Pp. 2677 – 2678.

(ii) The City's assertions that the exams at issue were not job related and consistent with business necessity are blatantly contradicted by the record, which demonstrates the detailed steps taken to develop and administer the tests and the **2663 painstaking analyses of the questions asked to assure their relevance to the captain and lieutenant positions. The testimony also shows that complaints that certain examination questions were contradictory or did not specifically apply to firefighting practices in the City were fully addressed, and that the City turned a blind eye to evidence supporting the exams' validity. Pp. 2678 – 2679.

(iii) Respondents also lack a strong basis in evidence showing an equally valid, less discriminatory testing alternative that the City, by certifying the test results, would necessarily have refused to adopt. Respondents' three arguments to the contrary all fail. First, respondents refer to testimony that a different composite-score calculation would have allowed the City to consider black candidates for then-open positions, but they have produced no evidence to show that the candidate weighting actually used was indeed arbitrary, or that the different weighting would be an equally valid way to determine whether candidates are qualified for promotions. Second, respondents argue that the City could have adopted a different interpretation of its charter provision limiting promotions to the highest scoring applicants, and that the interpretation would have produced less discriminatory results; but respondents' approach would have violated Title VII's prohibition of race-based adjustment of test results, § 2000e–2(*l*). Third, testimony asserting that the use of an assessment center to evaluate candidates' behavior in typical job tasks would have had less adverse impact than written exams does not aid respondents, as it is contradicted by other statements in the record indicating that the City could not have used assessment centers for the exams at issue. Especially when it is noted that the strong-basis-in-evidence standard applies to this case, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. Pp. 2679 – 2681.

(iv) Fear of litigation alone cannot justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. Discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of today's holding the City can avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability. P. 2681.

530 F.3d 87, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

*561 In the fire department of New Haven, Connecticut —as in emergency-service agencies throughout the Nation —firefighters *562 prize their promotion to and within the officer ranks. An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance ***563** sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question ****2665** whether respondents' actions may have violated the Equal Protection Clause.

I

This litigation comes to us after the parties' cross-motions for summary judgment, so we set out the facts in some detail. As the District Court noted, although "the parties strenuously dispute the relevance and legal import of, and inferences to be drawn from, many aspects of this case, the underlying facts are largely undisputed." 554 F.Supp.2d 142, 145 (Conn.2006).

A

When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (Department), the promotion and hiring process was governed by the city charter, in addition to federal and state law. The ***564** charter establishes a merit system. That system requires the City to fill vacancies in the classified civil-service ranks with the most qualified individuals, as determined by job-related examinations. After each examination, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who passed the test. Under the charter's "rule of three," the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list. Certified promotional lists remain valid for two years.

The City's contract with the New Haven firefighters' union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score. To sit for the examinations, candidates for lieutenant needed 30 months' experience in the Department, a high-school diploma, and certain vocational training courses. Candidates for captain needed one year's service as a lieutenant in the Department, a high-school diploma, and certain vocational training courses.

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of $100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge,

skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and ***565** lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each ****2666** test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3–month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken.

IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained ***566** two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. 554 F.Supp.2d, at 145. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. *Ibid.* Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. *Ibid.* Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics. *Ibid.*

B

The City's contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City's counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legel. (Legel was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legel defended the examinations' validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was ***567** in line with results of the Department's previous promotional examinations.

Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for ****2667** employer-initiated, voluntar[y] remedies—even ... race-conscious

remedies." App. to Pet. for Cert. in No. 07–1428, p. 443a; see also 554 F.Supp.2d, at 145 (issue of disparate impact "appears to have been raised by ... Ude").

1

The CSB first met to consider certifying the results on January 22, 2004. Tina Burgett, director of the City's Department of Human Resources, opened the meeting by telling the CSB that "there is a significant disparate impact on these two exams." App. to Pet. for Cert. in No. 07–1428, at 466a. She distributed lists showing the candidates' races and scores (written, oral, and composite) but not their names. Ude also described the test results as reflecting "a very significant disparate impact," *id.,* at 477a, and he outlined possible grounds for the CSB's refusing to certify the results.

Although they did not know whether they had passed or failed, some firefighter-candidates spoke at the first CSB meeting in favor of certifying the test results. Michael Blatchley stated that "[e]very one" of the questions on the written examination "came from the [study] material. ... [I]f you read the materials and you studied the material, you would have done well on the test." App. in No. 06–4996–cv (CA2), pp. A772–A773 (hereinafter CA2 App.). Frank Ricci stated that the test questions were based on the Department's own rules and procedures and on "nationally recognized" materials that represented the "accepted standard[s]" for firefighting. *Id.,* at A785–A786. Ricci stated that he ***568** had "several learning disabilities," including dyslexia; that he had spent more than $1,000 to purchase the materials and pay his neighbor to read them on tape so he could "give it [his] best shot"; and that he had studied "8 to 13 hours a day to prepare" for the test. *Id.,* at A786, A789. "I don't even know if I made it," Ricci told the CSB, "[b]ut the people who passed should be promoted. When your life's on the line, second best may not be good enough." *Id.,* at A787–A788.

Other firefighters spoke against certifying the test results. They described the test questions as outdated or not relevant to firefighting practices in New Haven. Gary Tinney stated that source materials "came out of New York.... Their makeup of their city and everything is totally different than ours." *Id.,* at A774–A775; see also *id.,* at A779, A780–A781. And they criticized the test materials, a full set of which cost about $500, for being too expensive and too long.

2

At a second CSB meeting, on February 5, the president of the New Haven firefighters' union asked the CSB to perform a validation study to determine whether the tests were job-related. Petitioners' counsel in this action argued that the CSB should certify the results. A representative of the International Association of Black Professional Firefighters, Donald Day from neighboring Bridgeport, Connecticut, "beseech[ed]" the CSB "to throw away that test," which he described as "inherently unfair" because of the racial distribution of the results. *Id.,* at A830–A831. Another Bridgeport-based representative of the association, Ronald Mackey, stated that a validation study was necessary. He suggested that the City could "adjust" the test results to "meet the criteria of having a certain amount of minorities get elevated to the rank of Lieutenant and Captain." *Id.,* at A838. At the end of this meeting, the CSB members agreed to ask IOS to send a representative to explain how it had developed and administered the examinations. They also ****2668** ***569** discussed asking a panel of experts to review the examinations and advise the CSB whether to certify the results.

3

At a third meeting, on February 11, Legel addressed the CSB on behalf of IOS. Legel stated that IOS had previously prepared entry-level firefighter examinations for the City but not a promotional examination. He explained that IOS had developed examinations for departments in communities with demographics similar to New Haven's, including Orange County, Florida; Lansing, Michigan; and San Jose, California.

Legel explained the exam-development process to the CSB. He began by describing the job analyses IOS performed of the captain and lieutenant positions—the interviews, ride-alongs, and questionnaires IOS designed to "generate a list of tasks, knowledge, skills and abilities that are considered essential to performance" of the jobs. *Id.,* at A931–A932. He outlined how IOS prepared the written and oral examinations, based on the job-analysis results, to test most heavily those qualities that the results indicated were "critica[l]" or "essentia[l]." *Id.,* at A931. And he noted that IOS took the material for each test question directly from the approved source materials. Legel told the CSB that third-party reviewers had scrutinized the examinations to ensure that the written test was drawn

from the source material and that the oral test accurately tested real-world situations that captains and lieutenants would face. Legel confirmed that IOS had selected oral-examination panelists so that each three-member assessment panel included one white, one black, and one Hispanic member.

Near the end of his remarks, Legel "implor[ed] anyone that had ... concerns to review the content of the exam. In my professional opinion, it's facially neutral. There's nothing in those examinations ... that should cause somebody to think that one group would perform differently than another group." *Id.,* at A961.

***570** 4

At the next meeting, on March 11, the CSB heard from three witnesses it had selected to "tell us a little bit about their views of the testing, the process, [and] the methodology." *Id.,* at A1020. The first, Christopher Hornick, spoke to the CSB by telephone. Hornick is an industrial/organizational psychologist from Texas who operates a consulting business that "direct[ly]" competes with IOS. *Id.,* at A1029. Hornick, who had not "stud[ied] the test at length or in detail" and had not "seen the job analysis data," told the CSB that the scores indicated a "relatively high adverse impact." *Id.,* at A1028, A1030, A1043. He stated that "[n]ormally, whites outperform ethnic minorities on the majority of standardized testing procedures," but that he was "a little surprised" by the disparity in the candidates' scores—although "[s]ome of it is fairly typical of what we've seen in other areas of the countr[y] and other tests." *Id.,* at A1028–A1029. Hornick stated that the "adverse impact on the written exam was somewhat higher but generally in the range that we've seen professionally." *Id.,* at A1030–A1031.

When asked to explain the New Haven test results, Hornick opined in the telephone conversation that the collective-bargaining agreement's requirement of using written and oral examinations with a 60/40 composite score might account for the statistical disparity. He also stated that "[b]y not having anyone from within the [D]epartment review" the tests before they were administered—a limitation the City had imposed to protect the security of the exam questions —"you inevitably get ****2669** things in there" that are based on the source materials but are not relevant to New Haven. *Id.,* at A1034–A1035. Hornick suggested that testing candidates at an "assessment center" rather than using written and oral examinations "might serve [the City's] needs better." *Id.,* at A1039–A1040. Hornick stated that assessment centers, where candidates face real-world situations and respond just as they would in the field, allow candidates ***571** "to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test." *Ibid.*

Hornick made clear that he was "not suggesting that [IOS] somehow created a test that had adverse impacts that it should not have had." *Id.,* at A1038. He described the IOS examinations as "reasonably good test[s]." *Id.,* at A1041. He stated that the CSB's best option might be to "certify the list as it exists" and work to change the process for future tests, including by "[r]ewriting the Civil Service Rules." *Ibid.* Hornick concluded his telephonic remarks by telling the CSB that "for the future," his company "certainly would like to help you if we can." *Id.,* at A1046.

The second witness was Vincent Lewis, a fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan. Lewis, who is black, had looked "extensively" at the lieutenant exam and "a little less extensively" at the captain exam. He stated that the candidates "should know that material." *Id.,* at A1048, A1052. In Lewis's view, the "questions were relevant for both exams," and the New Haven candidates had an advantage because the study materials identified the particular book chapters from which the questions were taken. In other departments, by contrast, "you had to know basically the ... entire book." *Id.,* at A1053. Lewis concluded that any disparate impact likely was due to a pattern that "usually whites outperform some of the minorities on testing," or that "more whites ... take the exam." *Id.,* at A1054.

The final witness was Janet Helms, a professor at Boston College whose "primary area of expertise" is "not with firefighters per se" but in "race and culture as they influence performance on tests and other assessment procedures." *Id.,* at A1060. Helms expressly declined the CSB's offer to review the examinations. At the outset, she noted that "regardless of what kind of written test we give in this country ... we can just about predict how many people will pass ***572** who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case." *Id.,* at A1061. Helms nevertheless offered several "ideas about what might be possible factors" to explain statistical differences in the results. *Id.,* at A1062. She concluded that because 67 percent of the respondents to

the job-analysis questionnaires were white, the test questions might have favored white candidates, because "most of the literature on firefighters shows that the different groups perform the job differently." *Id.,* at A1063. Helms closed by stating that no matter what test the City had administered, it would have revealed "a disparity between blacks and whites, Hispanics and whites," particularly on a written test. *Id.,* at A1072.

5

At the final CSB meeting, on March 18, Ude (the City's counsel) argued against certifying the examination results. Discussing the City's obligations under federal law, Ude advised the CSB that a finding of adverse impact "is the beginning, not the end, of a review of testing procedures" to determine whether they violated the ****2670** disparate-impact provision of Title VII. Ude focused the CSB on determining "whether there are other ways to test for ... those positions that are equally valid with less adverse impact." *Id.,* at A1101. Ude described Hornick as having said that the written examination "had one of the most severe adverse impacts that he had seen" and that "there are much better alternatives to identifying [firefighting] skills." *Ibid.* Ude offered his "opinion that promotions ... as a result of these tests would not be consistent with federal law, would not be consistent with the purposes of our Civil Service Rules or our Charter[,] nor is it in the best interests of the firefighters ... who took the exams." *Id.,* at A1103–A1104. He stated that previous Department exams "have not had this kind of result," and that previous results had not been "challenged as ***573** having adverse impact, whereas we are assured that these will be." *Id.,* at A1107, A1108.

CSB Chairman Segaloff asked Ude several questions about the Title VII disparate-impact standard.

> "CHAIRPERSON SEGALOFF: [M]y understanding is the group ... that is making to throw the exam out has the burden of showing that there is out there an exam that is reasonably probable or likely to have less of an adverse impact. It's not our burden to show that there's an exam out there that can be better. We've got an exam. We've got a result ....
>
> "MR. UDE: Mr. Chair, I point out that Dr. Hornick said that. He said that there are other tests out there that would have less adverse impact and that [would] be more valid.
>
> "CHAIRPERSON SEGALOFF: You think that's enough for us to throw this test upside-down ... because Dr. Hornick said it?
>
> "MR. UDE: I think that by itself would be sufficient. Yes. I also would point out that ... it is the employer's burden to justify the use of the examination." *Id.,* at A1108–A1109.

Karen DuBois–Walton, the City's chief administrative officer, spoke on behalf of Mayor John DeStefano and argued against certifying the results. DuBois–Walton stated that the results, when considered under the rule of three and applied to then-existing captain and lieutenant vacancies, created a situation in which black and Hispanic candidates were disproportionately excluded from opportunity. DuBois–Walton also relied on Hornick's testimony, asserting that Hornick "made it extremely clear that ... there are more appropriate ways to assess one's ability to serve" as a captain or lieutenant. *Id.,* at A1120.

Burgett (the human resources director) asked the CSB to discard the examination results. She, too, relied on Hornick's ***574** statement to show the existence of alternative testing methods, describing Hornick as having "started to point out that alternative testing does exist" and as having "begun to suggest that there are some different ways of doing written examinations." *Id.,* at A1125, A1128.

Other witnesses addressed the CSB. They included the president of the New Haven firefighters' union, who supported certification. He reminded the CSB that Hornick "also concluded that the tests were reasonable and fair and under the current structure to certify them." *Id.,* at A1137. Firefighter Frank Ricci again argued for certification; he stated that although "assessment centers in some cases show less adverse impact," *id.,* at A1140, they were not available alternatives for the current round of promotions. It would take several years, Ricci explained, for the Department to develop an assessment-center protocol and the accompanying training ****2671** materials. *Id.,* at A1141. Lieutenant Matthew Marcarelli, who had taken the captain's exam, spoke in favor of certification.

At the close of witness testimony, the CSB voted on a motion to certify the examinations. With one member recused, the CSB deadlocked 2 to 2, resulting in a decision not to certify the results. Explaining his vote to certify the results, Chairman Segaloff stated that "nobody convinced me that we can feel comfortable that, in fact, there's some likelihood that

there's going to be an exam designed that's going to be less discriminatory." *Id.,* at A1159–A1160.

C

The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings.

***575** Petitioners sued the City, Mayor DeStefano, DuBois–Walton, Ude, Burgett, and the two CSB members who voted against certification. Petitioners also named as a defendant Boise Kimber, a New Haven resident who voiced strong opposition to certifying the results. Those individuals are respondents in this Court. Petitioners filed suit under Rev. Stat. §§ 1979 and 1980, 42 U.S.C. §§ 1983 and 1985, alleging that respondents, by arguing or voting against certifying the results, violated and conspired to violate the Equal Protection Clause of the Fourteenth Amendment. Petitioners also filed timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC); upon the EEOC's issuing right-to-sue letters, petitioners amended their complaint to assert that the City violated the disparate-treatment prohibition contained in Title VII of the Civil Rights Act of 1964, as amended. See 42 U.S.C. §§ 2000e–2(a).

The parties filed cross-motions for summary judgment. Respondents asserted they had a good-faith belief that they would have violated the disparate-impact prohibition in Title VII, § 2000e–2(k), had they certified the examination results. It follows, they maintained, that they cannot be held liable under Title VII's disparate-treatment provision for attempting to comply with Title VII's disparate-impact bar. Petitioners countered that respondents' good-faith belief was not a valid defense to allegations of disparate treatment and unconstitutional discrimination.

The District Court granted summary judgment for respondents. 554 F.Supp.2d 142. It described petitioners' argument as "boil[ing] down to the assertion that if [respondents] cannot prove that the disparities on the Lieutenant and Captain exams were due to a particular flaw inherent in those exams, then they should have certified the results because there was no other alternative in place." *Id.,* at 156. The District Court concluded that, "[n]otwithstanding the shortcomings in the evidence on existing, effective alternatives, ***576** it is not the case that [respondents] *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact ... simply because they have not yet formulated a better selection method." *Ibid.* It also ruled that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact ... does not, as a matter of law, constitute discriminatory intent" under Title VII. *Id.,* at 160. The District Court rejected petitioners' equal protection claim on the theory that respondents had not acted because of "discriminatory animus" toward petitioners. ****2672** *Id.,* at 162. It concluded that respondents' actions were not "based on race" because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." *Id.,* at 161.

After full briefing and argument by the parties, the Court of Appeals affirmed in a one-paragraph, unpublished summary order; it later withdrew that order, issuing in its place a nearly identical, one-paragraph *per curiam* opinion adopting the District Court's reasoning. 530 F.3d 87 (C.A.2 2008). Three days later, the Court of Appeals voted 7 to 6 to deny rehearing en banc, over written dissents by Chief Judge Jacobs and Judge Cabranes. 530 F.3d 88.

This action presents two provisions of Title VII to be interpreted and reconciled, with few, if any, precedents in the courts of appeals discussing the issue. Depending on the resolution of the statutory claim, a fundamental constitutional question could also arise. We found it prudent and appropriate to grant certiorari. 555 U.S. 1091, 129 S.Ct. 894, 172 L.Ed.2d 768 (2009). We now reverse.

II

[1] Petitioners raise a statutory claim, under the disparate-treatment prohibition of Title VII, and a constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment. A decision for petitioners on their statutory claim would provide the relief sought, so we consider it first. ***577** See *Atkins v. Parker,* 472 U.S. 115, 123, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985); *Escambia County v. McMillan,* 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) *(per curiam)* ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

A

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as "disparate treatment") as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact").

[3] **[4]** As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1); see also 78 Stat. 255. Disparate-treatment cases present "the most easily understood type of discrimination," *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and occur where an employer has "treated [a] particular person less favorably than others because of" a protected trait. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 985–986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). A disparate-treatment plaintiff must establish "that the defendant had a discriminatory intent or motive" for taking a job-related action. *Id.,* at 986, 108 S.Ct. 2777.

The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact. But in *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Court interpreted the Act to prohibit, in some cases, employers' facially ****2673** neutral practices that, in fact, are ***578** "discriminatory in operation." *Id.,* at 431, 91 S.Ct. 849. The *Griggs* Court stated that the "touchstone" for disparate-impact liability is the lack of "business necessity": "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Ibid.;* see also *id*., at 432, 91 S.Ct. 849 (employer's burden to demonstrate that practice has "a manifest relationship to the employment in question"); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Under those precedents, if an employer met its burden by showing that its practice was job-related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination. *Ibid.* (allowing complaining party to show "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest").

Twenty years after *Griggs,* the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. That provision is now in force along with the disparate-treatment section already noted. Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *Ibid.* Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. §§ 2000e–2(k)(1)(A)(ii) and (C).

B

Petitioners allege that when the CSB refused to certify the captain and lieutenant exam results based on the race of ***579** the successful candidates, it discriminated against them in violation of Title VII's disparate-treatment provision. The City counters that its decision was permissible because the tests "appear[ed] to violate Title VII's disparate-impact provisions." Brief for Respondents 12.

[5] Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.,* how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because "too many whites and not enough minorities would be promoted were the lists to be certified." 554 F.Supp.2d, at 152; see also *ibid.* (respondents' "own arguments ... show that the City's reasons for advocating non-certification were related to the racial distribution of the results"). Without some other justification, this express,

race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race. See § 2000e–2(a)(1).

The District Court did not adhere to this principle, however. It held that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact ... does not, as a matter of law, constitute discriminatory intent." 554 F.Supp.2d, at 160. And the Government makes a similar argument in this **2674 Court. It contends that the "structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race." Brief for United States as *Amicus Curiae* 11. But both of those statements turn upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision *580 because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.

[6] We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. Courts often confront cases in which statutes and principles point in different directions. Our task is to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them. In providing this guidance, our decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.

[7] [8] With these principles in mind, we turn to the parties' proposed means of reconciling the statutory provisions. Petitioners take a strict approach, arguing that under Title VII, it cannot be permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability—even if the employer knows its practice violates the disparate-impact provision. See Brief for Petitioners 43. Petitioners would have us hold that, under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination. That assertion, however, ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination. We must interpret the statute to give effect to both provisions where possible. See, *e.g.*, *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) (rejecting an interpretation that would render a statutory provision "a dead letter"). We cannot accept petitioners' broad and inflexible formulation.

[9] [10] Petitioners next suggest that an employer in fact must be in violation of the disparate-impact provision before it can *581 use compliance as a defense in a disparate-treatment suit. Again, this is overly simplistic and too restrictive of Title VII's purpose. The rule petitioners offer would run counter to what we have recognized as Congress's intent that "voluntary compliance" be "the preferred means of achieving the objectives of Title VII." *Firefighters v. Cleveland,* 478 U.S. 501, 515, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986); see also *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 290, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring in part and concurring in judgment). Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill. Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment.

[11] [12] At the opposite end of the spectrum, respondents and the Government assert that an employer's good-faith **2675 belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct. But the original, foundational prohibition of Title VII bars employers from taking adverse action "because of ... race." § 2000e–2(a)(1). And when Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k). Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a *de facto* quota system, in which a "focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures." *582 *Watson,* 487 U.S., at 992, 108 S.Ct. 2777 (plurality opinion). Even worse, an employer could discard

test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing. § 2000e–2(j). The purpose of Title VII "is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Griggs,* 401 U.S., at 434, 91 S.Ct. 849.

In searching for a standard that strikes a more appropriate balance, we note that this Court has considered cases similar to this one, albeit in the context of the Equal Protection Clause of the Fourteenth Amendment. The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a " 'strong basis in evidence' " that the remedial actions were necessary. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *Wygant, supra,* at 277, 106 S.Ct. 1842 (plurality opinion)). This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution. That does not mean the constitutional authorities are irrelevant, however. Our cases discussing constitutional principles can provide helpful guidance in this statutory context. See *Watson, supra,* at 993, 108 S.Ct. 2777 (plurality opinion).

Writing for a plurality in *Wygant* and announcing the strong-basis-in-evidence standard, Justice Powell recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U.S., at 277, 106 S.Ct. 1842. The plurality stated that those "related constitutional duties are not always harmonious," and that "reconciling them requires ... employers to act with extraordinary care." *Ibid.* The plurality required a strong basis in evidence because "[e]videntiary support for the conclusion that ***583** remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The Court applied the same standard in *Croson,* observing that "an amorphous claim that there has been past discrimination ... cannot justify the use of an unyielding racial quota." 488 U.S., at 499, 109 S.Ct. 706.

[13] The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of ****2676** Title VII. Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation." *Griggs, supra,* at 431, 91 S.Ct. 849. But it has also prohibited employers from taking adverse employment actions "because of" race. § 2000e–2(a)(1). Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. See *Firefighters, supra,* at 515. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.

Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. See § 2000e–2(*l*). Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing ***584** for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.

If an employer cannot rescore a test based on the candidates' race, § 2000e–2(*l*), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII's express protection of bona fide promotional examinations. See § 2000e–2(h) ("[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate because of race"); cf. *AT & T Corp. v. Hulteen,* 556 U.S. 701, 710 – 711, 129 S.Ct. 1962, 1970, 173 L.Ed.2d 898 (2009).

For the foregoing reasons, we adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.

Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

****2677** **[14]** ***585** Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.

[15] **[16]** Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

C

The City argues that, even under the strong-basis-in-evidence standard, its decision to discard the examination results was permissible under Title VII. That is incorrect. Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

[17] **[18]** ***586** On this basis, we conclude that petitioners have met their obligation to demonstrate that there is "no genuine issue as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). On a motion for summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks omitted). In this Court, the City's only defense is that it acted to comply with Title VII's disparate-impact provision. To succeed on their motion, then, petitioners must demonstrate that there can be no genuine dispute that there was no strong basis in evidence for the City to conclude it would face disparate-impact liability if it certified the examination results. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (where the nonmoving party "will bear the burden of proof at trial on a dispositive issue," the nonmoving party bears the burden of production under Rule 56 to "designate specific facts showing that there is a genuine issue for trial" (internal quotation marks omitted)).

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. On the ****2678** captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80–percent standard set by the EEOC to implement the disparate-impact provision of Title VII. See 29 CFR § 1607.4(D) (2008) (selection rate that ***587** is less than 80 percent "of the rate for the

group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact"); *Watson,* 487 U.S., at 995–996, n. 3, 108 S.Ct. 2777 (plurality opinion) (EEOC's 80–percent standard is "a rule of thumb for the courts"). Based on how the passing candidates ranked and an application of the "rule of three," certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions.

[19] Based on the degree of adverse impact reflected in the results, respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact. The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, *Connecticut v. Teal,* 457 U.S. 440, 446, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. § 2000e–2(k)(1)(A), (C). We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects. We address each of the two points in turn, based on the record developed by the parties through discovery—a record that concentrates in substantial part on the statements various witnesses made to the CSB.

1

[20] There is no genuine dispute that the examinations were job-related and consistent with business necessity. The City's assertions to the contrary are "blatantly contradicted ***588** by the record." *Scott, supra,* at 380, 127 S.Ct. 1769. The CSB heard statements from Chad Legel (the IOS vice president) as well as city officials outlining the detailed steps IOS took to develop and administer the examinations. IOS devised the written examinations, which were the focus of the CSB's inquiry, after painstaking analyses of the captain and lieutenant positions—analyses in which IOS made sure that minorities were overrepresented. And IOS drew the questions from source material approved by the Department. Of the outside witnesses who appeared before the CSB, only one, Vincent Lewis, had reviewed the examinations in any detail, and he was the only one with any firefighting experience. Lewis stated that the "questions were relevant for both exams." CA2 App. A1053. The only other witness who had seen any part of the examinations, Christopher Hornick (a competitor of IOS's), criticized the fact that no one within the Department had reviewed the tests—a condition imposed by the City to protect the integrity of the exams in light of past alleged security breaches. But Hornick stated that the exams "appea[r] to be ... reasonably ****2679** good" and recommended that the CSB certify the results. *Id.,* at A1041.

Arguing that the examinations were not job-related, respondents note some candidates' complaints that certain examination questions were contradictory or did not specifically apply to firefighting practices in New Haven. But Legel told the CSB that IOS had addressed those concerns —that it entertained "a handful" of challenges to the validity of particular examination questions, that it "reviewed those challenges and provided feedback [to the City] as to what we thought the best course of action was," and that he could remember at least one question IOS had thrown out ("offer[ing] credit to everybody for that particular question"). *Id.,* at A955–A957. For his part, Hornick said he "suspect[ed] that some of the criticisms ... [leveled] by candidates" were not valid. *Id.,* at A1035.

***589** The City, moreover, turned a blind eye to evidence that supported the exams' validity. Although the City's contract with IOS contemplated that IOS would prepare a technical report consistent with EEOC guidelines for examination-validity studies, the City made no request for its report. After the January 2004 meeting between Legel and some of the city-official respondents, in which Legel defended the examinations, the City sought no further information from IOS, save its appearance at a CSB meeting to explain how it developed and administered the examinations. IOS stood ready to provide respondents with detailed information to establish the validity of the exams, but respondents did not accept that offer.

2

[21] Respondents also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt. Respondents raise three arguments to the contrary, but each argument fails. First, respondents refer to testimony before the CSB that a different

composite-score calculation—weighting the written and oral examination scores 30/70—would have allowed the City to consider two black candidates for then-open lieutenant positions and one black candidate for then-open captain positions. (The City used a 60/40 weighting as required by its contract with the New Haven firefighters' union.) But respondents have produced no evidence to show that the 60/40 weighting was indeed arbitrary. In fact, because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason. Nor does the record contain any evidence that the 30/70 weighting would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions. Changing the weighting formula, moreover, could well have violated Title VII's prohibition of altering test scores on the ***590** basis of race. See § 2000e–2(*l*). On this record, there is no basis to conclude that a 30/70 weighting was an equally valid alternative the City could have adopted.

Second, respondents argue that the City could have adopted a different interpretation of the "rule of three" that would have produced less discriminatory results. The rule, in the New Haven city charter, requires the City to promote only from "those applicants with the three highest scores" on a promotional examination. New Haven, Conn., Code of Ordinances, Tit. I, Art. XXX, § 160 (1992). A state court has interpreted the charter to prohibit so-called "banding"—the City's previous practice of rounding scores to the nearest whole number and considering all ****2680** candidates with the same whole-number score as being of one rank. Banding allowed the City to consider three ranks of candidates (with the possibility of multiple candidates filling each rank) for purposes of the rule of three. See *Kelly v. New Haven,* No. CV000444614, 2004 WL 114377, *3 (Conn.Super.Ct., Jan.9, 2004). Respondents claim that employing banding here would have made four black and one Hispanic candidates eligible for then-open lieutenant and captain positions.

A state court's prohibition of banding, as a matter of municipal law under the charter, may not eliminate banding as a valid alternative under Title VII. See 42 U.S.C. § 2000e–7. We need not resolve that point, however. Here, banding was not a valid alternative for this reason: Had the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII's prohibition of adjusting test results on the basis of race. § 2000e–2(*l*); see also *Chicago Firefighters Local 2 v. Chicago,* 249 F.3d 649, 656 (C.A.7 2001) (Posner, J.) ("We have no doubt that if banding were adopted in order to make lower black scores seem higher, it would indeed be ... forbidden"). As a matter of law, banding was not an alternative available to the City when it was considering whether to certify the examination results.

***591** Third, and finally, respondents refer to statements by Hornick in his telephone interview with the CSB regarding alternatives to the written examinations. Hornick stated his "belie[f]" that an "assessment center process," which would have evaluated candidates' behavior in typical job tasks, "would have demonstrated less adverse impact." CA2 App. A1039. But Hornick's brief mention of alternative testing methods, standing alone, does not raise a genuine issue of material fact that assessment centers were available to the City at the time of the examinations and that they would have produced less adverse impact. Other statements to the CSB indicated that the Department could not have used assessment centers for the 2003 examinations. *Supra,* at 2670. And although respondents later argued to the CSB that Hornick had pushed the City to reject the test results, *supra,* at 2671 – 2672, the truth is that the essence of Hornick's remarks supported its certifying the test results. See *Scott,* 550 U.S., at 380, 127 S.Ct. 1769. Hornick stated that adverse impact in standardized testing "has been in existence since the beginning of testing," CA2 App. A1037, and that the disparity in New Haven's test results was "somewhat higher but generally in the range that we've seen professionally." *Id.,* at A1030–A1031. He told the CSB he was "not suggesting" that IOS "somehow created a test that had adverse impacts that it should not have had." *Id.,* at A1038. And he suggested that the CSB should "certify the list as it exists." *Id.,* at A1041.

Especially when it is noted that the strong-basis-in-evidence standard applies, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. And there is no doubt respondents fall short of the mark by relying entirely on isolated statements by Hornick. Hornick had not "stud[ied] the test at length or in detail." *Id.,* at A1030. And as he told the CSB, he is a "direct competitor" of IOS's. *Id.,* at A1029. The remainder of his remarks showed that Hornick's primary ***592** concern—somewhat to the frustration of CSB members—was marketing his services for the future, not commenting on the results of the tests the City had already administered. See, *e.g., id.,* at A1026, A1027, A1032, A1036, A1040, A1041. Hornick's hinting had its intended effect: The City has since hired him as a consultant. As for the other outside witnesses ****2681** who spoke to the CSB, Vincent Lewis (the retired fire captain) thought the CSB

should certify the test results. And Janet Helms (the Boston College professor) declined to review the examinations and told the CSB that, as a society, "we need to develop a new way of assessing people." *Id.,* at A1073. That task was beyond the reach of the CSB, which was concerned with the adequacy of the test results before it.

3

[22] On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.

* * *

The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents ***593** thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair.

The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

***594** Justice SCALIA, concurring.

I join the Court's opinion in full, but write separately to observe that its resolution ****2682** of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one. See generally Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L.Rev. 493 (2003).

The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid "remedial" race-based actions when a disparate-impact violation would *not* otherwise result —the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result. See *ante,* at 2674. But if the Federal Government is prohibited from discriminating on the basis of race, *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954), then surely it is also prohibited from enacting laws mandating that third parties—*e.g.,* employers, whether private, State, or municipal—discriminate on the basis of race. See *Buchanan v. Warley,* 245 U.S. 60, 78–82, 38 S.Ct. 16, 62 L.Ed. 149 (1917). As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based

on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. See *ante,* at 2673; *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional ***595** discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level. "[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted). And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to "smoke out," as it were, disparate treatment. See Primus, *supra,* at 498–499, 520–521. Disparate impact is sometimes (though not always, see *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 992, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (plurality opinion)) a signal of something illicit, so a regulator might allow statistical disparities to play some role in the evidentiary process. Cf. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–803, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i.e.,* nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable. See *post,* at 2697 – 2698, and n. 1 (GINSBURG, J., dissenting) (describing the demanding ****2683** nature of the "business necessity" defense). This is a question that this Court will have to consider in due course. It is one thing to free plaintiffs from proving an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.

The Court's resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or ***596** later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, concurring.

I join the Court's opinion in full. I write separately only because the dissent, while claiming that "[t]he Court's recitation of the facts leaves out important parts of the story," *post,* at 2690 (opinion of GINSBURG, J.), provides an incomplete description of the events that led to New Haven's decision to reject the results of its exam. The dissent's omissions are important because, when all of the evidence in the record is taken into account, it is clear that, even if the legal analysis in Parts II and III–A of the dissent were accepted, affirmance of the decision below is untenable.

I

When an employer in a disparate-treatment case under Title VII of the Civil Rights Act of 1964 claims that an employment decision, such as the refusal to promote, was based on a legitimate reason, two questions—one objective and one subjective—must be decided. The first, objective question is whether the reason given by the employer is one that is legitimate under Title VII. See *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506–507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). If the reason provided by the employer is not legitimate on its face, the employer is liable. *Id.,* at 509, 113 S.Ct. 2742. The second, subjective question concerns the employer's intent. If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable. See *id.,* at 510–512, 113 S.Ct. 2742.

The question on which the opinion of the Court and the dissenting opinion disagree concerns the objective component of the determination that must be made when an employer justifies an employment decision, like the one made in ***597** this litigation, on the ground that a contrary decision would have created a risk of disparate-impact liability. The Court holds—and I entirely agree—that concern about disparate-impact liability is a legitimate reason for a decision of the type involved here only if there was a "substantial basis in evidence to find the tests

inadequate." *Ante,* at 2677. The Court ably demonstrates that in this litigation no reasonable jury could find that the city of New Haven (City) possessed such evidence and therefore summary judgment for petitioners is required. Because the Court correctly holds that respondents cannot satisfy this objective component, the Court has no need to discuss the question of the respondents' actual intent. As the Court puts it, "[e]ven if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, substantial basis in evidence to find the tests inadequate." *Ibid.*

The dissent advocates a different objective component of the governing standard. According to the dissent, the objective ****2684** component should be whether the evidence provided "good cause" for the decision, *post,* at 2699, and the dissent argues—incorrectly, in my view—that no reasonable juror could fail to find that such evidence was present here. But even if the dissent were correct on this point, I assume that the dissent would not countenance summary judgment for respondents if respondents' professed concern about disparate-impact litigation was simply a pretext. Therefore, the decision below, which sustained the entry of summary judgment for respondents, cannot be affirmed unless no reasonable jury could find that the City's asserted reason for scrapping its test—concern about disparate-impact liability—was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency.

***598** II

A

As initially described by the dissent, see *post,* at 2690 – 2695, the process by which the City reached the decision not to accept the test results was open, honest, serious, and deliberative. But even the District Court admitted that "a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African–American community." 554 F.Supp.2d 142, 162 (Conn.2006), summarily aff'd, 530 F.3d 87 (C.A.2 2008) *(per curiam)*.

This admission finds ample support in the record. Reverend Boise Kimber, to whom the District Court referred, is a politically powerful New Haven pastor and a self-professed " 'kingmaker.' " App. to Pet. for Cert. in No. 07–1428, p. 906a; see also *id.,* at 909a. On one occasion, "[i]n front of TV cameras, he threatened a race riot during the murder trial of the black man arrested for killing white Yalie Christian Prince. He continues to call whites racist if they question his actions." *Id.,* at 931a.

Reverend Kimber's personal ties with seven-term New Haven Mayor John DeStefano (Mayor) stretch back more than a decade. In 1996, for example, Mayor DeStefano testified for Rev. Kimber as a character witness when Rev. Kimber —then the manager of a funeral home—was prosecuted and convicted for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath. See *id.,* at 126a, 907a. "Reverend Kimber has played a leadership role in all of Mayor DeStefano's political campaigns, [and] is considered a valuable political supporter and vote-getter." *Id.,* at 126a. According to the Mayor's former campaign manager (who is currently his executive assistant), Rev. Kimber is an invaluable political ***599** asset because "[h]e's very good at organizing people and putting together field operations, as a result of his ties to labor, his prominence in the religious community and his long-standing commitment to roots." *Id.,* at 908a (internal quotation marks and alteration omitted).

In 2002, the Mayor picked Rev. Kimber to serve as the Chairman of the New Haven Board of Fire Commissioners (BFC), "despite the fact that he had no experience in the profession, fire administration, [or] municipal management." *Id.,* at 127a; see also *id.,* at 928a–929a. In that capacity, Rev. Kimber told firefighters that certain new recruits would not be hired because " 'they just have too many vowels in their name[s].' " Thanawala, New Haven Fire Panel Chairman Steps Down Over Racial Slur, Hartford Courant, June 13, 2002, p. B2. After protests about ****2685** this comment, Rev. Kimber stepped down as chairman of the BFC, *ibid.;* see also App. to Pet. for Cert. in No. 07–1428, at 929a, but he remained on the BFC and retained "a direct line to the mayor," *id.,* at 816a.

Almost immediately after the test results were revealed in "early January" 2004, Rev. Kimber called the City's Chief Administrative Officer, Karen Dubois–Walton, who "acts 'on behalf of the Mayor.' " *Id.,* at 221a, 812a. Dubois–Walton and Rev. Kimber met privately in her office because he wanted "to express his opinion" about the test results and "to have

some influence" over the City's response. *Id.,* at 815a–816a. As discussed in further detail below, Rev. Kimber adamantly opposed certification of the test results—a fact that he or someone in the Mayor's office eventually conveyed to the Mayor. *Id.,* at 229a.

B

On January 12, 2004, Tina Burgett (the director of the City's Department of Human Resources) sent an e-mail to Dubois–Walton to coordinate the City's response to the test results. Burgett wanted to clarify that the City's executive ***600** officials would meet "sans the Chief, and that once we had a better fix on the next steps we would meet with the Mayor (possibly) and then the two Chiefs." *Id.,* at 446a. The "two Chiefs" are Fire Chief William Grant (who is white) and Assistant Fire Chief Ronald Dumas (who is African–American). Both chiefs believed that the test results should be certified. *Id.,* at 228a, 817a. Petitioners allege, and the record suggests, that the Mayor and his staff colluded "sans the Chief[s]" because "the defendants did not want Grant's or Dumas' views to be publicly known; accordingly both men were prevented by the Mayor and his staff from making any statements regarding the matter." *Id.,* at 228a.[1]

The next day, on January 13, 2004, Chad Legel, who had designed the tests, flew from Chicago to New Haven to meet with Dubois–Walton, Burgett, and Thomas Ude, the City's corporate counsel. *Id.,* at 179a. "Legel outlined the merits of the examination and why city officials should be confident in the validity of the results." *Ibid.* But according to Legel, Dubois–Walton was "argumentative" and apparently had already made up her mind that the tests were " 'discriminatory.' " *Id.,* at 179a–180a. Again according to Legel, "[a] theme" of the meeting was "the political and racial overtones of what was going on in the City." *Id.,* at 181a. "Legel came away from the January 13, 2004 meeting with the impression that defendants were already leaning toward discarding the examination results." *Id.,* at 180a.

On January 22, 2004, the Civil Service Board (CSB or Board) convened its first public meeting. Almost immediately, Rev. Kimber began to exert political pressure on the CSB. He began a loud, minutes-long outburst that required the CSB Chairman to shout him down and hold him out of order three times. See *id.,* at 187a, 467a–468a; ***601** see also App. in No. 06–4996–cv (CA2), pp. A703–A705. Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private. App. to Pet. for Cert. in No. 07–1428, at 188a.

Four days after the CSB's first meeting, Mayor DeStefano's executive aide sent an e-mail to Dubois–Walton, Burgett, and ****2686** Ude. *Id.,* at 190a. The message clearly indicated that the Mayor had made up his mind to oppose certification of the test results (but nevertheless wanted to conceal that fact from the public):

> "I wanted to make sure we are all on the same page for this meeting tomorrow .... *[L]et's remember, that these folks are not against certification yet. So we can't go in and tell them that is our position;* we have to deliberate and arrive there as the fairest and most cogent outcome." *Ibid.*

On February 5, 2004, the CSB convened its second public meeting. Reverend Kimber again testified and threatened the CSB with political recriminations if they voted to certify the test results:

> "I look at this [Board] tonight. I look at three whites and one Hispanic and no blacks .... I would hope that you would not put yourself in this type of position, *a political ramification that may come back upon you* as you sit on this [Board] and decide the future of a department and the future of those who are being promoted.
>
> .....
>
> "(APPLAUSE)." *Id.,* at 492a (emphasis added).

One of the CSB members "t[ook] great offense" because he believed that Rev. Kimber "consider[ed][him] a bigot because [his] face is white." *Id.,* at 496a. The offended ***602** CSB member eventually voted not to certify the test results. *Id.,* at 586a–587a.

One of Rev. Kimber's "friends and allies," Lieutenant Gary Tinney, also exacerbated racial tensions before the CSB. *Id.,* at 129a. After some firefighters applauded in support of certifying the test results, "Lt. Tinney exclaimed, 'Listen to the Klansmen behind us.' " *Id.,* at 225a.

Tinney also has strong ties to the Mayor's office. See, *e.g., id.,* at 129a–130a, 816a–817a. After learning that he had not scored well enough on the captain's exam to earn a promotion, Tinney called Dubois–Walton and arranged a meeting in her office. *Id.,* at 830a–831a, 836a. Tinney alleged that the white firefighters had cheated on their exams—an accusation that Dubois–Walton conveyed to the Board without first

conducting an investigation into its veracity. *Id.,* at 837a–838a; see also App. 164 (statement of CSB Chairman, noting the allegations of cheating). The allegation turned out to be baseless. App. to Pet. for Cert. in No. 07–1428, at 836a.

Dubois–Walton never retracted the cheating allegation, but she and other executive officials testified several times before the CSB. In accordance with directions from the Mayor's office to make the CSB meetings appear deliberative, see *id.,* at 190a, executive officials remained publicly uncommitted about certification—while simultaneously "work[ing] as a team" behind closed doors with the secretary of the CSB to devise a political message that would convince the CSB to vote against certification, see *id.,* at 447a. At the public CSB meeting on March 11, 2004, for example, Corporation Counsel Ude bristled at one board member's suggestion that City officials were recommending against certifying the test results. See *id.,* at 215a ("Attorney Ude took offense, stating, 'Frankly, because I would never make a recommendation—I would not have made a recommendation like that' "). But within days of making that public statement, Ude privately told other members of the Mayor's team "the ONLY ***603** way we get to a decision not to certify is" to focus on something other than "a big discussion re: adverse impact" law. *Id.,* at 458a–459a.

****2687** As part of its effort to deflect attention from the specifics of the test, the City relied heavily on the testimony of Dr. Christopher Hornick, who is one of Chad Legel's competitors in the test-development business. Hornick never "stud[ied] the test [that Legel developed] at length or in detail," *id.,* at 549a; see also *id.,* at 203a, 553a, but Hornick did review and rely upon literature sent to him by Burgett to criticize Legel's test. For example, Hornick "noted in the literature that [Burgett] sent that the test was not customized to the New Haven Fire Department." *Id.,* at 551a. The Chairman of the CSB immediately corrected Hornick. *Id.,* at 552a ("Actually, it was, Dr. Hornick"). Hornick also relied on newspaper accounts—again, sent to him by Burgett—pertaining to the controversy surrounding the certification decision. See *id.,* at 204a, 557a. Although Hornick again admitted that he had no knowledge about the actual test that Legel had developed and that the City had administered, see *id.,* at 560a–561a, the City repeatedly relied upon Hornick as a testing "guru" and, in the CSB Chairman's words, "the City ke[pt] quoting him as a person that we should rely upon more than anybody else [to conclude that there] is a better way—a better mousetrap."[2] App. in No. 06–4996–cv (CA2), at A1128. Dubois–Walton later admitted that the City rewarded Hornick for his testimony by hiring him to develop and administer an alternative test. App. to Pet. for Cert. in ***604** No. 07–1428, at 854a; see also *id.,* at 562a–563a (Hornick's plea for future business from the City on the basis of his criticisms of Legel's tests).

At some point prior to the CSB's public meeting on March 18, 2004, the Mayor decided to use his executive authority to disregard the test results—*even if* the CSB ultimately voted to certify them. *Id.,* at 819a–820a. Accordingly, on the evening of March 17th, Dubois–Walton sent an e-mail to the Mayor, the Mayor's executive assistant, Burgett, and attorney Ude, attaching two alternative press releases. *Id.,* at 457a. The first would be issued if the CSB voted not to certify the test results; the second would be issued (and would explain the Mayor's invocation of his executive authority) if the CSB voted to certify the test results. *Id.,* at 217a–218a, 590a–591a, 819a–820a. Half an hour after Dubois–Walton circulated the alternative drafts, Burgett replied: "[W]ell, that seems to say it all. Let's hope draft # 2 hits the shredder tomorrow nite." *Id.,* at 457a.

Soon after the CSB voted against certification, Mayor DeStefano appeared at a dinner event and "took credit for the scu[tt]ling of the examination results." *Id.,* at 230a.

C

Taking into account all the evidence in the summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making ****2688** any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked—as things turned out, successfully—to persuade the CSB that acceptance of the test results would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB ***605** was not persuaded, the Mayor, wielding ultimate decisionmaking authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency. It is noteworthy

that the Solicitor General—whose position on the principal legal issue in this case is largely aligned with the dissent—concludes that "[n]either the district court nor the court of appeals ... adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination ... ." Brief for United States as *Amicus Curiae* 6; see also *id.,* at 32–33.

III

I will not comment at length on the dissent's criticism of my analysis, but two points require a response.

The first concerns the dissent's statement that I "equat[e] political considerations with unlawful discrimination." *Post,* at 2708 – 2709. The dissent misrepresents my position: I draw no such equation. Of course "there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination." *Post,* at 2708 – 2709. But—as I assume the dissent would agree—there are some things that a public official cannot do, and one of those is engaging in intentional racial discrimination when making employment decisions.

The second point concerns the dissent's main argument—that efforts by the Mayor and his staff to scuttle the test results are irrelevant because the ultimate decision was made by the CSB. According to the dissent, "[t]he relevant decision was made by the CSB," *post,* at 2708 – 2709, and there is "scant cause to suspect" that anything done by the opponents ***606** of certification, including the Mayor and his staff, "prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification," *post,* at 2708.

Adoption of the dissent's argument would implicitly decide an important question of Title VII law that this Court has never resolved—the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision. There is a large body of court of appeals case law on this issue, and these cases disagree about the proper standard. See *EEOC v. BCI Coca–Cola Bottling Co. of Los Angeles,* 450 F.3d 476, 484–488 (C.A.10 2006) (citing cases and describing the approaches taken in different Circuits). One standard is whether the subordinate "exerted influenc[e] over the titular decisionmaker." *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 227 (C.A.5 2000); see also *Poland v. Chertoff,* 494 F.3d 1174, 1182 (C.A.9 2007) (A subordinate's bias is imputed to the employer where the subordinate "influenced or was involved in the decision or decisionmaking process"). Another is whether the discriminatory input "caused the adverse employment action." ****2689** See *BCI Coca–Cola Bottling Co. of Los Angeles, supra,* at 487.

In the present cases, a reasonable jury could certainly find that these standards were met. The dissent makes much of the fact that members of the CSB swore under oath that their votes were based on the good-faith belief that certification of the results would have violated federal law. See *post,* at 2707 – 2708. But the good faith of the CSB members would not preclude a finding that the presentations engineered by the Mayor and his staff influenced or caused the CSB decision.

The least employee-friendly standard asks only whether "the actual decisionmaker" acted with discriminatory intent, see ***607** *Hill v. Lockheed Martin Logistics Management, Inc.,* 354 F.3d 277, 291 (C.A.4 2004) (en banc), and it is telling that, even under this standard, summary judgment for respondents would not be proper. This is so because a reasonable jury could certainly find that in New Haven, the Mayor—not the CSB—wielded the final decisionmaking power. After all, the Mayor claimed that authority and was poised to use it in the event that the CSB decided to accept the test results. See *supra,* at 2687. If the Mayor had the authority to overrule a CSB decision *accepting* the test results, the Mayor also presumably had the authority to overrule the CSB's decision *rejecting* the test results. In light of the Mayor's conduct, it would be quite wrong to throw out petitioners' case on the ground that the CSB was the ultimate decisionmaker.

* * *

Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession. In order to qualify for promotion, they made personal sacrifices. Petitioner Frank Ricci, who is dyslexic, found it necessary to "hir[e] someone, at considerable expense, to read onto audiotape the content of the books and study materials." App. to Pet. for Cert. in No. 07–1428, at 169a. He "studied an average of eight to thirteen hours a day ..., even listening to audio tapes while driving his car." *Ibid.* Petitioner Benjamin

Vargas, who is Hispanic, had to "give up a part-time job," and his wife had to "take leave from her own job in order to take care of their three young children while Vargas studied." *Id.,* at 176a. "Vargas devoted countless hours to study ..., missed two of his children's birthdays and over two weeks of vacation time," and "incurred significant financial expense" during the three-month study period. *Id.,* at 176a–177a.

Petitioners were denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam. The District Court threw out their case on summary judgment, even ***608** though that court all but conceded that a jury could find that the City's asserted justification was pretextual. The Court of Appeals then summarily affirmed that decision.

The dissent grants that petitioners' situation is "unfortunate" and that they "understandably attract this Court's sympathy." *Post,* at 2690, 2710. But "sympathy" is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII's prohibition against discrimination based on race. And that is what, until today's decision, has been denied them.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

In assessing claims of race discrimination, "[c]ontext matters." ****2690** *Grutter v. Bollinger,* 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to cover public employment. At that time, municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities. The extension of Title VII to cover jobs in firefighting effected no overnight change. It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities.

The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them. New Haven maintains that it refused to certify the test results because it believed, for good cause, that it would be vulnerable to a Title VII disparate-impact suit if it relied on those results. The Court today holds that New Haven has not demonstrated "a strong basis in evidence" for its plea. *Ante,* at 2664. In so holding, the Court pretends that "[t]he City rejected the test results solely because the higher scoring candidates were white." *Ante,* at 2674. That pretension, ***609** essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.[1]

By order of this Court, New Haven, a city in which African–Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions. In arriving at its order, the Court barely acknowledges the pathmarking decision in *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), which explained the centrality of the disparate-impact concept to effective enforcement of Title VII. The Court's order and opinion, I anticipate, will not have staying power.

I

A

The Court's recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow. In extending Title VII to state and local government employers in 1972, Congress took note of a U.S. Commission on Civil Rights (USCCR) report finding racial discrimination in municipal employment even "more pervasive than in the private sector." H.R.Rep. No. 92–238, p. 17 (1971). According to the report, overt racism was partly to blame, but so too was a failure on the part of municipal employers ***610** to apply merit-based employment principles. In making hiring and promotion decisions, public employers often "rel[ied] on criteria unrelated to job performance," including nepotism or political patronage. 118 Cong. Rec. 1817 (1972). Such flawed selection methods served to entrench preexisting racial hierarchies. The USCCR report singled out police and fire departments for having "[b]arriers to equal employment ... greater ... than in ****2691** any other area of State or local government," with African–Americans "hold[ing] almost no positions in the officer ranks." *Ibid*. See also National Commission on Fire Prevention and Control, America Burning 5 (1973) ("Racial minorities are under-represented in the fire departments in nearly every community in which they live.").

The city of New Haven (City) was no exception. In the early 1970's, African–Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the City's 502 firefighters. The racial disparity in the officer ranks was even more pronounced: "[O]f the 107 officers in the Department only one was black, and he held the lowest rank above private." *Firebird Soc. of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs,* 66 F.R.D. 457, 460 (Conn.1975).

Following a lawsuit and settlement agreement, see *ibid.,* the City initiated efforts to increase minority representation in the New Haven Fire Department (Department). Those litigation-induced efforts produced some positive change. New Haven's population includes a greater proportion of minorities today than it did in the 1970's: Nearly 40 percent of the City's residents are African–American and more than 20 percent are Hispanic. Among entry-level firefighters, minorities are still underrepresented, but not starkly so. As of 2003, African–Americans and Hispanics constituted 30 percent and 16 percent of the City's firefighters, respectively. In supervisory positions, however, significant disparities remain. Overall, the senior officer ranks (captain and higher) ***611** are nine percent African–American and nine percent Hispanic. Only one of the Department's 21 fire captains is African–American. See App. in No. 06–4996–cv (CA2), p. A1588 (hereinafter CA2 App.). It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed.

B

By order of its charter, New Haven must use competitive examinations to fill vacancies in fire officer and other civil-service positions. Such examinations, the City's civil service rules specify, "shall be practical in nature, shall relate to matters which fairly measure the relative fitness and capacity of the applicants to discharge the duties of the position which they seek, and shall take into account character, training, experience, physical and mental fitness." *Id.*, at A331. The City may choose among a variety of testing methods, including written and oral exams and "[p]erformance tests to demonstrate skill and ability in performing actual work." *Id.,* at A332.

New Haven, the record indicates, did not closely consider what sort of "practical" examination would "fairly measure the relative fitness and capacity of the applicants to discharge the duties" of a fire officer. Instead, the City simply adhered to the testing regime outlined in its two-decades-old contract with the local firefighters' union: a written exam, which would account for 60 percent of an applicant's total score, and an oral exam, which would account for the remaining 40 percent. *Id.,* at A1045. In soliciting bids from exam development companies, New Haven made clear that it would entertain only "proposals that include a written component that will be weighted at 60%, and an oral component that will be weighted at 40%." *Id.,* at A342. Chad Legel, a representative of the winning bidder, Industrial/Organizational Solutions, Inc. (IOS), testified during his deposition that the City never asked whether alternative methods ***612** might better measure the qualities of a successful fire officer, including leadership ****2692** skills and command presence. See *id.,* at A522 ("I was under contract and had responsibility only to create the oral interview and the written exam.").

Pursuant to New Haven's specifications, IOS developed and administered the oral and written exams. The results showed significant racial disparities. On the lieutenant exam, the pass rate for African–American candidates was about one-half the rate for Caucasian candidates; the pass rate for Hispanic candidates was even lower. On the captain exam, both African–American and Hispanic candidates passed at about half the rate of their Caucasian counterparts. See App. 225–226. More striking still, although nearly half of the 77 lieutenant candidates were African–American or Hispanic, none would have been eligible for promotion to the eight positions then vacant. The highest scoring African–American candidate ranked 13th; the top Hispanic candidate was 26th. As for the seven then-vacant captain positions, two Hispanic candidates would have been eligible, but no African–Americans. The highest scoring African–American candidate ranked 15th. See *id.,* at 218–219.

These stark disparities, the Court acknowledges, sufficed to state a prima facie case under Title VII's disparate-impact provision. See *ante,* at 2678 ("The pass rates of minorities ... f[e]ll well below the 80–percent standard set by the [Equal Employment Opportunity Commission (EEOC)] to implement the disparate-impact provision of Title VII."). New Haven thus had cause for concern about the prospect of Title VII litigation and liability. City officials referred the matter to the New Haven Civil Service Board (CSB), the entity responsible for certifying the results of employment exams.

Between January and March 2004, the CSB held five public meetings to consider the proper course. At the first meeting, New Haven's Corporation Counsel, Thomas Ude, described the legal standard governing Title VII disparate-impact claims. Statistical imbalances alone, Ude correctly ***613** recognized, do not give rise to liability. Instead, presented with a disparity, an employer "has the opportunity and the burden of proving that the test is job-related and consistent with business necessity." CA2 App. A724. A Title VII plaintiff may attempt to rebut an employer's showing of job-relatedness and necessity by identifying alternative selection methods that would have been at least as valid but with "less of an adverse or disparate or discriminatory effect." *Ibid*. See also *id*., at A738. Accordingly, the CSB Commissioners understood, their principal task was to decide whether they were confident about the reliability of the exams: Had the exams fairly measured the qualities of a successful fire officer despite their disparate results? Might an alternative examination process have identified the most qualified candidates without creating such significant racial imbalances?

Seeking a range of input on these questions, the CSB heard from test takers, the test designer, subject-matter experts, City officials, union leaders, and community members. Several candidates for promotion, who did not yet know their exam results, spoke at the CSB's first two meetings. Some candidates favored certification. The exams, they emphasized, had closely tracked the assigned study materials. Having invested substantial time and money to prepare themselves for the test, they felt it would be unfair to scrap the results. See, *e.g., id.,* at A772–A773, A785–A789.

Other firefighters had a different view. A number of the exam questions, they pointed out, were not germane to New Haven's practices and procedures. See, *e.g., id.,* at A774–A784. At least two candidates ****2693** opposed to certification noted unequal access to study materials. Some individuals, they asserted, had the necessary books even before the syllabus was issued. Others had to invest substantial sums to purchase the materials and "wait a month and a half for some of the books because they were on back-order." *Id.,* at A858. These disparities, it was suggested, fell at least in part along racial lines. While many Caucasian applicants could obtain ***614** materials and assistance from relatives in the fire service, the overwhelming majority of minority applicants were "first-generation firefighters" without such support networks. See *id.,* at A857–A861, A886–A887.

A representative of the Northeast Region of the International Association of Black Professional Firefighters, Donald Day, also spoke at the second meeting. Statistical disparities, he told the CSB, had been present in the Department's previous promotional exams. On earlier tests, however, a few minority candidates had fared well enough to earn promotions. *Id.,* at A828. See also App. 218–219. Day contrasted New Haven's experience with that of nearby Bridgeport, where minority firefighters held one-third of lieutenant and captain positions. Bridgeport, Day observed, had once used a testing process similar to New Haven's, with a written exam accounting for 70 percent of an applicant's score, an oral exam for 25 percent, and seniority for the remaining five percent. CA2 App. A830. Bridgeport recognized, however, that the oral component, more so than the written component, addressed the sort of "real-life scenarios" fire officers encounter on the job. *Id.,* at A832. Accordingly, that city "changed the relative weights" to give primacy to the oral exam. *Ibid*. Since that time, Day reported, Bridgeport had seen minorities "fairly represented" in its exam results. *Ibid*.

The CSB's third meeting featured IOS representative Legel, the leader of the team that had designed and administered the exams for New Haven. Several City officials also participated in the discussion. Legel described the exam development process in detail. The City, he recounted, had set the "parameters" for the exams, specifically, the requirement of written and oral components with a 60/40 weighting. *Id.,* at A923, A974. For security reasons, Department officials had not been permitted to check the content of the questions prior to their administration. Instead, IOS retained a senior fire officer from Georgia to review the exams "for content ***615** and fidelity to the source material." *Id.,* at A936. Legel defended the exams as "facially neutral," and stated that he "would stand by the[ir] validity." *Id.,* at A962. City officials did not dispute the neutrality of IOS's work. But, they cautioned, even if individual exam questions had no intrinsic bias, the selection process as a whole may nevertheless have been deficient. The officials urged the CSB to consult with experts about the "larger picture." *Id.,* at A1012.

At its fourth meeting, CSB solicited the views of three individuals with testing-related expertise. Dr. Christopher Hornick, an industrial/organizational psychology consultant with 25 years' experience with police and firefighter testing, described the exam results as having "relatively high adverse impact." *Id.,* at A1028. Most of the tests he had developed, Hornick stated, exhibited "significantly and dramatically less adverse impact." *Id.,* at A1029. Hornick downplayed the

notion of "facial neutrality." It was more important, he advised the CSB, to consider "the broader issue of how your procedures and your rules and the types of tests that you are using are contributing to the adverse impact." *Id.,* at A1038.

****2694** Specifically, Hornick questioned New Haven's union-prompted 60/40 written/oral examination structure, noting the availability of "different types of testing procedures that are much more valid in terms of identifying the best potential supervisors in [the] fire department." *Id.,* at A1032. He suggested, for example, "an assessment center process, which is essentially an opportunity for candidates ... to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test." *Id.,* at A1039–A1040. Such selection processes, Hornick said, better "identif[y] the best possible people" and "demonstrate dramatically less adverse impacts." *Ibid*. Hornick added:

> ***616** "I've spoken to at least 10,000, maybe 15,000 firefighters in group settings in my consulting practice and I have never one time ever had anyone in the fire service say to me, 'Well, the person who answers—gets the highest score on a written job knowledge, multiple-guess test makes the best company officer.' We know that it's not as valid as other procedures that exist." *Id.,* at A1033.

See also *id.,* at A1042–A1043 ("I think a person's leadership skills, their command presence, their interpersonal skills, their management skills, their tactical skills could have been identified and evaluated in a much more appropriate way.").

Hornick described the written test itself as "reasonably good," *id.,* at A1041, but he criticized the decision not to allow Department officials to check the content. According to Hornick, this "inevitably" led to "test[ing] for processes and procedures that don't necessarily match up into the department." *Id.,* at A1034–A1035. He preferred "experts from within the department who have signed confidentiality agreements ... to make sure that the terminology and equipment that's being identified from standardized reading sources apply to the department." *Id.,* at A1035.

Asked whether he thought the City should certify the results, Hornick hedged: "There is adverse impact in the test. That will be identified in any proceeding that you have. You will have industrial psychology experts, if it goes to court, on both sides. And it will not be a pretty or comfortable position for anyone to be in." *Id.,* at A1040–A1041. Perhaps, he suggested, New Haven might certify the results but immediately begin exploring "alternative ways to deal with these issues" in the future. *Id.,* at A1041.

The two other witnesses made relatively brief appearances. Vincent Lewis, a specialist with the Department of Homeland Security and former fire officer in Michigan, believed the exams had generally tested relevant material, although he noted a relatively heavy emphasis on questions ***617** pertaining to being an "apparatus driver." He suggested that this may have disadvantaged test takers "who had not had the training or had not had an opportunity to drive the apparatus." *Id.,* at A1051. He also urged the CSB to consider whether candidates had, in fact, enjoyed equal access to the study materials. *Ibid*. Cf. *supra,* at 2693.

Janet Helms, a professor of counseling psychology at Boston College, observed that two-thirds of the incumbent fire officers who submitted job analyses to IOS during the exam design phase were Caucasian. Members of different racial groups, Helms told the CSB, sometimes do their jobs in different ways, "often because the experiences that are open to white male firefighters are not open to members of these other under-represented groups." CA2 App. A1063–A1064. The heavy reliance on job analyses from white firefighters, ****2695** she suggested, may thus have introduced an element of bias. *Id.,* at A1063.

The CSB's fifth and final meeting began with statements from City officials recommending against certification. Ude, New Haven's counsel, repeated the applicable disparate-impact standard:

> "[A] finding of adverse impact is the beginning, not the end, of a review of testing procedures. Where a procedure demonstrates adverse impact, you look to how closely it is related to the job that you're looking to fill and you also look at whether there are other ways to test for those qualities, those traits, those positions that are equally valid with less adverse impact." *Id.,* at A1100–A1101.

New Haven, Ude and other officials asserted, would be vulnerable to Title VII liability under this standard. Even if the exams were "facially neutral," significant doubts had been raised about whether they properly assessed the key attributes of a successful fire officer. *Id.,* at A1103. See also *id*., at A1125 ("Upon close reading of the exams, the ***618** questions themselves would appear to test a candidate's ability to memorize textbooks but not necessarily to identify solutions to real problems on the fire ground."). Moreover, City officials reminded the CSB, Hornick and others had identified better, less discriminatory selection methods-such

as assessment centers or exams with a more heavily weighted oral component. *Id.,* at A1108–A1109, A1129–A1130.

After giving members of the public a final chance to weigh in, the CSB voted on certification, dividing 2 to 2. By rule, the result was noncertification. Voting no, Commissioner Webber stated, "I originally was going to vote to certify. ... But I've heard enough testimony here to give me great doubts about the test itself and ... some of the procedures. And I believe we can do better." *Id.,* at A1157. Commissioner Tirado likewise concluded that the "flawed" testing process counseled against certification. *Id.,* at A1158. Chairman Segaloff and Commissioner Caplan voted to certify. According to Segaloff, the testimony had not "compelled [him] to say this exam was not job-related," and he was unconvinced that alternative selection processes would be "less discriminatory." *Id.,* at A1159–A1160. Both Segalhoff and Caplan, however, urged the City to undertake civil service reform. *Id.,* at A1150–A1154.

C

Following the CSB's vote, petitioners—17 white firefighters and one Hispanic firefighter, all of whom had high marks on the exams—filed suit in the United States District Court for the District of Connecticut. They named as defendants —respondents here—the City, several City officials, a local political activist, and the two CSB members who voted against certifying the results. By opposing certification, petitioners alleged, respondents had discriminated against them in violation of Title VII's disparate-treatment provision and the Fourteenth Amendment's Equal Protection ***619** Clause. The decision not to certify, respondents answered, was a lawful effort to comply with Title VII's disparate-impact provision and thus could not have run afoul of Title VII's prohibition of disparate treatment. Characterizing respondents' stated rationale as a mere pretext, petitioners insisted that New Haven would have had a solid defense to any disparate-impact suit.

In a decision summarily affirmed by the Court of Appeals, the District Court granted summary judgment for respondents. 554 F.Supp.2d 142 (Conn.2006), aff'd, 530 F.3d 87 (C.A.2 2008) *(per curiam)*. Under Second Circuit precedent, the District Court explained, "the intent to remedy the ****2696** disparate impact" of a promotional exam "is not equivalent to an intent to discriminate against non-minority applicants." 554 F.Supp.2d, at 157 (quoting *Hayden v. County of Nassau,* 180 F.3d 42, 51 (C.A.2 1999)). Rejecting petitioners' pretext argument, the court observed that the exam results were sufficiently skewed "to make out a prima facie case of discrimination" under Title VII's disparate-impact provision. 554 F.Supp.2d, at 158. Had New Haven gone forward with certification and been sued by aggrieved minority test takers, the City would have been forced to defend tests that were presumptively invalid. And, as the CSB testimony of Hornick and others indicated, overcoming that presumption would have been no easy task. *Id.*, at 153–156. Given Title VII's preference for voluntary compliance, the court held, New Haven could lawfully discard the disputed exams even if the City had not definitively "pinpoint[ed]" the source of the disparity and "ha[d] not yet formulated a better selection method." *Id.*, at 156.

Respondents were no doubt conscious of race during their decisionmaking process, the court acknowledged, but this did not mean they had engaged in racially disparate treatment. The conclusion they had reached and the action thereupon taken were race-neutral in this sense: "[A]ll the test results were discarded, no one was promoted, and firefighters of ***620** every race will have to participate in another selection process to be considered for promotion." *Id.*, at 158. New Haven's action, which gave no individual a preference, "was 'simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly.' " *Id.*, at 157 (quoting *Hayden,* 180 F.3d, at 50). For these and other reasons, the court also rejected petitioners' equal protection claim.

II

A

Title VII became effective in July 1965. Employers responded to the law by eliminating rules and practices that explicitly barred racial minorities from "white" jobs. But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.

In *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), this Court responded to that reality and supplied important guidance on Title VII's mission and scope. Congress, the landmark decision recognized, aimed beyond "disparate treatment"; it targeted "disparate impact" as well.

Title VII's original text, it was plain to the Court, "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431, 91 S.Ct. 849.[2] Only by ignoring ***621** *Griggs* ****2697** could one maintain that intentionally disparate treatment alone was Title VII's "original, foundational prohibition," and disparate impact a mere afterthought. Cf. *ante,* at 2675.

Griggs addressed Duke Power Company's policy that applicants for positions, save in the company's labor department, be high school graduates and score satisfactorily on two professionally prepared aptitude tests. "[T]here was no showing of a discriminatory purpose in the adoption of the diploma and test requirements." 401 U.S., at 428, 91 S.Ct. 849. The policy, however, "operated to render ineligible a markedly disproportionate number of [African–Americans]." *Id.*, at 429, 91 S.Ct. 849. At the time of the litigation, in North Carolina, where the Duke Power plant was located, 34 percent of white males, but only 12 percent of African–American males, had high school diplomas. *Id.*, at 430, n. 6, 91 S.Ct. 849. African–Americans also failed the aptitude tests at a significantly higher rate than whites. *Ibid.* Neither requirement had been "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.*, at 431, 91 S.Ct. 849.

The Court unanimously held that the company's diploma and test requirements violated Title VII. "[T]o achieve equality of employment opportunities," the Court comprehended, Congress "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.*, at 429, 432, 91 S.Ct. 849. That meant "unnecessary barriers to employment" must fall, even if "neutral on their face" and "neutral in terms of intent." *Id.*, at 430, 431, 91 S.Ct. 849. "The touchstone" for determining whether a test or qualification meets Title VII's measure, the Court said, is not "good intent or the absence of discriminatory intent"; it is "business necessity." *Id.*, at 431, 432, 91 S.Ct. 849. Matching procedure to substance, the *Griggs* Court observed, Congress "placed on the employer ***622** the burden of showing that any given requirement ... ha[s] a manifest relationship to the employment in question." *Id.*, at 432, 91 S.Ct. 849.

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Court, again without dissent, elaborated on *Griggs*. When an employment test "select[s] applicants for hire or promotion in a racial pattern significantly different from the pool of applicants," the Court reiterated, the employer must demonstrate a "manifest relationship" between test and job. 422 U.S., at 425, 95 S.Ct. 2362. Such a showing, the Court cautioned, does not necessarily mean the employer prevails: "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Ibid.*

Federal trial and appellate courts applied *Griggs* and *Albemarle* to disallow a host of hiring and promotion practices that "operate[d] as 'built in headwinds' for minority groups." *Griggs,* 401 U.S., at 432, 91 S.Ct. 849. Practices discriminatory in effect, courts repeatedly emphasized, could be maintained only upon an employer's showing of "an overriding and compelling business purpose." *Chrisner v. Complete Auto Transit, Inc.,* 645 F.2d 1251, 1261, n. 9 (C.A.6 1981).[3] That a practice ***623** served ****2698** "legitimate management functions" did not, it was generally understood, suffice to establish business necessity. *Williams v. Colorado Springs, Colo., School Dist.,* 641 F.2d 835, 840–841 (C.A.10 1981) (internal quotation marks omitted). Among selection methods cast aside for lack of a "manifest relationship" to job performance were a number of written hiring and promotional examinations for firefighters.[4]

Moving in a different direction, in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), a bare majority of this Court significantly modified the *Griggs–Albemarle* delineation of Title VII's disparate-impact proscription. As to business necessity for a practice that disproportionately excludes members of minority groups, *Wards Cove* held, the employer bears only the burden of production, not the burden of persuasion. 490 U.S., at 659–660, 109 S.Ct. 2115. And in place of the instruction that the challenged practice "must have a manifest relationship to the employment in question," *Griggs,* 401 U.S., at 432, 91 S.Ct. 849, *Wards Cove* said that the practice would be permissible as long as it "serve[d], in a significant way, the legitimate employment goals of the employer." 490 U.S., at 659, 109 S.Ct. 2115.

***624** In response to *Wards Cove* and "a number of [other] recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," Congress enacted the Civil Rights Act of 1991. H.R.Rep. No. 102–40, pt. 2, p. 2 (1991). Among the 1991 alterations, Congress formally codified the disparate-impact component of Title VII. In so amending the statute, Congress made plain its intention to restore "the concepts

of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co. ... and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio." § 3(2), 105 Stat. 1071. Once a complaining party demonstrates that an employment practice causes a disparate impact, amended Title VII states, the burden is on the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e–2(k)(1)(A)(i). If the employer carries that substantial burden, the complainant may respond by identifying "an alternative employment ****2699** practice" which the employer "refuses to adopt." § 2000e–2(k)(1)(A)(ii), (C).

B

Neither Congress' enactments nor this Court's Title VII precedents (including the now-discredited decision in *Wards Cove*) offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions. Cf. *ante,* at 2673 – 2674. Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, ***625** the Court reasons, it acts "because of race"—something Title VII's disparate-treatment provision, see § 2000e–2(a)(1), generally forbids. *Ante,* at 2673 – 2674. This characterization of an employer's compliance-directed action shows little attention to Congress' design or to the *Griggs* line of cases Congress recognized as pathmarking.

"[O]ur task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 631–632, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973) (internal quotation marks omitted). A particular phrase need not "extend to the outer limits of its definitional possibilities" if an incongruity would result. *Dolan v. Postal Service,* 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006). Here, Title VII's disparate-treatment and disparate-impact proscriptions must be read as complementary.

In codifying the *Griggs* and *Albemarle* instructions, Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity.[5] In keeping with Congress' design, employers who reject such criteria due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination "because of" race. A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict. I would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the ***626** device would not withstand examination for business necessity. Cf. *Faragher v. Boca Raton,* 524 U.S. 775, 806, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (observing that it accords with "clear statutory policy" for employers "to prevent violations" and "make reasonable efforts to discharge their duty" under Title VII).

EEOC's interpretative guidelines are corroborative. "[B]y the enactment of title VII," the guidelines state, "Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement." 29 CFR § 1608.1(a) (2008). Recognizing EEOC's "enforcement ****2700** responsibility" under Title VII, we have previously accorded the Commission's position respectful consideration. See, *e.g., Albemarle,* 422 U.S., at 431, 95 S.Ct. 2362; *Griggs,* 401 U.S., at 434, 91 S.Ct. 849. Yet the Court today does not so much as mention EEOC's counsel.

Our precedents defining the contours of Title VII's disparate-treatment prohibition further confirm the absence of any intra-statutory discord. In *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), we upheld a municipal employer's voluntary affirmative-action plan against a disparate-treatment challenge. Pursuant to the plan, the employer selected a woman for a road-dispatcher position, a job category traditionally regarded as "male." A male applicant who had a slightly higher interview score brought suit under Title VII. This Court rejected his claim and approved the plan, which allowed consideration of gender as "one of numerous factors." *Id.*, at 638, 107 S.Ct. 1442. Such consideration, we said, is "fully consistent with Title VII" because plans of that

order can aid "in eliminating the vestiges of discrimination in the workplace." *Id.*, at 642, 107 S.Ct. 1442.

This litigation does not involve affirmative action. But if the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer's reasonable effort to comply with Title VII's disparate-impact provision by refraining from action of doubtful consistency with business necessity.

***627** C

To "reconcile" the supposed "conflict" between disparate treatment and disparate impact, the Court offers an enigmatic standard. *Ante,* at 2673 – 2674. Employers may attempt to comply with Title VII's disparate-impact provision, the Court declares, only where there is a "strong basis in evidence" documenting the necessity of their action. *Ante,* at 2662. The Court's standard, drawn from inapposite equal protection precedents, is not elaborated. One is left to wonder what cases would meet the standard and why the Court is so sure this case does not.

1

In construing Title VII, I note preliminarily, equal protection doctrine is of limited utility. The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component. See *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate. Until today, cf. *ante,* at 2664; *ante,* p. 2664 (SCALIA, J., concurring), this Court has never questioned the constitutionality of the disparate-impact component of Title VII, and for good reason. By instructing employers to avoid needlessly exclusionary selection processes, Title VII's disparate-impact provision calls for a "race-neutral means to increase minority ... participation"—something this Court's equal protection precedents also encourage. See *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 238, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)). "The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection," moreover, "suggests that only a very uncompromising court would issue such a decision." Primus, ***628** ****2701** Equal Protection and Disparate Impact: Round Three, 117 Harv. L.Rev. 493, 585 (2003).

The cases from which the Court draws its strong-basis-in-evidence standard are particularly inapt; they concern the constitutionality of absolute racial preferences. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion) (invalidating a school district's plan to lay off nonminority teachers while retaining minority teachers with less seniority); *Croson,* 488 U.S., at 499–500, 109 S.Ct. 706 (rejecting a set-aside program for minority contractors that operated as "an unyielding racial quota"). An employer's effort to avoid Title VII liability by repudiating a suspect selection method scarcely resembles those cases. Race was not merely a relevant consideration in *Wygant* and *Croson;* it was the decisive factor. Observance of Title VII's disparate-impact provision, in contrast, calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.[6]

2

The Court's decision in this litigation underplays a dominant Title VII theme. This Court has repeatedly emphasized that the statute "should not be read to thwart" efforts at voluntary compliance. *Johnson,* 480 U.S., at 630, 107 S.Ct. 1442. Such ***629** compliance, we have explained, is "the preferred means of achieving [Title VII's] objectives." *Firefighters v. Cleveland,* 478 U.S. 501, 515, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). See also *Kolstad v. American Dental Assn.,* 527 U.S. 526, 545, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) ("Dissuading employers from [taking voluntary action] to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."); 29 CFR § 1608.1(c). The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture.

As a result of today's decision, an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic. Concern about exposure to disparate-impact

liability, however well grounded, is insufficient to insulate an employer from attack. Instead, the employer must make a "strong" showing that (1) its selection method was "not job related and consistent with business necessity," or (2) that it refused to adopt "an equally valid, less-discriminatory alternative." *Ante,* at 2778. It is hard to see how these requirements differ from demanding that an employer establish "a provable, actual violation" *against itself*. Cf. *ante,* at 2676. There is indeed a sharp conflict here, but it is not the false one the Court describes between Title VII's core provisions. It is, ****2702** instead, the discordance of the Court's opinion with the voluntary compliance ideal. Cf. *Wygant,* 476 U.S., at 290, 106 S.Ct. 1842 (O'Connor, J., concurring in part and concurring in judgment) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they [act] would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.").[7]

***630** 3

The Court's additional justifications for announcing a strong-basis-in-evidence standard are unimpressive. First, discarding the results of tests, the Court suggests, calls for a heightened standard because it "upset[s] an employee's legitimate expectation." *Ante,* at 2677. This rationale puts the cart before the horse. The legitimacy of an employee's expectation depends on the legitimacy of the selection method. If an employer reasonably concludes that an exam fails to identify the most qualified individuals and needlessly shuts out a segment of the applicant pool, Title VII surely does not compel the employer to hire or promote based on the test, however unreliable it may be. Indeed, the statute's prime objective is to prevent exclusionary practices from "operat[ing] to 'freeze' the status quo." *Griggs,* 401 U.S., at 430, 91 S.Ct. 849.

Second, the Court suggests, anything less than a strong-basis-in-evidence standard risks creating "a *de facto* quota system, in which ... an employer could discard test results ... with the intent of obtaining the employer's preferred racial balance." *Ante,* at 2675. Under a reasonableness standard, however, an employer could not cast aside a selection method based on a statistical disparity alone.[8] The employer must have good cause to believe that the method ***631** screens out qualified applicants and would be difficult to justify as grounded in business necessity. Should an employer repeatedly reject test results, it would be fair, I agree, to infer that the employer is simply seeking a racially balanced outcome and is not genuinely endeavoring to comply with Title VII.

D

The Court stacks the deck further by denying respondents any chance to satisfy the newly announced strong-basis-in-evidence standard. When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance. See, *e.g., Johnson v. California,* 543 U.S. 499, 515, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); ****2703** *Pullman–Standard v. Swint,* 456 U.S. 273, 291, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). I see no good reason why the Court fails to follow that course in this case. Indeed, the sole basis for the Court's peremptory ruling is the demonstrably false pretension that respondents showed "nothing more" than "a significant statistical disparity." *Ante,* at 2677 – 2678; see *supra,* at 2702, n. 8.[9]

***632** III

A

Applying what I view as the proper standard to the record thus far made, I would hold that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity. Judged by that standard, petitioners have not shown that New Haven's failure to certify the exam results violated Title VII's disparate-treatment provision.[10]

The City, all agree, "was faced with a prima facie case of disparate-impact liability," *ante,* at 2677: The pass rate for minority candidates was half the rate for nonminority candidates, and virtually no minority candidates would have been eligible for promotion had the exam results been certified. Alerted to this stark disparity, the CSB heard expert and lay testimony, presented at public hearings, in an endeavor to ascertain whether the exams were fair and consistent with business necessity. Its investigation revealed grave cause for concern about the exam process itself and the City's failure to consider alternative selection devices.

Chief among the City's problems was the very nature of the tests for promotion. In choosing to use written and oral exams with a 60/40 weighting, the City simply adhered to the union's preference and apparently gave no consideration to whether

the weighting was likely to identify the most qualified fire-officer candidates.[11] There is strong reason to think it was not.

****2704** ***633** Relying heavily on written tests to select fire officers is a questionable practice, to say the least. Successful fire officers, the City's description of the position makes clear, must have the "[a]bility to lead personnel effectively, maintain discipline, promote harmony, exercise sound judgment, and cooperate with other officials." CA2 App. A432. These qualities are not well measured by written tests. Testifying before the CSB, Christopher Hornick, an exam-design expert with more than two decades of relevant experience, was emphatic on this point: Leadership skills, command presence, and the like "could have been identified and evaluated in a much more appropriate way." *Id.*, at A1042–A1043.

Hornick's commonsense observation is mirrored in case law and in Title VII's administrative guidelines. Courts have long criticized written firefighter promotion exams for being "more probative of the test-taker's ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge and abilities." *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Serv.,* 625 F.Supp. 527, 539 (NJ 1985). A fire officer's job, courts have ***634** observed, "involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test." *Firefighters Inst. for Racial Equality v. St. Louis,* 616 F.2d 350, 359 (C.A.8 1980).[12] Interpreting the Uniform Guidelines, EEOC and other federal agencies responsible for enforcing equal opportunity employment laws have similarly recognized that, as measures of "interpersonal relations" or "ability to function under danger (*e.g.,* firefighters)," "[p]encil-and-paper tests ... generally are not close enough approximations of work behaviors to show content validity." 44 Fed.Reg. 12007 (1979). See also 29 CFR § 1607.15(C)(4).[13]

****2705** Given these unfavorable appraisals, it is unsurprising that most municipal employers do not evaluate their fire-officer candidates as New Haven does. Although comprehensive statistics are scarce, a 1996 study found that nearly two-thirds of surveyed municipalities used assessment centers ***635** "simulations of the real world of work") as part of their promotion processes. P. Lowry, A Survey of the Assessment Center Process in the Public Sector, 25 Public Personnel Management 307, 315 (1996). That figure represented a marked increase over the previous decade, see *ibid.,* so the percentage today may well be even higher. Among municipalities still relying in part on written exams, the median weight assigned to them was 30 percent—half the weight given to New Haven's written exam. *Id.*, at 309.

Testimony before the CSB indicated that these alternative methods were both more reliable and notably less discriminatory in operation. According to Donald Day of the International Association of Black Professional Firefighters, nearby Bridgeport saw less skewed results after switching to a selection process that placed primary weight on an oral exam. CA2 App. A830–A832; see *supra,* at 2692 – 2693. And Hornick described assessment centers as "demonstrat[ing] dramatically less adverse impacts" than written exams. CA2 App. A1040.[14] Considering the prevalence of these proven alternatives, New Haven was poorly positioned to argue that promotions based on its outmoded and exclusionary selection process qualified as a business necessity. Cf. *Robinson v. Lorillard Corp.,* 444 F.2d 791, 798, n. 7 (C.A.4 1971) ("It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates its intended purpose or is equally effective but less discriminatory.").[15]

***636** Ignoring the conceptual and other defects in New Haven's selection process, the Court describes the exams as "painstaking[ly]" developed to test "relevant" material and on that basis finds no substantial risk of disparate-impact liability. See *ante,* at 2778. Perhaps such reasoning would have sufficed under *Wards Cove,* which permitted exclusionary practices as long as they advanced an employer's "legitimate" ****2706** goals. 490 U.S., at 659, 109 S.Ct. 2115. But Congress repudiated *Wards Cove* and reinstated the "business necessity" rule attended by a "manifest relationship" requirement. See *Griggs,* 401 U.S., at 431–432, 91 S.Ct. 849. See also *supra,* at 2672. Like the chess player who tries to win by sweeping the opponent's pieces off the table, the Court simply shuts from its sight the formidable obstacles New Haven would have faced in defending against a disparate-impact suit. See *Lanning v. Southeastern Pa. Transp. Auth.,* 181 F.3d 478, 489 (C.A.3 1999) ("Judicial application of a standard focusing solely on whether the qualities measured by an ... exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard.").

***637** That IOS representative Chad Legel and his team may have been diligent in designing the exams says little about the exams' suitability for selecting fire officers. IOS worked within the City's constraints. Legel never discussed with the City the propriety of the 60/40 weighting and

"was not asked to consider the possibility of an assessment center." CA2 App. A522. See also *id*., at A467. The IOS exams, Legel admitted, had not even attempted to assess "command presence": "[Y]ou would probably be better off with an assessment center if you cared to measure that." *Id*., at A521. Cf. *Boston Chapter, NAACP v. Beecher,* 504 F.2d 1017, 1021–1022 (C.A.1 1974) ("A test fashioned from materials pertaining to the job ... superficially may seem job-related. But what is at issue is whether it demonstrably selects people who will perform better the required on-the-job behaviors.").

In addition to the highly questionable character of the exams and the neglect of available alternatives, the City had other reasons to worry about its vulnerability to disparate-impact liability. Under the City's ground rules, IOS was not allowed to show the exams to anyone in the New Haven Fire Department prior to their administration. This "precluded [IOS] from being able to engage in [its] normal subject matter expert review process"—something Legel described as "very critical." CA2 App. A477, A506. As a result, some of the exam questions were confusing or irrelevant, and the exams may have over-tested some subject-matter areas while missing others. See, *e.g., id*., at A1034–A1035, A1051. Testimony before the CSB also raised questions concerning unequal access to study materials, see *id*., at A857–A861, and the potential bias introduced by relying principally on job analyses from nonminority fire officers to develop the exams, see *id*., at A1063–A1064.[16] See also *supra,* at 2667, 2694.

***638** The Court criticizes New Haven for failing to obtain a "technical report" from IOS, which, the Court maintains, would have provided "detailed information to establish ****2707** the validity of the exams." *Ante,* at 2679. The record does not substantiate this assertion. As Legel testified during his deposition, the technical report merely summarized "the steps that [IOS] took methodologically speaking," and would not have established the exams' reliability. CA2 App. A461. See also *id*., at A462 (the report "doesn't say anything that other documents that already existed wouldn't say").

In sum, the record solidly establishes that the City had good cause to fear disparate-impact liability. Moreover, the Court supplies no tenable explanation why the evidence of the tests' multiple deficiencies does not create at least a triable issue under a strong-basis-in-evidence standard.

B

Concurring in the Court's opinion, Justice ALITO asserts that summary judgment for respondents would be improper even if the City had good cause for its noncertification decision. A reasonable jury, he maintains, could have found that respondents were not actually motivated by concern about disparate-impact litigation, but instead sought only "to placate a politically important [African–American] constituency." ***639** *Ante,* at 2665. As earlier noted, I would not oppose a remand for further proceedings fair to both sides. See *supra,* at 2703, n. 10. It is the Court that has chosen to short-circuit this litigation based on its pretension that the City has shown, and can show, nothing more than a statistical disparity. See *supra,* at 2702, n. 8, 2702 – 2703. Justice ALITO compounds the Court's error.

Offering a truncated synopsis of the many hours of deliberations undertaken by the CSB, Justice ALITO finds evidence suggesting that respondents' stated desire to comply with Title VII was insincere, a mere "pretext" for discrimination against white firefighters. *Ante,* at 2683 – 2684. In support of his assertion, Justice ALITO recounts at length the alleged machinations of Rev. Boise Kimber (a local political activist), Mayor John DeStefano, and certain members of the mayor's staff. See *ante,* at 2684 – 2687.

Most of the allegations Justice ALITO repeats are drawn from petitioners' statement of facts they deem undisputed, a statement displaying an adversarial zeal not uncommonly found in such presentations.[17] What cannot credibly be denied, ***640** however, is that the decision against certification of the exams was made neither by Kimber nor by the mayor and his staff. The relevant decision was made by ****2708** the CSB, an unelected, politically insulated body. It is striking that Justice ALITO's concurrence says hardly a word about the CSB itself, perhaps because there is scant evidence that its motivation was anything other than to comply with Title VII's disparate-impact provision. Notably, petitioners did not even seek to take depositions of the two commissioners who voted against certification. Both submitted uncontested affidavits declaring unequivocally that their votes were "based solely on [their] good faith belief that certification" would have discriminated against minority candidates in violation of federal law. CA2 App. A1605, A1611.

Justice ALITO discounts these sworn statements, suggesting that the CSB's deliberations were tainted by the preferences of Kimber and City officials, whether or not the CSB itself was aware of the taint. Kimber and City officials, Justice ALITO

speculates, decided early on to oppose certification and then "engineered" a skewed presentation to the CSB to achieve their preferred outcome. *Ante,* at 2683.

As an initial matter, Justice ALITO exaggerates the influence of these actors. The CSB, the record reveals, designed and conducted an inclusive decisionmaking process, in which it heard from numerous individuals on both sides of the certification question. See, *e.g.,* CA2 App. A1090. Kimber and others no doubt used strong words to urge the CSB not to certify the exam results, but the CSB received "pressure" from supporters of certification as well as opponents. Cf. *ante,* at 2686. Petitioners, for example, engaged counsel to speak on their behalf before the CSB. Their counsel did not mince words: "[I]f you discard these results," she warned, "you will get sued. You will force the taxpayers ***641** of the city of New Haven into protracted litigation." CA2 App. A816. See also *id*., at A788.

The local firefighters union—an organization required by law to represent all the City's firefighters—was similarly outspoken in favor of certification. Discarding the test results, the union's president told the CSB, would be "totally ridiculous." *Id.,* at A806. He insisted, inaccurately, that the City was not at risk of disparate-impact liability because the exams were administered pursuant to "a collective bargaining agreement." *Id*., at A1137. Cf. *supra,* at 2703 – 2704, n. 11. Never mentioned by Justice ALITO in his attempt to show testing expert Christopher Hornick's alliance with the City, *ante,* at 2684, the CSB solicited Hornick's testimony at the union's suggestion, not the City's. CA2 App. A1128. Hornick's cogent testimony raised substantial doubts about the exams' reliability. See *supra,* at 2686 – 2687.[18]

There is scant cause to suspect that maneuvering or overheated rhetoric, from either side, prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification. Justice ALITO acknowledges that the CSB had little patience for Kimber's antics. ****2709** *Ante,* at 2685 – 2686.[19] As to petitioners, Chairman Segaloff—who voted to certify the exam ***642** results—dismissed the threats made by their counsel as unhelpful and needlessly "inflammatory." CA2 App. A821. Regarding the views expressed by City officials, the CSB made clear that they were entitled to no special weight. *Id.,* at A1080.[20]

In any event, Justice ALITO's analysis contains a more fundamental flaw: It equates political considerations with unlawful discrimination. As Justice ALITO sees it, if the mayor and his staff were motivated by their desire "to placate a ... racial constituency," *ante,* at 2684, then they engaged in unlawful discrimination against petitioners. But Justice ALITO fails to ask a vital question: "[P]lacate" how? That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination. As courts have recognized, "[p]oliticians routinely respond to bad press ..., but it is not a violation of Title VII to take advantage of a situation to gain political favor." *Henry v. Jones,* 507 F.3d 558, 567 (C.A.7 2007).

The real issue, then, is not whether the mayor and his staff were politically motivated; it is whether their attempt to score political points was legitimate (*i.e.,* nondiscriminatory). Were they seeking to exclude white firefighters from promotion (unlikely, as a fair test would undoubtedly result in the addition of white firefighters to the officer ranks), or did they realize, at least belatedly, that their tests could be toppled in a disparate-impact suit? In the latter case, ***643** there is no disparate-treatment violation. Justice ALITO, I recognize, would disagree. In his view, an employer's action to avoid Title VII disparate-impact liability qualifies as a presumptively improper race-based employment decision. See *ante,* at 2683. I reject that construction of Title VII. See *supra,* at 2699 – 2700. As I see it, when employers endeavor to avoid exposure to disparate-impact liability, they do not thereby encounter liability for disparate treatment.

Applying this understanding of Title VII, supported by *Griggs* and the long line of decisions following *Griggs,* see *supra,* at 2697 – 2698, and nn. 3–4, the District Court found no genuine dispute of material fact. That court noted, particularly, the guidance furnished by Second Circuit precedent. See *supra,* at 2688 – 2689. Petitioners' allegations that City officials took account of politics, the District Court determined, simply "d[id] not suffice" to create an inference of unlawful discrimination. 554 F.Supp.2d, at 160, n. 12. The noncertification decision, even if undertaken "in a political context," reflected a legitimate "intent not to implement a promotional process based on testing results that had an adverse impact." *Id*., at 158, 160. Indeed, the District Court perceived ****2710** "a total absence of any evidence of discriminatory animus towards [petitioners]." *Id*., at 158. See also *id.,* at 162 ("Nothing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward [petitioners] or other non-

minority applicants for promotion."). Perhaps the District Court could have been more expansive in its discussion of these issues, but its conclusions appear entirely consistent with the record before it.[21]

***644** It is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests "fair in form, but discriminatory in operation." 401 U.S., at 431, 91 S.Ct. 849.

* * *

This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place. But what this case does not present is race-based discrimination in violation of Title VII. I dissent from the Court's judgment, which rests on the false premise that respondents showed "a significant statistical disparity," but "nothing more." See *ante,* at 2677 – 2678.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Although the dissent disputes it, see *post,* at 2707, n. 17, the record certainly permits the inference that petitioners' allegation is true. See App. to Pet. for Cert. in No. 07–1428, pp. 846a–851a (deposition of Dubois–Walton).

2 The City's heavy reliance on Hornick's testimony makes the two chiefs' silence all the more striking. See *supra,* at 2685. While Hornick knew little or nothing about the tests he criticized, the two chiefs were involved "during the lengthy process that led to the devising of the administration of these exams," App. to Pet. for Cert. in No. 07–1428, at 847a, including "collaborating with City officials on the extensive job analyses that were done," "selection of the oral panelists," and selection of "the proper content and subject matter of the exams," *id.,* at 847a–848a.

1 Never mind the flawed tests New Haven used and the better selection methods used elsewhere, Justice ALITO's concurring opinion urges. Overriding all else, racial politics, fired up by a strident African–American pastor, were at work in New Haven. See *ante,* at 2665 – 2668. Even a detached and disinterested observer, however, would have every reason to ask: Why did such racially skewed results occur in New Haven, when better tests likely would have produced less disproportionate results?

2 The Court's disparate-impact analysis rested on two provisions of Title VII: § 703(a)(2), which made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin"; and § 703(h), which permitted employers "to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." *Griggs v. Duke Power Co.,* 401 U.S. 424, 426, n. 1, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (quoting 78 Stat. 255, 42 U.S.C. § 2000e–2(a)(2), (h) (1964 ed.)). See also 401 U.S., at 433–436, 91 S.Ct. 849 (explaining that § 703(h) authorizes only tests that are "demonstrably a reasonable measure of job performance").

3 See also *Dothard v. Rawlinson,* 433 U.S. 321, 332, n. 14, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"); *Williams v. Colorado Springs, Colo., School Dist.,* 641 F.2d 835, 840–841 (C.A.10 1981) ("The term

'necessity' connotes that the exclusionary practice must be shown to be of great importance to job performance."); *Kirby v. Colony Furniture Co.,* 613 F.2d 696, 705, n. 6 (C.A.8 1980) ("the proper standard for determining whether 'business necessity' justifies a practice which has a racially discriminatory result is not whether it is justified by routine business considerations but whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove there is *no* alternative to the challenged practice"); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 244, n. 87 (C.A.5 1974) ("this doctrine of business necessity ... connotes an irresistible demand" (internal quotation marks omitted)); *United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 662 (C.A.2 1971) (an exclusionary practice "must not only directly foster safety and efficiency of a plant, but also be essential to those goals"); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 798 (C.A.4 1971) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.").

4 See, *e.g., Nash v. Jacksonville,* 837 F.2d 1534 (C.A.11 1988), vacated, 490 U.S. 1103, 109 S.Ct. 3151, 104 L.Ed.2d 1015 (1989), opinion reinstated, 905 F.2d 355 (C.A.11 1990); *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Serv.,* 832 F.2d 811 (CA3 1987); *Guardians Assn. of N.Y. City Police Dept. v. Civil Serv. Comm'n,* 630 F.2d 79 (C.A.2 1980); *Ensley Branch of NAACP v. Seibels,* 616 F.2d 812 (C.A.5 1980); *Firefighters Inst. for Racial Equality v. St. Louis,* 616 F.2d 350 (C.A.8 1980); *Boston Chapter, NAACP v. Beecher,* 504 F.2d 1017 (C.A.1 1974).

5 What was the "business necessity" for the tests New Haven used? How could one justify, *e.g.,* the 60/40 written/oral ratio, see *supra,* at 2665 – 2666, 2667 – 2668, under that standard? Neither the Court nor the concurring opinions attempt to defend the ratio.

6 Even in Title VII cases involving race-conscious (or gender-conscious) affirmative-action plans, the Court has never proposed a strong-basis-in-evidence standard. In *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), the Court simply examined the municipal employer's action for reasonableness: "Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency ... to consider as one factor the sex of [applicants] in making its decision." *Id.*, at 637, 107 S.Ct. 1442. See also *Firefighters v. Cleveland,* 478 U.S. 501, 516, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) ("Title VII permits employers and unions voluntarily to make use of reasonable race-conscious affirmative action.").

7 Notably, prior decisions applying a strong-basis-in-evidence standard have not imposed a burden as heavy as the one the Court imposes today. In *Croson,* the Court found no strong basis in evidence because the City had offered "nothing approaching a prima facie case." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). The Court did not suggest that anything beyond a prima facie case would have been required. In the context of race-based electoral districting, the Court has indicated that a "strong basis" exists when the "threshold conditions" for liability are present. *Bush v. Vera,* 517 U.S. 952, 978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

8 Infecting the Court's entire analysis is its insistence that the City rejected the test results "in sole reliance upon race-based statistics." *Ante,* at 2676. See also *ante,* at 2673 – 2674, 2677 – 2678. But as the part of the story the Court leaves out, see *supra,* at 2690 – 2695, so plainly shows—the long history of rank discrimination against African–Americans in the firefighting profession, the multiple flaws in New Haven's test for promotions—"sole reliance" on statistics certainly is not descriptive of the CSB's decision.

9 The Court's refusal to remand for further proceedings also deprives respondents of an opportunity to invoke 42 U.S.C. § 2000e–12(b) as a shield to liability. Section 2000e–12(b) provides:

"In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] .... Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect ... ."

Specifically, given the chance, respondents might have called attention to the EEOC guidelines set out in 29 CFR §§ 1608.3 and 1608.4 (2008). The guidelines recognize that employers may "take affirmative action based on an analysis

which reveals facts constituting actual or potential adverse impact." § 1608.3(a). If "affirmative action" is in order, so is the lesser step of discarding a dubious selection device.

10 The lower courts focused on respondents' "intent" rather than on whether respondents in fact had good cause to act. See 554 F.Supp.2d 142, 157 (Conn.2006). Ordinarily, a remand for fresh consideration would be in order. But the Court has seen fit to preclude further proceedings. I therefore explain why, if final adjudication by this Court is indeed appropriate, New Haven should be the prevailing party.

11 This alone would have posed a substantial problem for New Haven in a disparate-impact suit, particularly in light of the disparate results the City's scheme had produced in the past. See *supra,* at 2692 – 2693. Under the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), employers must conduct "an investigation of suitable alternative selection procedures." 29 CFR § 1607.3(B). See also *Officers for Justice v. Civil Serv. Comm'n,* 979 F.2d 721, 728 (C.A.9 1992) ("before utilizing a procedure that has an adverse impact on minorities, the City has an *obligation* pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid"). It is no answer to "presume" that the two-decades-old 60/40 formula was adopted for a "rational reason" because it "was the result of a union-negotiated collective bargaining agreement." Cf. *ante,* at 2667. That the parties may have been "rational" says nothing about whether their agreed-upon selection process was consistent with business necessity. It is not at all unusual for agreements negotiated between employers and unions to run afoul of Title VII. See, *e.g., Peters v. Missouri–Pacific R. Co.,* 483 F.2d 490, 497 (C.A.5 1973) (an employment practice "is not shielded [from the requirements of Title VII] by the facts that it is the product of collective bargaining and meets the standards of fair representation").

12 See also *Nash,* 837 F.2d, at 1538 ("the examination did not test the one aspect of job performance that differentiated the job of firefighter engineer from fire lieutenant (combat): supervisory skills"); *Firefighters Inst. for Racial Equality v. St. Louis,* 549 F.2d 506, 512 (C.A.8 1977) ("there is no good pen and paper test for evaluating supervisory skills"); *Boston Chapter, NAACP,* 504 F.2d, at 1023 ("[T]here is a difference between memorizing ... fire fighting terminology and being a good fire fighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire [players] who could not bat, pitch or catch.").

13 Cf. *Gillespie v. Wisconsin,* 771 F.2d 1035, 1043 (C.A.7 1985) (courts must evaluate "the degree to which the nature of the examination procedure approximates the job conditions"). In addition to "content validity," the Uniform Guidelines discuss "construct validity" and "criterion validity" as means by which an employer might establish the reliability of a selection method. See 29 CFR § 1607.14(B)-(D). Content validity, however, is the only type of validity addressed by the parties and "the only feasible type of validation in these circumstances." Brief for Industrial–Organizational Psychologists as *Amicus Curiae* 7, n. 2 (hereinafter I–O Psychologists Brief).

14 See also G. Thornton & D. Rupp, Assessment Centers in Human Resource Management 15 (2006) ("Assessment centers predict future success, do not cause adverse impact, and are seen as fair by participants."); W. Cascio & H. Aguinis, Applied Psychology in Human Resource Management 372 (6th ed.2005) ("research has demonstrated that adverse impact is less of a problem in an [assessment center] as compared to an aptitude test"). Cf. *Firefighters Inst. for Racial Equality,* 549 F.2d, at 513 (recommending assessment centers as an alternative to written exams).

15 Finding the evidence concerning these alternatives insufficiently developed to "create a genuine issue of fact," *ante,* at 2680 – 2681, the Court effectively confirms that an employer cannot prevail under its strong-basis-in-evidence standard unless the employer decisively proves a disparate-impact violation against itself. The Court's specific arguments are unavailing. First, the Court suggests, changing the oral/written weighting may have violated Title VII's prohibition on altering test scores. *Ante,* at 2680. No one is arguing, however, that the results of the exams given should have been altered. Rather, the argument is that the City could have availed itself of a better option when it initially decided what selection process to use. Second, with respect to assessment centers, the Court identifies "statements to the CSB indicat [ing] that the Department could not have used [them] for the 2003 examinations." *Ante,* at 2680 – 2681. The Court comes up with only a single statement on this subject—an offhand remark made by petitioner Ricci, who hardly qualifies as an expert in testing methods. See *ante,* at 2686. Given the large number of municipalities that regularly use assessment centers, it is impossible to fathom why the City, with proper planning, could not have done so as well.

16 The I–O Psychologists Brief identifies still other, more technical flaws in the exams that may well have precluded the City from prevailing in a disparate-impact suit. Notably, the exams were never shown to be suitably precise to allow strict rank ordering of candidates. A difference of one or two points on a multiple-choice exam should not be decisive of an applicant's promotion chances if that difference bears little relationship to the applicant's qualifications for the job. Relatedly, it appears that the line between a passing and failing score did not accurately differentiate between qualified and unqualified candidates. A number of fire-officer promotional exams have been invalidated on these bases. See, *e.g., Guardians Assn.,* 630 F.2d, at 105 ("When a cutoff score unrelated to job performance produces disparate racial results, Title VII is violated."); *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Serv.,* 625 F.Supp. 527, 538 (NJ 1985) ("[T]he tests here at issue are not appropriate for ranking candidates.").

17 Some of petitioners' so-called facts find little support in the record, and many others can scarcely be deemed material. Petitioners allege, for example, that City officials prevented New Haven's fire chief and assistant chief from sharing their views about the exams with the CSB.App. to Pet. for Cert. in No. 07–1428, p. 228a. None of the materials petitioners cite, however, "suggests" that this proposition is accurate. Cf. *ante,* at 2685. In her deposition testimony, City official Karen Dubois–Walton specifically denied that she or her colleagues directed the chief and assistant chief not to appear. App. to Pet. for Cert. in No. 07–1428, p. 850a. Moreover, contrary to the insinuations of petitioners and Justice ALITO, the statements made by City officials before the CSB did not emphasize allegations of cheating by test takers. Cf. *ante,* at 2686 – 2687. In her deposition, Dubois–Walton acknowledged sharing the cheating allegations not with the CSB, but with a different City commission. App. to Pet. for Cert. in No. 07–1428, p. 837a. Justice ALITO also reports that the City's attorney advised the mayor's team that the way to convince the CSB not to certify was "to focus on something other than 'a big discussion re: adverse impact' law." *Ante,* at 2686 – 2687 (quoting App. to Pet. for Cert. in No. 07–1428, p. 458a). This is a misleading abbreviation of the attorney's advice. Focusing on the exams' defects and on disparate-impact law is precisely what he recommended. See *id.*, at 458a–459a.

18 City officials, Justice ALITO reports, sent Hornick newspaper accounts and other material about the exams prior to his testimony. *Ante,* at 2686. Some of these materials, Justice ALITO intimates, may have given Hornick an inaccurate portrait of the exams. But Hornick's testimony before the CSB, viewed in full, indicates that Hornick had an accurate understanding of the exam process. Much of Hornick's analysis focused on the 60/40 weighting of the written and oral exams, something that neither the Court nor the concurrences even attempt to defend. It is, moreover, entirely misleading to say that the City later hired union-proposed Hornick as a "rewar[d]" for his testimony. Cf. *Ante,* at 2687.

19 To be clear, the Board of Fire Commissioners on which Kimber served is an entity separate from the CSB. Kimber was *not* a member of the CSB. Kimber, Justice ALITO states, requested a private meeting with the CSB. *Ante,* at 2685. There is not a shred of evidence that a private meeting with Kimber or anyone else took place.

20 Justice ALITO points to evidence that the mayor had decided not to make promotions based on the exams even if the CSB voted to certify the results, going so far as to prepare a press release to that effect. *Ante,* at 2687. If anything, this evidence reinforces the conclusion that the CSB—which made the noncertification decision—remained independent and above the political fray. The mayor and his staff needed a contingency plan precisely because they did not control the CSB.

21 The District Court, Justice ALITO writes, "all but conceded that a jury could find that the City's asserted justification was pretextual" by "admitt[ing] that 'a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African–American community.' " *Ante,* at 2696, 2689 (quoting 554 F.Supp.2d, at 162). The District Court drew the quoted passage from petitioners' lower court brief, and used it in reference to a First Amendment claim not before this Court. In any event, it is not apparent why these alleged political maneuvers suggest an intent to discriminate against petitioners. That City officials may have wanted to please political supporters is entirely consistent with their stated desire to avoid a disparate-impact violation. Cf. *Ashcroft v. Iqbal,* 556 U.S. 662, 680 – 684, 129 S.Ct. 1937, 1951–1952, 173 L.Ed.2d 868 (2009) (allegations that senior Government officials condoned the arrest and detention of thousands of Arab Muslim men following the September 11 attacks failed to establish even a "plausible inference" of unlawful discrimination sufficient to survive a motion to dismiss).

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145 Cal.App.4th 660
Court of Appeal, Fifth District, California.

Enrique SANCHEZ et al.,
Plaintiffs and Appellants,
v.
CITY OF MODESTO et al.,
Defendants and Respondents.

No. F048277.
|
Dec. 6, 2006.
|
Review Denied March 21, 2007.
|
Certiorari Denied Oct. 15, 2007.
|
See 128 S.Ct. 438.

Synopsis
Background: Latino voters filed action against city under the California Voting Rights Act (CVRA), alleging that because of racially polarized voting in the city, they are precluded from electing any candidates in the city's at-large city council elections. The Superior Court of Stanislaus County, No. 347903, Roger M. Beauchesne, J., granted city's motion for judgment on the pleadings after ruling that the CVRA was facially invalid under the equal protection clauses of the state and federal Constitutions. Voters appealed.

Holdings: The Court of Appeal, Wiseman, J., held that:

[1] CVRA is race-neutral;

[2] city had third-party standing to maintain equal protection challenge to CVRA;

[3] city failed to show that CVRA was facially invalid;

[4] all persons have standing under CVRA to sue for race-based vote dilution; and

[5] CVRA is not subject to strict scrutiny under equal protection.

Reversed and remanded.

West Headnotes (30)

[1] **Election Law** Judicial Review or Intervention

California Voting Rights Act (CVRA) is race-neutral; it does not favor any race over others or allocate burdens or benefits to any groups on the basis of race, but simply gives a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system. West's Ann.Cal.Elec.Code §§ 14025–14032.

See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 233.

2 Cases that cite this headnote

[2] **Evidence** Population; census data

In voting rights case, the Court of Appeal would take judicial notice of the fact, which was revealed by the 2000 census, reporting non-Hispanic Whites as 46.7 percent of state population.

5 Cases that cite this headnote

[3] **Appeal and Error** Judgment on the pleadings

Appeal and Error Objections and exceptions; demurrer

Appeal and Error Judgment on the pleadings

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer; Court of Appeal treats as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determines

de novo whether the complaint states a cause of action under any legal theory.

5 Cases that cite this headnote

[4] **Appeal and Error** Theory and Grounds of Decision Below and on Review

Court of Appeal may rely on any applicable legal theory in affirming or reversing a case because it reviews the trial court's disposition of the matter, not its reasons for the disposition.

3 Cases that cite this headnote

[5] **Constitutional Law** Presumptions and Construction as to Constitutionality

Where reasonably possible, courts are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional.

[6] **Statutes** Judicial authority and duty

Judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.

1 Case that cites this headnote

[7] **Constitutional Law** Necessity of Determination

Constitutional Law Resolution of non-constitutional questions before constitutional questions

Principles of judicial self-restraint require courts to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available.

9 Cases that cite this headnote

[8] **Action** Persons entitled to sue

The issue of standing may be raised at any time.

2 Cases that cite this headnote

[9] **Constitutional Law** Equal Protection

Rule barring cities from mounting equal protection challenges to state statutes is subject to an exception for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[10] **Constitutional Law** Equal Protection

Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[11] **Constitutional Law** Elections

Constitutional Law Elections, Voting, and Political Rights

The constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that kind may reinforce racial stereotypes and threaten to undermine the system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole, and individual voters are entitled to assert this interest through litigation testing state laws. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[12] **Constitutional Law** Elections

City had third-party standing to maintain equal protection challenge on behalf of its citizens to state law giving a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system; the relationship between the city and individual citizens or

voters was of the appropriate kind, city voters had rejected district-based elections by a large margin in a recent referendum, there were genuine obstacles to citizens asserting their own rights, and a showing of impossibility was not required. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law** Differing levels set forth or compared

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right; otherwise, the classification is subject only to rational-basis review. U.S.C.A. Const.Amend. 14.

[14] **Constitutional Law** Race, national origin, or ethnicity

Race is a suspect classification subject to strict scrutiny under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[15] **Constitutional Law** Voting and political rights

The right to vote is a fundamental right under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[16] **Constitutional Law** Differing levels set forth or compared

A law subject to strict scrutiny under equal protection is upheld only if it is narrowly tailored to promote a compelling governmental interest, while under rational-basis review, a law need only bear a rational relationship to a legitimate governmental interest. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law** Facial invalidity

A facial constitutional challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid.

5 Cases that cite this headnote

[18] **Constitutional Law** Electoral districts and gerrymandering

Election Law In general; power to prohibit discrimination

City failed to show that the California Voting Rights Act (CVRA), permitting voters to challenge racially polarized voting in the city if they were precluded from electing any candidates in the city's at-large city council elections, was facially invalid under equal protection, where they failed to show that the CVRA could be validly applied under no circumstances. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[19] **Constitutional Law** Elections, Voting, and Political Rights

Election Law Dilution of voting power in general

California Voting Rights Act (CVRA) vote-dilution cause of action differs from the Federal Voting Rights Act (FVRA) version in that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated; differences do not introduce a racial classification or a burden on the right to vote, however, and the facial terms of the statute thus are not subject to strict scrutiny under equal protection, only rational-basis review applies, and the CVRA readily passes it. West's Ann.Cal.Elec.Code §§ 14025–14032; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[20] **Constitutional Law** Race, national origin, or ethnicity

A law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny under equal protection even if persons of all races bear the burden or receive the benefit equally. U.S.C.A. Const.Amend. 14.

[21] **Constitutional Law** Race, national origin, or ethnicity

A statute is not automatically subject to strict scrutiny because it involves race consciousness if it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. U.S.C.A. Const.Amend. 14.

[22] **Election Law** Racial and language minorities in general

The classification "language minority group" in the Federal Voting Rights Act (FVRA) does not define any group in terms of language, but simply identifies four specific racial or ethnic groups, American Indians, Asian Americans, Alaskan Natives, and Hispanics, as belonging to a protected class; definition refers to these as racial or ethnic groups, not in terms of their language, and the category "language minority group" was added to the FVRA for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

[23] **Election Law** Parties; standing

All persons have standing under the California Voting Rights Act CVRA to sue for race-based vote dilution because all persons are members of a race. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[24] **Election Law** In general; power to prohibit discrimination

California Voting Rights Act (CVRA) is not an affirmative action statute because, unlike affirmative action laws, it does not identify any races for conferral of preferences. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[25] **Constitutional Law** Equality of Voting Power (One Person, One Vote)

The California Voting Rights Act (CVRA) is not subject to strict scrutiny under equal protection because it imposes liability on the basis of voting; while the CVRA requires a showing of racially polarized voting as an element of liability, that does not mean any person or group of people is held liable for voting or for how they voted, as the liability is that of the government entity that maintains the at-large voting system, and it is imposed because of dilution of a groups' votes. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

2 Cases that cite this headnote

[26] **Election Law** Dilution of voting power in general

California Voting Rights Act (CVRA) does not burden anyone's right to engage in racially polarized voting, but only makes racially polarized voting part of the predicate for a government entity's liability for racial vote dilution; effect of racially polarized voting, the election of monoracial city councils and the like, may be and is intended to be reduced by the application of the CVRA, but no voter has a right to a voting system that chronically and systematically brings about that effect. West's Ann.Cal.Elec.Code §§ 14025–14032.

4 Cases that cite this headnote

[27] **Constitutional Law** Race, national origin, or ethnicity

A facially neutral law is subject to strict scrutiny under equal protection if it was adopted for a racially discriminatory purpose. U.S.C.A. Const.Amend. 14.

[28] **Constitutional Law** Affirmative action in general

A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose under equal protection no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory, although an intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. U.S.C.A. Const.Amend. 14.

[29] **Constitutional Law** Necessity of Determination

A court should not decide constitutional questions unless required to do so.

[30] **Constitutional Law** Facial invalidity

A court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation, which is justified only where the statute could be validly applied under no circumstances.

5 Cases that cite this headnote

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***665 OPINION**

WISEMAN, J.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is

invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied* ****826** invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

[1] ***666** Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is raceneutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

[2] The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities. Both demographic situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted ***667** their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to ****827** which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec.Code, §§ 14025–14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election...." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511(*Shaw*);*Thornburg v. Gingles* (1986) 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25(*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can " ' "minimize or cancel out the voting strength" ' " of minorities (*Gingles, supra,* at p. 47, 106 S.Ct. 2752), the Supreme Court delineated the elements of a vote-dilution ***668** violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at pp. 50–51, 106 S.Ct. 2752 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the court considered a new district map for the State of North Carolina, created by the ****828** state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633–634, 641, 113 S.Ct. 2816.) Among the justifications the state offered for the plan was that the two majority-Black districts were needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655, 113 S.Ct. 2816.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637–639, 642, 113 S.Ct. 2816.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally ... be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649, 113 S.Ct. 2816.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958–959, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra,* 517 U.S. at pp. 976–979, 116 S.Ct. 1941.)

***669** The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy* stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra,* 478 U.S. 30, 106 S.Ct. 2752] requirements without an additional showing of geographical compactness.... This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill

puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

****829** Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says “[t]he author states that [the bill] ‘addresses the problem of racial block voting,’ which is particularly harmful to a state like California due to its diversity.... In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction....” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

  “An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.”

- A protected class is a class of voters “who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.).” (§ 14026, subd. (d).)

***670** - Section 14032 gives a right of action to voters in protected classes.

- Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

- The court shall “implement appropriate remedies, including the imposition of district-based elections,” if it finds liability. (§ 14029.)

- Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority ****830** group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the ***671** CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

[3] **[4]** The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972, 14 Cal.Rptr.3d 787.) We may rely on any applicable legal theory in affirming or reversing because we " 'review the trial court's disposition of the matter, not its reasons for the disposition.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065, 20 Cal.Rptr.3d 562.)

[5] **[6]** **[7]** Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60, 195 P.2d 1;*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254, 125 Cal.Rptr.2d 337.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.(*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660–661, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, 18 Cal.Rptr.3d 492.)

I. City's standing to challenge statute

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

[8] Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We ***672** disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745, 30 Cal.Rptr.3d 230; ****831** *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1251, 15 Cal.Rptr.3d 344;*People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2, 7 Cal.Rptr.2d 290.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star–Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6, 227 Cal.Rptr. 391, 719 P.2d 987(*Star–Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star–Kist, supra,* 42 Cal.3d at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40, 53 S.Ct. 431,

77 L.Ed. 1015(*Williams*) and a number of earlier cases. In *Williams,* the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37–38, 53 S.Ct. 431.) The railroad was in the hands of a receiver ***673** appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39–40, 53 S.Ct. 431.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id.* at p. 40, 53 S.Ct. 431.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 [city not entitled to raise 14th Amend. equal protection challenge to ****832** state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185–188, 192, 43 S.Ct. 534, 67 L.Ed. 937 [city not entitled to challenge same fee under due process clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209, 282 P.2d 481 [city cannot rely on contract clause to obtain invalidation of state statute allegedly impairing preexisting contract between city and state]; *City of Burbank v. Burbank–Glendale–Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380, 85 Cal.Rptr.2d 28 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. state statute allowing city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296–297, 268 Cal.Rptr. 219(*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457, 140 Cal.Rptr. 684 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe* (9th Cir.1980) 625 F.2d 231, 233–234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star–Kist, supra,* 42 Cal.3d at pp. 4, 8–9, 227 Cal.Rptr. 391, 719 P.2d 987.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution.(*Id.* at p. 8, 227 Cal.Rptr. 391, 719 P.2d 987.) The court did not, however, disturb the ***674** doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987.)

[9] A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777, 192 Cal.Rptr. 782(*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance ****833** of which the neighbors had received notice; the neighbors' due process rights had therefore been violated. (*Id.* at pp. 779–781, 782, 192 Cal.Rptr. 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra,* 144 Cal.App.3d at pp. 784–785, 192 Cal.Rptr. 782.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra,* 144 Cal.App.3d at p. 783, 192 Cal.Rptr. 782.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 264 Cal.Rptr. 499(*Selinger*), relied on *Drum,* among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger,* a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra,* 216 Cal.App.3d at p. 263, 264 Cal.Rptr. 499.) Among other things, the city argued that the Permit Streamlining Act violated ***675** adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270, 264 Cal.Rptr. 499.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star–Kist, supra,* 42 Cal.3d at page 6, 227 Cal.Rptr. 391, 719 P.2d 987, but it cited *Drum, supra,* 144 Cal.App.3d 777, 192 Cal.Rptr. 782 in support of making an exception. (*Selinger, supra,* 216 Cal.App.3d at pp. 270, 271, 264 Cal.Rptr. 499.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114, 96 S.Ct. 2868.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v.* ****834** *Wulff, supra,* 428 U.S. at pp. 114–115, 96 S.Ct. 2868.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra,* 428 U.S. at pp. 115–116, 96 S.Ct. 2868.)

In *Selinger,* the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra,* 216 Cal.App.3d at p. 271, 264 Cal.Rptr. 499.) Also, there was a high obstacle to local citizens' ***676** ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90–day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid.*)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 21 Cal.Rptr.2d 453(*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627–629, 630, 21 Cal.Rptr.2d 453.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630–631, 21 Cal.Rptr.2d 453.) The court did not explain what obstacles prevented the constituents from suing on their own behalf.

[10] We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for

those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum,* and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their ****835** creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

[11] This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that ***677** kind may "reinforce ... racial stereotypes and threaten ... to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650, 113 S.Ct. 2816.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw.* The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

[12] The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra,* 428 U.S. at p. 114, 96 S.Ct. 2868) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415, 111 S.Ct. 1364, 113 L.Ed.2d 411 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6, 96 S.Ct. 2868 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

***678** *II. Equal protection*

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review ****836** of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652–653, 88 Cal.Rptr.2d 283, 982 P.2d 154 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685, 15 Cal.Rptr.2d

480, 842 P.2d 1240.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

[13] [14] [15] A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216–218 & fns. 14 & 15, 102 S.Ct. 2382, 72 L.Ed.2d 786.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949(*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626–628, 89 S.Ct. 1886, 23 L.Ed.2d 583) for equal protection purposes.

[16] A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra,* 543 U.S. at p. 505, 125 S.Ct. 1141.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra,* 521 U.S. at p. 799, 117 S.Ct. 2293.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

[17] Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697(*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process ***679** challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g., *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. ****837** (*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id.* at pp. 77–80 & fns. 1–3, 119 S.Ct. 1849 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

[18] The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745, 107 S.Ct. 2095) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir.1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122;*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338, 84 Cal.Rptr.2d 425, 975 P.2d 622;*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir.2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only

by showing that the CVRA can be validly applied under no circumstances.

680 *B. Analysis

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis review. Second, although the *Shaw–Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

[19] The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation ****838** of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010(*Loving*) and *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving,* the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law ***681** was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra,* 388 U.S. at p. 8, 87 S.Ct. 1817.) In *Johnson,* a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.)

[20] What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson,* for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.' " (*Ibid.*)

[21] What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624(*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the court of appeals subjected a provision of Title VII of the federal

Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir.1999) 198 F.3d 1305, 1319–1324.

This argument does not work. The *Boerne* test has nothing to do with strict ****839** scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress' enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

***682** Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the First Amendment and its free exercise clause. (*Boerne, supra,* 521 U.S. at pp. 512–517, 117 S.Ct. 2157.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id.* at pp. 519–520, 532, 117 S.Ct. 2157.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular ***683** racial group rather than their constituency as a whole." (*Shaw, supra,* 509 U.S. at p. 650, 113 S.Ct. 2816.) Similarly, in *Vera,* the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related ****840** harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983–984, 116 S.Ct. 1941.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based on the trial court's view that the statute is racially discriminatory on its face because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is

referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of "language minority group" in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that "voting discrimination against citizens of language minorities is pervasive" and that "[s]uch minority citizens are from environments in which the dominant language is other than English." The trial court believed this was the federal statutory definition of "language minority group" to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that "language minority group" means "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." The court believed this further restricted the meaning of the term, ***684** so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups that speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of "language minority group," which is found at Title 42 United States Code section 1973*l*(c)(3): "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." This provision uses and defines the precise phrase ("language minority group") contained in the CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about "environments in which the dominant language is other than English," which does not use the phrase "language ****841** minority group" and which states a congressional finding, not a definition.

[22] Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94–925, 1st Sess. (1975), reprinted in 1975 U.S.Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups.(*Rice v. Cayetano* (2000) 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al–Khazraji* (1987) 481 U.S. 604, 610, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 [prohibition of racial discrimination in 42 U.S.C. § 1981 protects all persons from discrimination based on their ***685** "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280, 96 S.Ct. 2574, 49 L.Ed.2d 493 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill.2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish–Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish–Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is

not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318, 92 Cal.Rptr.2d 418.)

[23] The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race- ****842** based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

[24] Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255, 123 S.Ct. 2411). In *Richmond v. J.A. Croson Co., supra,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the ***686** money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups.(*Id.* at pp. 477–478, 511, 109 S.Ct. 706.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

[25] As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting...." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about candidates and ballot measures. Bloc voting, then, represents a coalition of political interests ****843** that lie close to the core of the freedom of political association."

[26] Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a government ***687** entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

[27] A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted *solely* for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

[28] This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not ***688** narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that ****844** might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra,* 481 U.S. at page 745, 107 S.Ct. 2095, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, was the first in this line of cases. It held, as mentioned earlier, that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw–Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, ***689** a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48–49[, 141 Cal.Rptr. 315, 569 P.2d 1303], and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant

parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450–451, 123 Cal.Rptr.2d 122(*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation...." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

"If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just ****845** one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

[29] The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra,* 122 Cal.App.4th at p. 10, 18 Cal.Rptr.3d 492.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

[30] Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances.(*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at p. 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case,* then the court will ***690** have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case.* It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?
- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?
- Is the court precluded from employing any alternative at-large voting system as a remedy?
- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSITION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

****846** Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental

briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

***691** The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of Respondents Requesting Judicial Notice (filed July 20, 2006).

HARRIS, Acting P.J., and CORNELL, J., concur.

All Citations

145 Cal.App.4th 660, 51 Cal.Rptr.3d 821, 06 Cal. Daily Op. Serv. 11,187

Footnotes

1 We take judicial notice of this fact, which was revealed by the 2000 census. (See < http://factfinder.census.gov/servlet/QTTable?_bm =y&-qr_ name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_ lang =en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

2 Subsequent statutory references are to the Elections Code unless otherwise noted.

3 In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

End of Document

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Harris v. Arizona Independent Redistricting Com'n, U.S.Ariz., April 20, 2016

133 S.Ct. 2612
Supreme Court of the United States

SHELBY COUNTY, ALABAMA, Petitioner
v.
Eric H. HOLDER, Jr., Attorney General, et al.

No. 12–96
|
Argued Feb. 27, 2013.
|
Decided June 25, 2013.

Synopsis

Background: County brought declaratory judgment action against United States Attorney General, seeking determination that Voting Rights Act's coverage formula and preclearance requirement, under which covered jurisdictions were required to demonstrate that proposed voting law changes were not discriminatory, was unconstitutional. United States and civil rights organization intervened. After intervenors' motion for additional discovery was denied, 270 F.R.D. 16, parties cross-moved for summary judgment. The United States District Court for the District of Columbia, John D. Bates, J., 811 F.Supp.2d 424, entered summary judgment for Attorney General. County appealed. The United States Court of Appeals for the District of Columbia Circuit, Tatel, Circuit Judge, 679 F.3d 848, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Chief Justice Roberts, held that Voting Rights Act provision setting forth coverage formula was unconstitutional.

Reversed.

Justice Thomas filed concurring opinion.

Justice Ginsburg filed dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.

West Headnotes (19)

[1] **Statutes** Validity

Exceptional conditions can justify legislative measures not otherwise appropriate.

4 Cases that cite this headnote

[2] **Election Law** Discrimination; Voting Rights Act

The Voting Rights Act imposes current burdens and must be justified by current needs. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

77 Cases that cite this headnote

[3] **States** Exercise of Powers by States or the United States

A departure from the fundamental principle of states' equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

23 Cases that cite this headnote

[4] **Constitutional Law** Constitution as supreme, paramount, or highest law

States Exercise of Federal Power; Infringement on State Powers

Although the Constitution and laws of the United States are the supreme law of the land, and state legislation may not contravene federal law, the Federal Government does not have a general right to review and veto state enactments before they go into effect. U.S.C.A. Const. Art. 6, cl. 2.

14 Cases that cite this headnote

[5] **States** Federalism; Relationship Between Federal and State Governments

States Supremacy of Federal Law Over State Law

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their

governments and pursuing legislative objectives. U.S.C.A. Const. Art. 6, cl. 2.

5 Cases that cite this headnote

[6] **States** Federalism; Relationship Between Federal and State Governments

The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.

1 Case that cites this headnote

[7] **States** Federalism; Relationship Between Federal and State Governments

The federal balance is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

4 Cases that cite this headnote

[8] **Election Law** Power to Confer and Regulate

States Other particular powers

Although the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, the Federal Government retains significant control over federal elections. U.S.C.A. Const.Amend. 10.

15 Cases that cite this headnote

[9] **Election Law** State legislatures

States have broad powers to determine the conditions under which the right of suffrage may be exercised.

6 Cases that cite this headnote

[10] **Election Law** State legislatures

Public Employment Grounds for and Propriety of Selection; Eligibility and Qualification

States Qualification

Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.

4 Cases that cite this headnote

[11] **United States** Power and duty to apportion

Drawing lines for congressional districts is primarily the duty and responsibility of the State.

8 Cases that cite this headnote

[12] **States** Relations Among States Under Constitution of United States

Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States.

30 Cases that cite this headnote

[13] **States** Relations Among States Under Constitution of United States

Our Nation was and is a union of States, equal in power, dignity, and authority, and, indeed, the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.

7 Cases that cite this headnote

[14] **States** Relations Among States Under Constitution of United States

The fundamental principle of equal sovereignty among the States remains highly pertinent in assessing disparate treatment of States subsequent to their admission.

19 Cases that cite this headnote

[15] **Constitutional Law** Fifteenth Amendment

The Fifteenth Amendment, which commands that the right to vote shall not be denied or abridged on account of race or color, and gives Congress the power to enforce that command, is not designed to punish for the past; its purpose is to ensure a better future. U.S.C.A. Const.Amend. 15.

27 Cases that cite this headnote

[16] **Constitutional Law** Fifteenth Amendment

To serve the Fifteenth Amendment's purpose to ensure a better future, Congress, if it is to divide the States, must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions; it cannot rely simply on the past. U.S.C.A. Const.Amend. 15.

9 Cases that cite this headnote

[17] **Constitutional Law** Invalidation, annulment, or repeal of statutes

Statutes Judicial authority and duty

Striking down an Act of Congress is the gravest and most delicate duty that the Supreme Court is called on to perform, and it does not do so lightly.

3 Cases that cite this headnote

[18] **Election Law** In general; covered jurisdictions

Voting Rights Act provision setting forth coverage formula used to determine which states and political subdivisions were subject to preclearance was unconstitutional, and thus could no longer be used as basis for subjecting jurisdictions to preclearance; although formula at time of Act's passage had met test that current burdens were required to be justified by current needs and that disparate geographic coverage was required to be sufficiently related to the problem that it targeted, formula no longer met that test. U.S.C.A. Const. Art. 6, cl. 2; U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b(b).

75 Cases that cite this headnote

[19] **Election Law** In general; power to prohibit discrimination

While any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

28 Cases that cite this headnote

West Codenotes

Held Unconstitutional

42 U.S.C.A. § 1973b(b), transferred to 52 U.S.C.A. § 10303

****2615** *Syllabus*[*]

***529** The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color," 42 U.S.C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the "covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C. § 1973c(a). Such approval is known as "preclearance."

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court

in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing ***530** § 4(b)'s coverage formula. The D.C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

Held : Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 2622 – 2628.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs" and concluded that "a departure ****2616** from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S., at 203, 129 S.Ct. 2504. These basic principles guide review of the question presented here. Pp. 2622 – 2627.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including "the power to regulate elections." *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410. There is also a "fundamental principle of equal sovereignty" among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as "stringent" and "potent," *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. The Court nonetheless upheld the Act, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. Pp. 2622 – 2625.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it —made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points ***531** below the national average." *Id.,* at 330, 86 S.Ct. 803. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* Pp. 2624 – 2625.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin, supra,* at 202, 129 S.Ct. 2504. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years**.** Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 2625 – 2627.

(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 2627 – 2631.

****2617** (1) In 1966, the coverage formula was "rational in both practice and theory." *Katzenbach, supra,* at 330, 86 S.Ct. 803. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. Coverage today is based on decades-old

data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 2627 – 2628.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered"—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula ... was relevant to the problem." 383 U.S., at 329, 330, 86 S.Ct. 803. The Government has a fallback ***532** argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[ ]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 2627 – 2629.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40–year–old facts having no logical relation to the present day. Pp. 2629 – 2630.

679 F.3d 848, reversed.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

[1] ***534** The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 ***535** of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.,* at 334, 86 S.Ct. 803. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally ****2619** covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203–204, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

[2] ***536** At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

I

A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Id.,* at 197, 129 S.Ct. 2504. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African–Americans from voting. *Katzenbach,* 383 U.S., at 310, 86 S.Ct. 803. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African–Americans barely improved. *Id.,* at 313–314, 86 S.Ct. 803.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current ***537** version forbids any " standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November

1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), *id*., at 438–439. A ****2620** covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), *id.,* at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 C.F.R. pt. 51, App. (2012).

In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. *Id.,* at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid*.

***538** Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), *id.,* at 438; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504. In *South Carolina v. Katzenbach,* we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U.S., at 308, 86 S.Ct. 803.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§ 3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 C.F.R. pt. 51, App. Congress also extended the ban in § 4(a) on tests and devices nationwide. § 6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *id.,* at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 C.F.R. pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§ 203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. § 102, *id*., at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act ***539** Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a § 2 suit, in the ten years prior to seeking bailout. § 2, *id.,* at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); ****2621** *City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Lopez v. Monterey County,* 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended § 5 to prohibit more conduct than before. § 5, *id.,* at 580–581; see *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 341, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier II*); *Georgia v. Ashcroft,* 539 U.S. 461, 479, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b)-(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See *Northwest Austin,* 557 U.S., at 200–201, 129 S.Ct. 2504.

A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." *Northwest Austin Municipal Util. Dist. No. One v. Mukasey,* 573 F.Supp.2d 221, 232 (D.D.C.2008). The District Court also rejected the constitutional challenge. *Id.,* at 283.

***540** We reversed. We explained that " 'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.' " *Northwest Austin, supra,* at 205, 129 S.Ct. 2504 (quoting *Escambia County v. McMillan,* 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. *Northwest Austin,* 557 U.S., at 207, 129 S.Ct. 2504. In doing so we expressed serious doubts about the Act's continued constitutionality.

We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.,* at 202, 203, 129 S.Ct. 2504 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.,* at 202, 129 S.Ct. 2504. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." *Id.,* at 203, 129 S.Ct. 2504.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 ****2622** of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their ***541** enforcement. The District Court ruled against the county and upheld the Act. 811 F.Supp.2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

The Court of Appeals for the D.C. Circuit affirmed. In assessing § 5, the D.C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful § 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, § 5 preclearance suits involving covered jurisdictions, and the deterrent effect of § 5. See 679 F.3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary. *Id.,* at 873.

Turning to § 4, the D.C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question." *Id.,* at 879. But the court looked to data comparing the number of successful § 2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of § 5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.,* at 883.

Judge Williams dissented. He found "no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout." *Id.,* at 891. Rather, to the extent there was any correlation, it actually went the other way: "condemnation under § 4(b) is a marker of *higher* black registration and turnout." *Ibid.* (emphasis added). Judge Williams also found that "[c]overed jurisdictions have *far more* black officeholders as a proportion of the black ***542** population than do uncovered ones." *Id.,* at 892. As to the evidence of successful § 2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions." *Id.,* at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data.

Ibid. Judge Williams would have held the coverage formula of § 4(b) "irrational" and unconstitutional. *Id.,* at 885.

We granted certiorari. 568 U.S. ——, 133 S.Ct. 594, 184 L.Ed.2d 389 (2012).

II

[3] In *Northwest Austin,* we stated that "the Act imposes current burdens and must be justified by current needs." 557 U.S., at 203, 129 S.Ct. 2504. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.[1]

****2623** A

[4] The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 ***543** Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.,* at 27–29, 390–392.

[5] **[6]** **[7]** Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

[8] **[9]** **[10]** **[11]** More specifically, " 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.' " *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also *Arizona v. Inter Tribal Council of Ariz., Inc.,* —— U.S., at ——– ——, 133 S.Ct., at 2253 – 2254. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash,* 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (internal quotation marks omitted); see also *Arizona, ante,* at —— U.S., at ——– ——, 133 S.Ct., at 2257 – 2259. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry v. Perez,* 565 U.S. ——, ——, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012) (*per curiam*) (internal quotation marks omitted).

[12] **[13]** **[14]** ***544** Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504 (citing *United States v. Louisiana,* 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960); *Lessee of Pollard v. Hagan,* 3 How. 212, 223, 11 L.Ed. 565 (1845); and *Texas v. White,* 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.,* at 580, 31 S.Ct. 688. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle ****2624** operated as a *bar* on differential treatment outside that context. 383 U.S., at 328–329, 86 S.Ct. 803. At the same time, as we made clear in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U.S., at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law

—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Id.,* at 202, 129 S.Ct. 2504. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 C.F.R. §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal ***545** legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F.3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez,* 525 U.S., at 282, 119 S.Ct. 693, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County Comm'n,* 502 U.S. 491, 500–501, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). As we reiterated in *Northwest Austin,* the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." 557 U.S., at 211, 129 S.Ct. 2504.

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans from voting. *Id.,* at 310, 86 S.Ct. 803. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.,* at 314, 86 S.Ct. 803. Shortly before ***546** enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.,* at 313, 86 S.Ct. 803. Those figures were roughly ****2625** 50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.,* at 334, 335, 86 S.Ct. 803. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.,* at 333, 86 S.Ct. 803; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.,* at 330, 86 S.Ct. 803. We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* We therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.,* at 308, 86 S.Ct. 803. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.,* at 315, 86 S.Ct. 803.

***547** C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin,* 557 U.S., at 202, 129 S.Ct. 2504. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R.Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been "significant increases in the number of African–Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act. *Id.,* at 18.

****2626** The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These ***548** are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S.Rep. No. 109–295, p. 11 (2006); H.R.Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African–American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R. Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S.Rep. No. 109–295, at 13.

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African–American voters. See ***549** *United States v. Price,* 383 U.S. 787, 790, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African–American enfranchisement. See *Northwest Austin, supra,* at 220, n. 3, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African–American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U.S.C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5

to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II,* 528 U.S., at 324, 335–336, 120 S.Ct. 866. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups ****2627** but did not do so because of a discriminatory purpose, see 42 U.S.C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality," *Bossier II, supra,* at 336, 120 S.Ct. 866 (citation and internal quotation marks omitted). In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." § 1973c(b). In light of those two amendments, the bar that covered jurisdictions ***550** must clear has been raised even as the conditions justifying that requirement have dramatically improved.

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504; see *Georgia v. Ashcroft,* 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5"). Nothing has happened since to alleviate this troubling concern about the current application of § 5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." *Katzenbach,* 383 U.S., at 330, 86 S.Ct. 803. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin,* 557 U.S., at 204, 129 S.Ct. 2504. As we explained, a statute's "current burdens" must be justified by "current needs," and ***551** any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.,* at 203, 129 S.Ct. 2504. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H.R.Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e.g.,* ****2628** *Katzenbach, supra,* at 313, 329–330, 86 S.Ct. 803. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is

that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the "formula ... was relevant to the ***552** problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S., at 329, 330, 86 S.Ct. 803.

Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin, supra,* at 211, 129 S.Ct. 2504—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history —rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach, supra,* at 308, 86 S.Ct. 803 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need [ ]" for a preclearance system ***553** that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress ****2629** reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

[15] **[16]** The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano,* 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment."). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin,* and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.,* ***554** 679 F.3d, at 873–883 (case below), with *id.,* at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803; *Northwest Austin,* 557 U.S., at 201, 129 S.Ct. 2504.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see *post,* at 2644, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post,* at 2644 – 2648. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby ****2630** County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The ***555** county was selected based on that formula, and may challenge it in court.

D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Post,* at 2637 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, *post,* at 2637, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335, 86 S.Ct. 803. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g., Northwest Austin, supra,* at 211, 129 S.Ct. 2504. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." *Post,* at 2650.

***556** In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U.S., at 201, 129 S.Ct. 2504, but the dissent describes current levels of discrimination as " flagrant," "widespread," and "pervasive," *post,* at 2636, 2641 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U.S., at 203, 129 S.Ct. 2504, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish ****2631** between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use

of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

[17] **[18]** Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the ***557** Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

[19] Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley,* 502 U.S., at 500–501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice THOMAS, concurring.
I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Ante,* at 2618. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Though § 5's preclearance ***558** requirement represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, *ante,* at 2622, 2623, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale." *Katzenbach, supra,* at 308, 86 S.Ct. 803.

Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." *Ante,* at 2618. As the Court explains: " '[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' " *Ante,* at 2625 (quoting ****2632** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 202, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." *Ante,* at 2621. "Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.' " *Ante,* at 2621. While the pre–2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 480–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress' decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." *Ante,* at 2627. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination ***559** that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Ante,* at 2629. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." "The extensive pattern of discrimination that

led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Northwest Austin, supra,* at 226, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

While the Court claims to "issue no holding on § 5 itself," *ante,* at 2631, its own opinion compellingly demonstrates that Congress has failed to justify " 'current burdens' " with a record demonstrating " 'current needs.' " See *ante,* at 2622 (quoting *Northwest Austin, supra,* at 203, 129 S.Ct. 2504). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find § 5 unconstitutional.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would ***560** guard against backsliding. Those assessments were well within Congress' province to make and ****2633** should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." *Ante,* at 2619. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. *Id.,* at 311, 86 S.Ct. 803. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon,* 273 U.S. 536, 541, 47 S.Ct. 446, 71 L.Ed. 759; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, *Smith v. Allwright,* 321 U.S. 649, 658, 64 S.Ct. 757, 88 L.Ed. 987; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams,* 345 U.S. 461, 469, 73 S.Ct. 809, 97 L.Ed. 1152.

***561** During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Giles v. Harris,* 189 U.S. 475, 488, 23 S.Ct. 639, 47 L.Ed. 909 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of "the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *Katzenbach,* 383 U.S., at 313, 86 S.Ct. 803. But circumstances reduced the ameliorative potential of these legislative Acts:

> "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting

officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied ****2634** and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Id.,* at 314, 86 S.Ct. 803 (footnote omitted).

Patently, a new approach was needed.

***562** Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U.S.C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] ... the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and ***563** Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b) (1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States,* 446 U.S. 156, 181, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." *Ibid.* (quoting H.R.Rep. No. 94–196, p. 10 (1975)). See also *Shaw v. Reno,* 509 U.S. 630, 640, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

****2635** Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Id.,* at 642, 113 S.Ct. 2816. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the ***564** South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw,* 509 U.S., at 640–641, 113 S.Ct. 2816; *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362,

12 L.Ed.2d 506 (1964). See also H.R.Rep. No. 109–478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. *Ante,* at 2620 – 2621. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante,* at 2620. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S.Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H.R. Rep. 109–478, at 5; ***565** S. Rep. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work ... in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress "amassed a sizable record." ****2636** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 205, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). See also 679 F.3d 848, 865–873 (C.A.D.C.2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H.R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F.3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority ***566** voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)-(5), *id.,* at 577–578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), *id.,* at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U.S.C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

***567** The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation."[2] In choosing this language, the ****2637** Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin,*[3] is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could 'make no law' over a ***568** certain domain"; in contrast, the Civil War Amendments used " language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers ... to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores,* 111 Harv. L.Rev. 153, 182 (1997) (quoting Civil War-era framer that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch,* 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its ****2638** judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S., at 324, 86 S.Ct. 803. Faced with subsequent reauthorizations of the VRA, the ***569** Court has reaffirmed this standard. *E.g., City of Rome,* 446 U.S., at 178, 100 S.Ct. 1548. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

For three reasons, legislation *re*authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See *id.,* at 174, 100 S.Ct. 1548 ("The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach* ..., in which we upheld the constitutionality of the Act."); *Lopez v. Monterey County,* 525 U.S. 266, 283, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act.

It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary").

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch–22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

***570** This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." *City of Rome,* 446 U.S., at 176–177, 100 S.Ct. 1548.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, ****2639** to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch,* 4 Wheat., at 421: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome,* 446 U.S., at 181, 100 S.Ct. 1548 (identifying "information on the number and types of ***571** submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H.R.Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F.3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H.R.Rep. No. 109–478, at 40–41.[4] Congress also received empirical studies ***572** finding that DOJ's requests for more information had a significant effect on the degree to which covered ****2640**

jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.,* at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a § 2 claim, and clearance by DOJ substantially reduces the likelihood that a § 2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., ***573** pp. 13, 120–121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8–9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation").

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H.R.Rep. No. 109–478, at 39.

- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength ... in the city as a whole." *Id.,* at 37 (internal quotation marks omitted).

- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African–American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.,* at 36–37.

- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA. ***574** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 440 [126 S.Ct. 2594, 165 L.Ed.2d 609] (2006). In response, ****2641** Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement. See Order in *League of United Latin American Citizens v. Texas,* No. 06–cv–1046 (WD Tex.), Doc. 8.

- In 2003, after African–Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African–American members of the school board, was found to be an " 'exact replica' " of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F.Supp.2d 424, 483 (D.D.C.2011). See also S.Rep. No. 109–295, at 309. DOJ invoked § 5 to block the proposal.

- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.,* at 816.

- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce

the availability of early voting in that election at polling places near a historically black university. 679 F.3d, at 865–866.

- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, ***575** noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F.3d, at 865.[5]

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202 ****2642** (footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into ***576** subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome,* 446 U.S., at 180–182, 100 S.Ct. 1548 (congressional reauthorization of the preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination") (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in § 4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante,* at 2624 – 2625. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante,* at 2628. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was ***577** especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would ****2643** expect that the rate of successful § 2 lawsuits would be roughly the same in both areas.[6] The study's findings, however, indicated that racial discrimination in

voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered ***578** jurisdictions. 679 F.3d, at 874. The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H.R.Rep. No. 109–478, at 34–35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L.Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." *Ibid.* Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic ***579** literature. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable"); H.R.Rep. No. 109–478, at 35 (2006), 2006 U.S.C.C.A.N. 618; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered ****2644** jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See *Northwest Austin,* 557 U.S., at 199, 129 S.Ct. 2504. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U.S.C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.).

Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H.R.Rep. No. 109–478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also ***580** worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces

the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *supra,* at 2641 – 2642. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat [e about] what [the] record shows." *Ante,* at 2629. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

***581** A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. ****2645** "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610–611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick,* 413 U.S., at 610, 93 S.Ct. 2908. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, Bending Toward Justice: ***582** The Voting Rights Act and the Transformation of American Democracy 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F.3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U.S.C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F.3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement.[7]

****2646** A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by § 5's preclearance requirement are "justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504. In the interim between the VRA's 1982 and 2006 reauthorizations,

this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States,* 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County's neighbor—engaged in purposeful ***583** discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.,* at 465, 471–472, 107 S.Ct. 794.

Two years before *Pleasant Grove,* the Court in *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.,* at 223, 105 S.Ct. 1916 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.,* at 233, 105 S.Ct. 1916.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. *Dillard v. Crenshaw Cty.,* 640 F.Supp. 1347, 1354–1363 (M.D.Ala.1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.,* at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.,* 686 F.Supp. 1459, 1461 (M.D.Ala.1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.,* 748 F.Supp. 819 (M.D.Ala.1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example, ***584** the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that "would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*." 811 F.Supp.2d 424, 443 (D.D.C.2011). Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African–American councilman who represented the former majority-black district. *Ibid.* The city's defiance required DOJ to bring a § 5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent–Intervenors Earl Cunningham et al. 20.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See ****2647** *United States v. McGregor,* 824 F.Supp.2d 1339, 1344–1348 (M.D.Ala.2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African–Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African–American voter turnout. *Id.,* at 1345–1346 (internal quotation marks omitted). See also *id.,* at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, " '[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses' "). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.,* at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama. ***585** *Id.,* at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." *Ibid.*

These recent episodes forcefully demonstrate that § 5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[8] And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines,* 362 U.S. 17, 24–25, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743,

123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to *some* jurisdictions").

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States v. Georgia,* 546 U.S. 151, 159, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity "insofar as [it] creates a private cause of action ... for conduct that *actually* violates the Fourteenth Amendment"); *Tennessee v. Lane,* 541 U.S. 509, 530–534, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Title II of the ADA is constitutional "as it applies to the class of cases implicating the fundamental right of access to the courts"); ***586** *Raines,* 362 U.S., at 24–26, 80 S.Ct. 519 (federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here.[9]

****2648** The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. The severability provision states:

> "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U.S.C. § 1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e.g.,* Arizona and Alaska, see *ante,* at 2622 —§ 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for juris-dictions as to which its application does not transgress constitutional limits.

Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be "to try our hand at updating the statute." *Ante,* at 2629. ***587** Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is "Congress' explicit textual instruction to leave unaffected the remainder of [the Act]" if any particular " application is unconstitutional." *National Federation of Independent Business v. Sebelius,* 567 U.S. ——, ——, 132 S.Ct. 2566, 2639, 183 L.Ed.2d 450 (2012) (plurality opinion) (internal quotation marks omitted); *id.,* at ——, 132 S.Ct., at 2641–2642 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (slip op., at 60) (agreeing with the plurality's severability analysis). See also *Raines,* 362 U.S., at 23, 80 S.Ct. 519 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in "that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante,* at 2623 – 2624, 2630. In *Katzenbach,* however, the Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union,* and not to the remedies for local evils which have subsequently appeared." 383 U.S., at 328–329, 86 S.Ct. 803 (emphasis added).

****2649** *Katzenbach,* the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on ***588** differential treatment outside [the] context [of the admission of new States]." *Ante,* at 2623 – 2624 (citing 383 U.S., at 328–329, 86 S.Ct. 803) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Ante,* at

2624 (citing 557 U.S., at 203, 129 S.Ct. 2504). See also *ante,* at 2630 (relying on *Northwest Austin* 's "emphasis on [the] significance" of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach* 's limitation of the equal sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach* 's holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U.S., at 203–204, 129 S.Ct. 2504. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin,* attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach* 's ruling on the limited "significance" of the equal sovereignty principle.

Today's unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.,* 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U.S.C. § 142(*l*) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per ***589** square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that " [n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e.g., United States v. Morrison,* 529 U.S. 598, 626–627, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily 195 ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

In the Court's conception, it appears, defenders of the VRA could not prevail ****2650** upon showing what the record overwhelmingly bears out, *i.e.,* that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

***590** C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e.g., City of Boerne v. Flores,* 521 U.S. 507, 530, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante,* at 2627. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on "decades-old data and eradicated practices." *Ante,* at 2627. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must "star[t] from scratch." *Ante,* at 2630. I do not see why that should be so.

Congress' chore was different in 1965 than it was in 2006. In 1965, there were a "small number of States ... which in most instances were familiar to Congress by name," on which Congress fixed its attention. ***591** *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. In drafting the coverage formula, " Congress began work with reliable evidence of actual voting discrimination in a great majority of the States" it sought to target. *Id.,* at 329, 86 S.Ct. 803. "The formula [Congress] eventually evolved to describe these areas" also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair "to infer a significant danger of the evil" in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up *re* authorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and *all* of the jurisdictions covered by it were "familiar to Congress by name." *Id.,* at 328, 86 S.Ct. 803. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the ****2651** formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of ***592** discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra,* at 2643 – 2645, 2646 – 2647.

The Court holds § 4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Ante,* at 2631. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions. See *supra,* at 2634 – 2635, 2636, 2640 – 2641.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante,* at 2629 – 2630, 2630 – 2631. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are ***593** identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach,* 383 U.S., at 311, 86 S.Ct. 803; *supra,* at 2633. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence

that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because ****2652** Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 & half; years" he had served in the House. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner). After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization § 2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's ***594** utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

All Citations

570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651, 81 USLW 4572, 13 Cal. Daily Op. Serv. 6569, 2013 Daily Journal D.A.R. 8199, 24 Fla. L. Weekly Fed. S 407

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin,* see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One v. Holder,* O.T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

1 The Court purports to declare unconstitutional only the coverage formula set out in § 4(b). See *ante,* at 2631. But without that formula, § 5 is immobilized.

2 The Constitution uses the words "right to vote" in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U.S. Const., Art. I, § 4 ("[T]he Congress may at any time by Law make or alter" regulations concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona v. Inter Tribal Council of Ariz., Inc.,* ——U.S., ——, —— – ——, 133 S.Ct. 2247, —— – ——, 186L.Ed.2d 239 (2013).

3 Acknowledging the existence of "serious constitutional questions," see *ante,* at 2630 (internal quotation marks omitted), does not suggest how those questions should be answered.

4 This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an "informal consultation process" with DOJ before formally submitting a proposal, so that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre–Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006). All agree

that an unsupported assertion about "deterrence" would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante,* at 2627. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

5 For an illustration postdating the 2006 reauthorization, see *South Carolina v. United States,* 898 F.Supp.2d 30 (D.D.C.2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a § 5 enforcement action to block the law's implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it "far easier than some might have expected or feared" for South Carolina citizens to vote. *Id.,* at 37. A three-judge panel precleared the law after adopting both interpretations as an express "condition of preclearance." *Id.,* at 37–38. Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.,* at 54 (opinion of Bates, J.).

6 Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful § 2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

7 This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County's constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to § 5's preclearance requirement by virtue of *Alabama's* designation as a covered jurisdiction under § 4(b) of the VRA. See *ante,* at 2621 – 2622. In any event, Shelby County's recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to § 5's preclearance mandate. See *infra,* at 2646.

8 Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no "redhead" caught up in an arbitrary scheme. See *ante,* at 2629.

9 The Court does not contest that Alabama's history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to § 4's coverage formula because it is subject to § 5's preclearance requirement by virtue of that formula. See *ante,* at 2630 ("the county was selected [for preclearance] based on th[e] [coverage] formula."). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra,* at 2647, n. 8.

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143 S.Ct. 2141
Supreme Court of the United States.

STUDENTS FOR FAIR ADMISSIONS, INC., Petitioner
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE
Students for Fair Admissions, Inc., Petitioner
v.
University of North Carolina, et al.

No. 20-1199, No. 21-707
|
Argued October 31, 2022
|
Decided June 29, 2023

Synopsis

Background: In first case, nonprofit organization brought action for declaratory and injunctive relief against private college, alleging that its race-based admissions program violated Equal Protection Clause, Title VI of Civil Rights Act, and federal statute prohibiting racial discrimination in contracting. The United States District Court for the District of Massachusetts, Allison D. Burroughs, J., 261 F.Supp.3d 99, denied motion to dismiss for lack of Article III standing, and following bench trial entered judgment for college, 397 F.Supp.3d 126. Organization appealed. The United States Court of Appeals for the First Circuit, Lynch, Circuit Judge, 980 F.3d 157, affirmed. Certiorari was granted. In second case, same nonprofit organization brought action for declaratory and injunctive relief against public university, asserting same constitutional and statutory claims as in first case. Following a bench trial, the United States District Court for the Middle District of North Carolina, Loretta C. Biggs, J., 567 F.Supp.3d 580, entered judgment for university. Organization appealed to the United States Court of Appeals for the Fourth Circuit, and the Supreme Court granted certiorari before judgment.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] nonprofit organization established its representational or organizational standing under Article III;

[2] college's asserted compelling interests for race-based admissions program did not satisfy requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation, which would also be a Title VI violation;

[3] university's asserted compelling interests were not sufficiently measurable;

[4] college and university failed to articulate a meaningful connection between the means they employed and their diversity goals;

[5] admissions programs failed strict scrutiny by using race as a stereotype or negative; and

[6] admissions programs failed strict scrutiny by lacking a logical end point.

Court of Appeals reversed in first case; District Court reversed in second case.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Thomas filed a concurring opinion.

Justice Gorsuch filed a concurring opinion, in which Justice Thomas joined.

Justice Kavanaugh filed a concurring opinion.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined, and in which Justice Jackson joined as it applied to second case.

Justice Jackson filed a dissenting opinion in second case, in which Justices Sotomayor and Kagan joined.

Justice Jackson took no part in consideration or decision of first case.

West Headnotes (38)

[1] **Civil Rights** Publicly assisted programs

Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI, which provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

6 Cases that cite this headnote

[2] **Federal Courts** Jurisdiction, powers, and authority in general

Before turning to the merits in a case in which the Supreme Court has granted certiorari review, it must assure itself of its jurisdiction.

2 Cases that cite this headnote

[3] **Federal Courts** Case or Controversy Requirement

Federal Courts Nature of dispute; concreteness

Article III limits the judicial power of the United States to "cases" or "controversies," ensuring that federal courts act only as a necessity in the determination of real, earnest, and vital disputes. U.S. Const. art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Case or Controversy Requirement

To state a case or controversy under Article III, as required for federal jurisdiction, a plaintiff must establish standing, and that, in turn, requires a plaintiff to demonstrate that it has: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[5] **Associations** Injury or interest in general

Associations Suits on Behalf of Members; Associational or Representational Standing

Where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways: either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert standing solely as the representative of its members. U.S. Const. art. 3, § 2, cl. 1.

45 Cases that cite this headnote

[6] **Associations** Suits on Behalf of Members; Associational or Representational Standing

For an organization, as a plaintiff, to invoke representational or organizational standing under Article III, it must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S. Const. art. 3, § 2, cl. 1.

59 Cases that cite this headnote

[7] **Associations** Education

Civil Rights Education

Declaratory Judgment Subjects of relief in general

Nonprofit organization established its representational or organizational standing under Article III to bring actions for declaratory and injunctive relief against private college and

public university, alleging that their race-based admissions programs violated Equal Protection Clause and Title VI, by identifying its members and offering declarations that members were being represented in good faith, and thus, further scrutiny into how the organization operated was not required; organization offered evidence in action against college that it was validly incorporated 501(c)(3) nonprofit with 47 members who joined voluntarily to support its mission, and in action against university, four high school graduates who had been denied admission filed declarations stating they voluntarily joined organization, supported its mission, received updates about status of case from organization's president, and had opportunity for input and direction on organization's case. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14; 26 U.S.C.A. § 501(c)(3); Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

24 Cases that cite this headnote

[8] **Constitutional Law** Persons or Entities Protected

Constitutional Law Race, National Origin, or Ethnicity

The Equal Protection Clause is a broad and benign provision that applies to all persons, and in the eye of the law, hostility to race and nationality is not justified. U.S. Const. Amend. 14.

1 Case that cites this headnote

[9] **Constitutional Law** Discrimination and Classification

Under the Equal Protection Clause, separate cannot be equal. U.S. Const. Amend. 14.

12 Cases that cite this headnote

[10] **Constitutional Law** Public Elementary and Secondary Education

Racial segregation in public schools violates the Equal Protection Clause, even if the physical facilities and other tangible factors provided to Black students and white students are of roughly the same quality; the mere act of separating children because of their race generates a feeling of inferiority. U.S. Const. Amend. 14.

[11] **Constitutional Law** Public Elementary and Secondary Education

Constitutional Law Elementary and Secondary Education

Under the Equal Protection Clause, the right to a public education must be made available to all on equal terms, and no State has any authority to use race as a factor in affording educational opportunities among its citizens. U.S. Const. Amend. 14.

[12] **Constitutional Law** Race, National Origin, or Ethnicity

The Equal Protection Clause requires equality of treatment before the law for all persons without regard to race or color. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law** Intentional or purposeful action

The Equal Protection Clause proscribes all invidious racial discriminations. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[14] **Constitutional Law** Race, National Origin, or Ethnicity

The core purpose of the Equal Protection Clause is to do away with all governmentally imposed discrimination based on race. U.S. Const. Amend. 14.

4 Cases that cite this headnote

[15] **Constitutional Law** Race, National Origin, or Ethnicity

The Equal Protection Clause applies without regard to any differences of race, of color, or

of nationality—it is universal in its application. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[16] **Constitutional Law** Race, National Origin, or Ethnicity

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination under strict scrutiny, with a court asking, first, whether the racial classification is used to further compelling governmental interests, and second, if so, whether the government's use of race is narrowly tailored—meaning necessary—to achieve that interest. U.S. Const. Amend. 14.

13 Cases that cite this headnote

[17] **Constitutional Law** Affirmative action in general

Under strict scrutiny for an equal protection violation, compelling interests that permit resort to race-based government action are remediating specific, identified instances of past discrimination that violated the Constitution or a statute, and avoiding imminent and serious risks to human safety in prisons, such as a race riot. U.S. Const. Amend. 14.

12 Cases that cite this headnote

[18] **Constitutional Law** Race, national origin, or ethnicity

Even the most rigid scrutiny for an equal protection violation can sometimes fail to detect an illegitimate racial classification, and any retreat from the most searching judicial inquiry can only increase the risk of such error occurring in the future. U.S. Const. Amend. 14.

[19] **Constitutional Law** Race, National Origin, or Ethnicity

Under the Equal Protection Clause, distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality, and that principle cannot be overridden except in the most extraordinary case. U.S. Const. Amend. 14.

4 Cases that cite this headnote

[20] **Constitutional Law** Race, National Origin, or Ethnicity

Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake, which the Equal Protection Clause forbids. U.S. Const. Amend. 14.

1 Case that cites this headnote

[21] **Constitutional Law** Admissions

Because racial discrimination is invidious in all contexts, universities must operate their race-based admissions programs in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny for an equal protection violation. U.S. Const. Amend. 14.

6 Cases that cite this headnote

[22] **Constitutional Law** Public Elementary and Secondary Education

To satisfy strict scrutiny for an equal protection violation, classifying and assigning students based on their race requires more than an amorphous end. U.S. Const. Amend. 14.

1 Case that cites this headnote

[23] **Civil Rights** Admission

Constitutional Law Admissions

Interests that private college asserted as compelling interests for its race-based admissions program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; college identified, as educational benefits it was pursuing, training future leaders in public and private sectors, preparing graduates to adapt to increasingly

pluralistic society, better educating its students through diversity, and producing new knowledge stemming from diverse outlooks. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

3 Cases that cite this headnote

[24] **Civil Rights** Admission

Constitutional Law Admissions

Interests that public university asserted as compelling interests for its race-based admissions program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; university identified, as educational benefits it was pursuing, promoting the robust exchange of ideas, broadening and refining understanding, fostering innovation and problem-solving, preparing engaged and productive citizens and leaders, enhancing appreciation, respect, empathy, and cross-racial understanding, and breaking down stereotypes. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

2 Cases that cite this headnote

[25] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Private college and public university failed to articulate a meaningful connection between the means they employed, i.e., assigning applicants to racial categories, and diversity goals they pursued, as would be required for their race-based admissions programs to survive strict scrutiny for an equal protection violation, which would also be a Title VI violation; categories were arbitrary or undefined, e.g., "Hispanic," or plainly overbroad, e.g., grouping together all Asian students, or underinclusive, e.g., it was unclear how applicants from Middle Eastern countries were classified, and using opaque racial categories undermined the goals. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[26] **Constitutional Law** Post-Secondary Institutions

While courts give a degree of deference to a university's academic decisions, any deference must exist within constitutionally prescribed limits, and deference does not imply abandonment or abdication of judicial review for equal protection violations, and thus, courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. U.S. Const. Amend. 14.

[27] **Constitutional Law** Race, national origin, or ethnicity

Under the Equal Protection Clause, racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. U.S. Const. Amend. 14.

[28] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Under strict scrutiny, race-based admissions programs of private college and public university violated Equal Protection Clause, which violation was also a Title VI violation, by using race as a stereotype or negative; college's consideration of race led to 11.1% decrease in number of Asian-Americans admitted, college and university acknowledged that race was determinative for at least some—if not many—of the students they admitted, and the point of their admissions programs was that there was an inherent benefit in race for race's sake, e.g., college's program rested on pernicious stereotype that a Black student could usually bring something that a white person could not offer. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

16 Cases that cite this headnote

[29] **Constitutional Law** Discrimination and Classification

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. U.S. Const. Amend. 14.

[30] **Constitutional Law** Students

Under the Equal Protection Clause, universities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. U.S. Const. Amend. 14.

1 Case that cites this headnote

[31] **Constitutional Law** Intentional or purposeful action

Equal protection does not allow government actors to intentionally allocate preference to those who may have little in common with one another but the color of their skin. U.S. Const. Amend. 14.

[32] **Constitutional Law** Race, National Origin, or Ethnicity

One of the principal reasons race is treated as a forbidden classification under the Equal Protection Clause is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[33] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Under strict scrutiny, race-based admissions programs of private college and public university violated Equal Protection Clause, which violation was also a Title VI violation, by lacking a logical end point; by promising to terminate their use of race when some rough percentage of various racial groups was admitted, college and university effectively assured that race would always be relevant and that ultimate goal of eliminating race as a criterion would never be achieved, and while college and university asserted that they would no longer need to engage in race-based admissions when, in their absence, students nevertheless received educational benefits of diversity, it was not clear how a court was supposed to determine when stereotypes had broken down or productive citizens and leaders had been created. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

4 Cases that cite this headnote

[34] **Constitutional Law** Affirmative action in general

Outright racial balancing is patently unconstitutional, because at the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[35] **Constitutional Law** Affirmative action in general

Under strict scrutiny for an equal protection violation, remedying the effects of societal discrimination is not a compelling interest for racial classification; such an interest presents an amorphous concept of injury that may be ageless in its reach into the past, and it cannot justify a racial classification that imposes disadvantages upon persons who bear no responsibility for whatever harms the beneficiaries of the race-based classification are thought to have suffered. U.S. Const. Amend. 14.

1 Case that cites this headnote

[36] **Constitutional Law** Admissions

Under the Equal Protection Clause, race-based university admissions programs must have reasonable durational limits, and their deviation from the norm of equal treatment must be a temporary matter. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[37] **Constitutional Law** Constitutional Rights in General

Constitutional Law Race, National Origin, or Ethnicity

The Constitution deals with substance, not shadows, and the Equal Protection Clause's prohibition against racial discrimination is leveled at the thing, not the name. U.S. Const. Amend. 14.

6 Cases that cite this headnote

[38] **Constitutional Law** Admissions

Under the Equal Protection Clause, for university admissions, an applicant must be treated based on his or her experiences as an individual, not on the basis of race, and thus, a benefit to an applicant who overcame racial discrimination must be tied to that applicant's courage and determination, or a benefit to an applicant whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. U.S. Const. Amend. 14.

1 Case that cites this headnote

****2147** *Syllabus*[*]

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process. Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and this Court's precedents. In the Harvard case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 2156 - 21761.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its members," *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U.S. at 342, 97 S.Ct. 2434. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. 2156 - 2159.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person ... the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208. But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. There, the Court overturned the separate but equal regime

established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U.S. at 493, 74 S.Ct. 686. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.,* at 298, 75 S.Ct. 753, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (*per curiam*); racial segregation in the enjoyment of public beaches and bathhouses *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (*per curiam*); and antimiscegenation laws, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304, and second whether the government's use of race is "narrowly tailored," *i.e.,* "necessary," to achieve that interest, *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474. Acceptance of race-based state action is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007. Pp. 2158 - 2163.

(c) This Court first considered whether a university may make race-based admissions decisions in *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." 438 U.S. at 311–312, 98 S.Ct. 2733. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.,* at 315, 98 S.Ct. 2733. Neither still could a university use race to foreclose an individual from all consideration. *Id.,* at 318, 98 S.Ct. 2733. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.,* at 317, 98 S.Ct. 2733. Pp. 2162 - 2164.

(d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their admissions programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the

risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (plurality opinion). Admissions programs could thus not operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs: At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.*, at 343, 123 S.Ct. 2325. Pp. 2164 - 2166.

(e) Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. 2165 - 2173.

(1) Respondents fail to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949, but the question whether a particular mix of minority students produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' admissions programs.

The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. 2166 - 2168.

(2) Respondents' race-based admissions systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that Harvard's consideration of race has resulted in fewer admissions of Asian-American students. Respondents' assertion that race is never a negative factor in their admissions programs cannot withstand scrutiny. College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents admissions programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits students "on

the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879. Pp. 2168 - 2169.

(3) Respondents' admissions programs also lack a "logical end point" as *Grutter* required. 539 U.S. at 342, 123 S.Ct. 2325. Respondents suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,* 570 U.S. at 311, 133 S.Ct. 2411. Respondents' second proffered end point—when students receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on college campuses. Finally, respondents argue that the frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. 2169 - 2173.

(f) Because Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

980 F.3d 157; 567 F.Supp.3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***190** ****2154** In these cases we consider whether the admissions systems used by Harvard College and the University of North ***191** Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

***192** I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 ***193** people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. ***194** See 980 F.3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

****2155** The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off " in minority admissions from the prior class. 2 App. in No. 20–1199, pp. 744, 747–748. Each applicant considered by the full committee is discussed ***195** one by one, and every member of the committee must vote on admission. 980 F.3d at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for

admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F.3d at 170. The full committee decides as a group which students to lop. 397 F.Supp.3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F.Supp.3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity ... as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include ***196** academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). ****2156** The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954, 2020 WL 13414000 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every [initial] decision." 567 F.Supp.3d at 599. The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may ***197** also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.[1]

C

[1] Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F.3d at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their ***198** race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] ****2157** See 397 F.Supp.3d at 131–132; 567 F.Supp.3d at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F.3d at 179; 567 F.Supp.3d at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F.Supp.3d at 132, 183. The

First Circuit affirmed that determination. See 980 F.3d at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause. 567 F.Supp.3d at 588, 666.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).

II

[2] Before turning to the merits, we must assure ourselves of our jurisdiction. See *Summers v. Earth Island Institute*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. Brief for University Respondents in No. 21–707, pp. 23–26. Every court to have considered ***199** this argument has rejected it, and so do we. See *Students for Fair Admissions, Inc. v. University of Tex. at Austin*, 37 F.4th 1078, 1084–1086, and n. 8 (CA5 2022) (collecting cases).

[3] **[4]** Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies," ensuring that federal courts act only "as a necessity in the determination of real, earnest and vital" disputes. *Muskrat v. United States*, 219 U.S. 346, 351, 359, 31 S.Ct. 250, 55 L.Ed. 246 (1911) (internal quotation marks omitted). "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[5] **[6]** In cases like these, where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The latter approach is known as representational or organizational standing. *Ibid.*; *Summers*, 555 U.S. at 497–498, 129 S.Ct. 1142. To invoke it, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

****2158** Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. See 980 F.3d at 182–184; ***200** 397 F.Supp.3d at 183–184; No. 1:14–cv–954 (MDNC, Sept. 29, 2018), App. D to Pet. for Cert. in No. 21–707, pp. 237–245 (2018 DC Opinion). Respondents instead argue that SFFA was not a "genuine 'membership organization' " when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. Brief for University Respondents in No. 21–707, at 24. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing. Brief for University Respondents in No. 21–707, at 24 (citing *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434).

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. See *id.*, at 336–341, 97 S.Ct. 2434. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization ..., for it ha[d] no members at all." *Id.*, at 342, 97 S.Ct. 2434. As a result, we could not easily apply the three-part test for organizational standing, which asks whether an organization's *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. *Id.*, at 344, 97 S.Ct. 2434. The growers and dealers "alone elect[ed] the members of the Commission," "alone ... serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." *Ibid.* The Commission was therefore

a genuine membership organization in substance, if not in form. And it was "clearly" entitled to ***201** rely on the doctrine of organizational standing under the three-part test recounted above. *Id.*, at 343, 97 S.Ct. 2434.

[7] The indicia of membership analysis employed in *Hunt* has no applicability in these cases. Here, SFFA *is* indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. See 2018 DC Opinion 241–242. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." 980 F.3d at 184. Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. See 2018 DC Opinion 234. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." *Id.*, at 234–235 (internal quotation marks omitted). Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates. Because SFFA complies with the standing requirements demanded of organizational ****2159** plaintiffs in *Hunt*, its obligations under Article III are satisfied.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) ***202** (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

[8] At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder v. West Virginia*, 100 U.S. 303, 307–309, 25 L.Ed. 664. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo v. Hopkins*, 118 U.S. 356, 368–369, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see also *id.*, at 368, 6 S.Ct. 1064 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax v. Raich*, 239 U.S. 33, 36, 36 S.Ct. 7, 60 L.Ed. 131 (1915) ("a native of Austria"); semble *Strauder*, 100 U.S. at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly ***203** failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

[9] After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Some cases ****2160** in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students

educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups ...."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal.... But they signify that the State ... sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

[10] The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned ***204** *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U.S. at 494–495, 74 S.Ct. 686. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493, 74 S.Ct. 686 (emphasis added). The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494, 74 S.Ct. 686.

[11] The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493, 74 S.Ct. 686. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952); see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief."); *post*, at 2197, n. 7 (THOMAS, J., concurring). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298, 75 S.Ct. 753.

[12] So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder*, for example, we summarily affirmed a decision ***205** invalidating state and local laws that required segregation in busing. 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) (*per curiam*). As the lower court explained, "[t]he equal protection clause requires equality of treatment ****2161** before the law for all persons without regard to race or color." *Browder v. Gayle*, 142 F.Supp. 707, 715 (MD Ala. 1956). And in *Mayor and City Council of Baltimore* v. *Dawson*, we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore. 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (*per curiam*). "It is obvious that racial segregation in recreational activities can no longer be sustained," the lower court observed. *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386, 387 (CA4 1955) (*per curiam*). "[T]he ideal of equality before the law which characterizes our institutions" demanded as much. *Ibid.*

[13] In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution ... forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12, 87 S.Ct. 1817; see also *Yick Wo*, 118 U.S. at 373–375, 6 S.Ct. 1064 (commercial property); *Shelley v. Kraemer*, 334 U.S.

1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (housing covenants); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (composition of juries); *Dawson*, 350 U.S. at 877, 76 S.Ct. 133 (beaches and bathhouses); ***206** *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) (*per curiam*) (golf courses); *Browder*, 352 U.S. at 903, 77 S.Ct. 145 (busing); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) (*per curiam*) (public parks); *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) (*per curiam*) (transportation facilities); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (education); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory jury strikes).

[14] These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10, 87 S.Ct. 1817; see also *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

[15] Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly ****2162** held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290, 98 S.Ct. 2733.

[16] Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Under that standard we ask, first, whether the racial classification ***207** is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*) (internal quotation marks omitted).

[17] **[18]** Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *post*, at 2186 - 2187, 2192 - 2193 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).[3]

***208** **[19]** Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ****2163** *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U.S. at 272–276, 98 S.Ct. 2733. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at 272–275, 98 S.Ct. 2733. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277, 98 S.Ct. 2733.

Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325.

[20] Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group ***209** for no reason other than race or ethnic origin." *Bakke*, 438 U.S. at 306–307, 98 S.Ct. 2733 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307, 98 S.Ct. 2733 (citing, *inter alia*, *Loving*, 388 U.S. at 11, 87 S.Ct. 1817). Justice Powell next observed that the goal of "remedying ... the effects of 'societal discrimination' " was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310, 98 S.Ct. 2733.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." *Id.*, at 311–312, 98 S.Ct. 2733. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." *Id.*, at 312, 98 S.Ct. 2733.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315, 98 S.Ct. 2733. Nor could it impose a "multitrack ****2164** program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration ... simply because he was not the right color." *Id.*, at 318, 98 S.Ct. 2733.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317, 98 S.Ct. 2733. And ***210** even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316, 98 S.Ct. 2733. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416, 98 S.Ct. 2733 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination." *Id.*, at 418, n. 21, 98 S.Ct. 2733 (internal quotation marks omitted).

***211** C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311, 123 S.Ct. 2325. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325, 123 S.Ct. 2325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328, 123 S.Ct. 2325. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on ****2165** separate admissions tracks." *Id.*, at 334, 123 S.Ct. 2325. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority ***212** viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U.S. at 298, 98 S.Ct. 2733 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341, 123 S.Ct. 2325 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid.*; see also ***213** *id.*, at 342–343, 123 S.Ct. 2325 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years ****2166** from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343, 123 S.Ct. 2325.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 201199, p. 52. Neither does UNC's. 567 F.Supp.3d at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

***214** A

[21] **[22]** Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it." *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738.

[23] **[24]** Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F.3d at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F.Supp.3d at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F.3d at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point ***215** at which there exists sufficient "innovation and problem-solving," or ****2167** students who are appropriately "engaged and productive." 567 F.Supp.3d at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U.S. at 512–513, 125 S.Ct. 1141. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F.Supp.3d at 656; 980 F.3d at 173–174. The

interests that respondents seek, though plainly worthy, are inescapably imponderable.

[25] Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational ***216** benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F.Supp.3d at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397 F.Supp.3d at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories ... reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other ****2168** categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 2210 - 2211 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

***217** Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.' " *Parents Involved*, 551 U.S. at 724, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 329, 123 S.Ct. 2325). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

[26] **[27]** The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (internal quotation marks ***218** omitted). The programs at issue here do not satisfy that standard.[5]

B

[28] The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F.3d at 170, n. 29. And

the District Court **2169 observed that Harvard's "policy of considering applicants' race ... overall results in fewer Asian American and white students being admitted." 397 F.Supp.3d at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative' " to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit *219 provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

[29] Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d at 633. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U.S. at 22, 68 S.Ct. 836.[6]

[30] Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause *220 jurisprudence more generally. See, *e.g.*, *Schuette v. BAMN*, 572 U.S. 291, 308, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike ....' " (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain **2170 preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

[31] We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

[32] "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517, 120 S.Ct. 1044. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that *221 [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912, 115 S.Ct. 2475 (internal quotation marks omitted). Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U.S. at 631, 111 S.Ct. 2077, contrary as it is to

the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707, at 167. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F.Supp.3d at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court ***222** finding that Harvard uses race to "trac[k] how ****2171** each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199, at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race

	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%

Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard's focus on numbers is obvious.[7]

***223** UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment ****2172** within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F.Supp.3d at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F.Supp.3d at 594.

[33] **[34]** The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on ***224** its head. Their admissions programs "effectively assure[ ] that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U.S. at 495, 109 S.Ct. 706 (internal quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F.Supp.3d at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343, 123 S.Ct. 2325. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and ***225** UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine ****2173** whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342, 123 S.Ct. 2325. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 2163 - 2164.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F.Supp.3d at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

***226** V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

[35] The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U.S. at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307, 98 S.Ct. 2733. It cannot "justify a [racial] classification that imposes disadvantages upon persons ... who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310, 98 S.Ct. 2733.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U.S. at 909–910, 116 S.Ct. 1894. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged ***227** group." 488 U.S. at 505, 109 S.Ct. 706. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens ... would be lost," we observed, "in a mosaic of shifting ****2174** preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506, 109 S.Ct. 706. "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Id.*, at 506, 109 S.Ct. 706.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (Justice JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 2232 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law

to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

[36] The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality ***228** will end." *Post*, at 2255 (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based admissions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U.S. at 342, 123 S.Ct. 2325. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U.S. at 377, 136 S.Ct. 2198, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U.S. at 297, 133 S.Ct. 2411. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U.S. at 388, 136 S.Ct. 2198. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379, 136 S.Ct. 2198. To drive the point home, *Fisher II* limited itself just as ****2175** *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U.S. at 388, 136 S.Ct. 2198 (emphasis added); see also *Fisher I*, 570 U.S. at 313, 133 S.Ct. 2411 (recognizing that "*Grutter* ... approved the plan at issue upon concluding that it ... was limited in time"). And the Court openly acknowledged ***229** that its decision offered limited "prospective guidance." *Fisher II*, 579 U.S. at 379, 136 S.Ct. 2198.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U.S. at 310, 133 S.Ct. 2411. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*, 347 U.S. at 495, 74 S.Ct. 686 (emphasis added). It depends, says the dissent.

***230** That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 2265 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

****2176** **[37]** **[38]** At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1867). A benefit ***231** to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

Justice JACKSON took no part in the consideration or decision of the case in No. 20–1199.

Justice THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation ***232** and ushering in the Jim Crow era, the Court finally corrected course in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*). It then pulled back in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319, 123 S.Ct. 2325. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education ****2177** admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 315, 328, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (concurring opinion) (*Fisher I*); *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 389, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with ***233** the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U.S. at 559, 16 S.Ct. 1138. It was the view of the Court in *Brown*, which rejected " 'any authority ... to use race as a factor in affording educational opportunities.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 747, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. *Ante*, at 2159 (internal quotation marks omitted).

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter ***234** and complete extirpation" of slavery from "the soil of the Republic." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 ****2178** (1973). After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude ... shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." § 1. It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. Amar, America's Constitution: A Biography 362 (2005) (internal quotation marks omitted). The Amendment also authorized "Congress ... to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. § 2. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. Foner, The Second Founding 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, 14 Stat. 27, in an attempt to pre-empt the Black ***235** Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws

> and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. See M. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 958 (1995) ("Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). And, while the 1866 Act used the rights of ****2179** "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

***236** The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." *Id.*, at 407, 411. The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States." *Id.*, at 498.

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 596 U. S. ——, ——, 142 S.Ct. 1539, 1547, 212 L.Ed.2d 496 (2022) (THOMAS, J., concurring). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. Indeed, the drafters later included a specific carveout for "Indians not taxed," demonstrating the breadth of the bill's otherwise general citizenship language. 14 Stat. 27.[1] As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited ***237** by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's nondiscrimination provisions. See, *e.g.*, *id.*, at 475 (statement of Sen. Trumbull); *id.*, at 1152 (statement of Rep. Thayer); *id.*, at 503–504 (statement of Sen. Howard). In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens." *Id.*, at 474.

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). Consequently, "doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority." R. Williams, ****2180** Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 532–533 (2013) (describing appeals to the naturalization power and the inherent power to protect the rights of citizens). As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 498 (statement of Sen. Van Winkle).

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the ***238** principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint

Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." *Id.*, at 1033–1034. Representative John Bingham, its drafter, was among those who believed Congress lacked the power to enact the 1866 Act. See *id.*, at 1291. Specifically, he believed the "very letter of the Constitution" already required equality, but the enforcement of that requirement "is of the reserved powers of the States." Cong. Globe, 39th Cong., 1st Sess., at 1034, 1291 (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. Nelson, The Fourteenth Amendment 48–49 (1988).

Discussion of Bingham's initial draft was later postponed in the House, but the Joint Committee on Reconstruction continued its work. See 2 K. Lash, The Reconstruction Amendments 8 (2021). In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess., 31–32 (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any ***239** person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " *Id.*, at 39. This revised text was submitted to the full House on April 30, 1866. Cong. Globe, 39th Cong., 1st Sess., at 2286–2287. Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions. *Ibid.*

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.*, at 2459. Moreover, Stevens' later statements indicate that he did not believe there was a ****2181** difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. U. S. *Brown* Reargument Brief 44 (noting a distinction only with respect to a suffrage provision). And, Bingham argued that the need for the proposed text was "one of the lessons that have been taught ... by the history of the past four years of terrific conflict" during the Civil War. Cong. Globe, 39th Cong., 1st Sess., at 2542. The proposal passed the House by a vote of 128 to 37. *Id.*, at 2545.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" *Id.*, at 2766. In keeping with this view, he proposed an introductory sentence, declaring that " 'all persons born in the United States, and ***240** subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.' " *Id.*, at 2869. This text, the Citizenship Clause, was the final missing element of what would ultimately become § 1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text, and he suggested the alternative language to "remov[e] all doubt as to what persons are or are not citizens of the United States," a question which had "long been a great desideratum in the jurisprudence and legislation of this country." *Id.*, at 2890. He further characterized the addition as "simply declaratory of what I regard as the law of the land already." *Ibid.*

The proposal was approved in the Senate by a vote of 33 to 11. *Id.*, at 3042. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. See *id.*, at 3149. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. See 15 Stat. 706–707; *id.*, at 709–711. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." § 1.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by guaranteeing citizenship status, invoking the "longstanding ***241** political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality." *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1547 (THOMAS, J., concurring) (internal quotation marks omitted). It then confirms that States may not "abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause." *Id.*, at ——, n. 3, 142 S.Ct., at 1550 n. 3. Finally, it pledges that even noncitizens must be treated equally "as individuals, and not as members of racial, ethnic, or religious groups." ****2182** *Missouri v. Jenkins*, 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring).

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials ... show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color." U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (noting that the "primary ***242** purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866").[2] The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." 19 How. at 407, 411. And, like the 1866 Act, the Amendment also clarified that American citizenship conferred rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1548 (THOMAS, J., concurring). Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." ****2183** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

***243** C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, ch. 114, 18 Stat. 335–337, and the justifications offered by proponents of that measure are further evidence for the colorblind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike:

Blacks could not attend a white school, but symmetrically, whites could not attend a black school. See *Plessy*, 163 U.S. at 544, 16 S.Ct. 1138 (arguing that, in light of the social circumstances at the time, racial segregation did not "necessarily imply the inferiority of either race to the other"). Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess., 3193 (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *Id.*, at 242; see also *ibid.* ("I insist ***244** that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you ... would feel keenly were it directed against you or your child." *Id.*, at 384. He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color." *Id.*, at 385.

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess., at 3193. And, Senator Henry Wilson sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." *Id.*, at 819; see also 3 Cong. Rec., at 956 (statement of Rep. Cain) ("[M]en [are] formed of God equally .... The civil-rights bill simply declares this: that there shall be no discriminations between citizens of this land so far as the laws of the land are concerned"). The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." ****2184** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin. See *ante*, at 2159 – 2160.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), the Court identified the "pervading purpose" of the Reconstruction ***245** Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 67–72. Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." *Id.*, at 72. Rather, "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." *Ibid.* And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Ibid.* The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court relied on the *Slaughter-House* view to conclude that "[t]he words of the [Fourteenth A]mendment ... contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored." *Strauder v. West Virginia*, 100 U.S. 303, 307–308, 25 L.Ed. 664 (1880). The Court thus found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to ... race prejudice." *Id.*, at 308. See also *ante*, at 2159 – 2160. Similar statements appeared in other cases decided around that time. See *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them,

was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and ***246** criminal, of the two races exactly the same"); *Ex parte Virginia*, 100 U.S. 339, 344–345, 25 L.Ed. 676 (1880) ("One great purpose of [the Thirteenth and Fourteenth Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States").

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U.S. at 544, 16 S.Ct. 1138. That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563, 16 S.Ct. 1138. For Justice Harlan, the Constitution was ****2185** colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562, 16 S.Ct. 1138.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.' " *Dobbs v Jackson Women's Health Organization*, 597 U. S. —, ——, 142 S.Ct. 2228, 2265, 213 L.Ed.2d 545 (2022). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in ***247** the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 2228. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel ... needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, ... not more than forty acres of such land." Ch. 90, §§ 2, 4, 13 Stat. 507. The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Ch. 200, 14 Stat. 173–174. Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," " 'freedman' " was a decidedly under-inclusive proxy for race. M. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 98 (2013) (Rappaport). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, Racial Classifications and Reconstruction Legislation, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; ***248** rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. 14 Stat. 367–368. At ****2186** the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen] did not understand how the payment system operated." Rappaport 110; see also S. Siegel, The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92

Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. See Rappaport 111–112. Another law, passed in 1867, provided funds for "freedmen or destitute colored people" in the District of Columbia. Res. of Mar. 16, 1867, No. 4, 15 Stat. 20. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves ... lived in densely populated shantytowns." Rappaport 104–105 (citing Cong. Globe, 39th Cong., 1st Sess., at 1507). Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] ***249** that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505, 109 S.Ct. 706 (majority opinion). In that way, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were ... not inconsistent with the colorblind Constitution." *Parents Involved*, 551 U.S. at 772, n. 19, 127 S.Ct. 2738 (THOMAS, J., concurring). Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race.[3] And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view.

Justice SOTOMAYOR argues otherwise, pointing to "a number of race-conscious" federal laws passed around the time of the Fourteenth Amendment's enactment. *Post*, at 2228 (dissenting opinion). She identifies the Freedmen's Bureau Act of 1865, already discussed above, as one such law, but she admits that the programs did not benefit blacks exclusively. She also does not dispute that legislation targeting the needs of newly freed blacks in 1865 could be understood as directly remedial. Even today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See *Croson*, 488 U.S. at 526, 109 S.Ct. 706 ***250** (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the ****2187** beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*" (emphasis in original)); see also *ante*, at 2175 – 2176.

Justice SOTOMAYOR points also to the Civil Rights Act of 1866, which as discussed above, mandated that all citizens have the same rights as those "enjoyed by white citizens." 14 Stat. 27. But these references to the station of white citizens do not refute the view that the Fourteenth Amendment is colorblind. Rather, they specify that, in meeting the Amendment's goal of equal citizenship, States must level up. The Act did not single out a group of citizens for special treatment—rather, all citizens were meant to be treated the same as those who, at the time, had the full rights of citizenship. Other provisions of the 1866 Act reinforce this view, providing for equality in civil rights. See Rappaport 97. Most notably, § 14 stated that the basic civil rights of citizenship shall be secured "without respect to race or color." 14 Stat. 176–177. And, § 8 required that funds from land sales must be used to support schools "without distinction of color or race, ... in the parishes of" the area where the land had been sold. *Id.*, at 175.

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, 1870 S. C. Acts pp. 387–388, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County, 1871 Ky. Acts pp. 273–274. Even if these statutes provided race-based benefits, they do not support respondents' and Justice SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. Cf., *e.g.*, O. Fiss, Groups and the Equal Protection Clause, 5 Philos. & Pub. Aff. 107, 147 (1976) (articulating the antisubordination view); ***251** R. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1473, n. 8 (2004) (collecting scholarship). At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted.

If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded black persons would work to equalize treatment against a concrete baseline of government-imposed inequality. It thus may have been the case that Kentucky's county-specific, race-based public aid law was necessary because that particular county was not providing certain services to local poor blacks. Similarly, South Carolina's burden-shifting framework (where the substantive rule being applied remained notably race neutral) may have been necessary to streamline litigation around the most commonly litigated type of case: a lawsuit seeking to remedy discrimination against a member of the large population of recently freed black Americans. See 1870 S. C. Acts, at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities).

Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment's adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for race. See Rappaport 113–115. These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those ****2188** laws as evidence of the Fourteenth Amendment's true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment's enactment. This is particularly true in light of the clear equality requirements present in the ***252** Fourteenth Amendment's text. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ——, —— – ——, 142 S.Ct. 2111, 2128–2129, 213 L.Ed.2d 387 (2022) (noting that text controls over inconsistent postratification history).

II

Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for colorblind laws.[4] That is why, for example, courts "must subject all racial classifications to the strictest of scrutiny." *Jenkins*, 515 U.S. at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); see also *ante*, at 2166, n. 4 (emphasizing the consequences of an insufficiently searching inquiry). And, in case after case, we have employed strict scrutiny vigorously to reject various forms of racial discrimination as unconstitutional. See *Fisher I*, 570 U.S. at 317–318, 133 S.Ct. 2411 (THOMAS, J., concurring). The Court today rightly upholds that tradition and acknowledges the consequences that have flowed from *Grutter*'s contrary approach.

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental ***253** discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." 539 U.S. at 328, 333, 123 S.Ct. 2325. Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from " 'training future leaders in the public and private sectors' " to " 'enhancing appreciation, respect, and empathy,' " with references to " 'better educating [their] students through diversity' " in between. *Ante*, at 2166. The Court today finds that each of these interests are too vague and immeasurable to suffice, *ibid.*, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a ****2189** diverse student body." 539 U.S. at 333, 123 S.Ct. 2325. Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks," 980 F.3d 157, 174 (CA1 2020)—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because ***254** Harvard blinds itself to other forms of applicant diversity, such as religion. See 2 App. in No. 20–1199, pp. 734–743. It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students' reasoning skills. But, it is not clear how diversity with respect to race, *qua* race, furthers this goal. Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well have more diverse outlooks on this metric than two students from Manhattan's Upper East Side attending its most elite schools, one of whom is white and other of whom is black. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." Brief for University Respondents in No. 21707, p. 39. This may well be important to a university experience, but it is a *social* goal, not an educational one. See *Grutter*, 539 U.S. at 347–348, 123 S.Ct. 2325 (Scalia, J., concurring in part and dissenting in part) (criticizing similar rationales as divorced from educational goals). And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. The United States focuses on alleged civic benefits, including "increasing tolerance and decreasing racial prejudice." Brief for United States as *Amicus Curiae* 21–22. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." ***255** N. Bowman, College Diversity Experiences and Cognitive Development: A Meta-Analysis, 80 Rev. Educ. Research 4, 20 (2010). Here again, the link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. See, *e.g.*, Brief for Major American Business Enterprises as *Amici Curiae* 7–9; Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 16–17 (describing experience at IBM). Yet, none of those assertions deals exclusively with *racial* diversity—as ****2190** opposed to cultural or ideological diversity. And, none of those *amici* demonstrate measurable or concrete benefits that have resulted from universities' race-conscious admissions programs.

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. See *Cooper v. Aaron*, 358 U.S. 1, 16, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958) (following *Brown*, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights"). As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. That is why "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity" sufficient to satisfy strict scrutiny today. *Grutter*, 539 U.S. at 353, 123 S.Ct.. 2325 (opinion of THOMAS, J.) (internal quotations marks omitted). Cf. *Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *Croson*, 488 U.S. at 521, 109 S.Ct. 706 (opinion of Scalia, J.) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and ***256** limb ... can justify [racial discrimination]"). For this reason, "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown* v. *Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." *Fisher I*, 570 U.S. at 320, 133 S.Ct. 2411 (THOMAS, J., concurring) (citation omitted).

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling. It instead demands that the "interests [universities] view as compelling" must be capable of being "subjected to meaningful judicial review." *Ante*, at 2166. In other words, a court must be able to

measure the goals asserted and determine when they have been reached. *Ante*, at 2166 – 2167. The Court's opinion today further insists that universities must be able to "articulate a meaningful connection between the means they employ and the goals they pursue." *Ante*, at 2167. Again, I agree. Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race.

In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. See *Grutter*, 539 U.S. at 362–364, 123 S.Ct. 2325 (opinion of THOMAS, J.); see also *Fisher I*, 570 U.S. at 318–319, 133 S.Ct. 2411 (THOMAS, J., concurring); *United States v. Virginia*, 518 U.S. 515, 551, n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (refusing to defer to the Virginia Military Institute's judgment that the changes necessary to accommodate the admission of women would be too great and characterizing the necessary changes as "manageable"). We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. See ***257** *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803–805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). And, Congress has passed numerous ****2191** laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.

This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. Take, for example, the university respondents here. Harvard's "holistic" admissions policy began in the 1920s when it was developed to exclude Jews. See M. Synnott, The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900–1970, pp. 58–59, 61, 69, 73–74 (2010). Based on *de facto* quotas that Harvard quietly implemented, the proportion of Jews in Harvard's freshman class declined from 28% as late as 1925 to just 12% by 1933. J. Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 172 (2005). During this same period, Harvard played a prominent role in the eugenics movement. According to then-President Abbott Lawrence Lowell, excluding Jews from Harvard would help maintain admissions opportunities for Gentiles and perpetuate the purity of the Brahmin race—New England's white, Protestant upper crust. See D. Okrent, The Guarded Gate 309, and n. * (2019).

UNC also has a checkered history, dating back to its time as a segregated university. It admitted its first black undergraduate students in 1955—but only after being ordered to do so by a court, following a long legal battle in which UNC sought to keep its segregated status. Even then, UNC did not turn on a dime: The first three black students admitted as undergraduates enrolled at UNC but ultimately earned their bachelor's degrees elsewhere. See M. Beauregard, Column: The Desegregation of UNC, The Daily Tar Heel, Feb. 16, 2022. To the extent past is prologue, the university ***258** respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals.

Of course, none of this should matter in any event; courts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override. See *ante*, at 2168, n. 5. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

C

In an effort to salvage their patently unconstitutional programs, the universities and their *amici* pivot to argue that the Fourteenth Amendment permits the use of race to benefit only certain racial groups—rather than applicants writ large. Yet, this is just the latest disguise for discrimination. The sudden narrative shift is not surprising, as it has long been apparent that " 'diversity [was] merely the current rationale of convenience' " to support racially discriminatory admissions programs. *Grutter*, 539 U.S. at 393, 123 S.Ct. 2325 (Kennedy, J., dissenting). Under our precedents, this new rationale is also lacking.

To start, the case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding ****2192** and diffuse racial

prejudice. See R. Kennedy, For Discrimination: Race, Affirmative Action, and the Law 78 (2013); see also P. Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has only recognized one interest as compelling: the educational benefits of diversity ***259** embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. See *supra*, at 2188. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests. See, *e.g.*, *post*, at 2237 – 2238, 2248 – 2249, 2262 (opinion of SOTOMAYOR, J.) (noting that UNC's black admissions percentages "do not reflect the diversity of the State"; equating the diversity interest under the Court's precedents with a goal of "integration in higher education" more broadly; and warning of "the dangerous consequences of an America where its leadership does not reflect the diversity of the People"); *post*, at 2275 – 2276 (opinion of JACKSON, J.) (explaining that diversity programs close wealth gaps). But language—particularly the language of controlling opinions of this Court—is not so elastic. See J. Pieper, Abuse of Language—Abuse of Power 23 (L. Krauth transl. 1992) (explaining that propaganda, "in contradiction to the nature of language, intends not to communicate but to manipulate" and becomes an "[i]nstrument of power" (emphasis deleted)).

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. See *ante*, at 2172 – 2174. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. In *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the University of California made clear its rationale for the quota system it had established: It wished to "counteract effects of generations of pervasive discrimination" against certain minority groups. Brief for Petitioner, O. T. 1977, No. 76811, p. 2. But, the Court rejected this distinctly remedial rationale, with Justice Powell adopting in its place the familiar "diversity" interest that appeared later in *Grutter*. See *Bakke*, 438 U.S. at 306, 98 S.Ct. 2733 (plurality opinion). The Court similarly did not adopt the broad remedial rationale ***260** in *Grutter*; and it rejects it again today. Newly and often minted theories cannot be said to be commanded by our precedents.

Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate victims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. *Croson*, 488 U.S. at 504–505, 109 S.Ct. 706; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 226–227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. See *United States v. Fordice*, 505 U.S. 717, 731, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). Today's opinion for the Court reaffirms the need for such a close remedial fit, hewing to the same line we have consistently drawn. *Ante*, at 2167 – 2168.

Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. Even *Grutter* itself could not tolerate this outcome. It accordingly imposed a ****2193** time limit for its race-based regime, observing that " 'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' " 539 U.S. at 341–342, 123 S.Ct. 2325 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); alterations omitted).

The Court today enforces those limits. And rightly so. As noted above, both Harvard and UNC have a history of racial discrimination. But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct. Nor could they; the current race-conscious admissions programs take no account of ancestry and, at least for Harvard, likely have the effect of discriminating against some of ***261** the very same ethnic groups against which Harvard previously discriminated (*i.e.*, Jews and those who are not part of the white elite). All the while, Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of their membership in a currently disfavored race.

The Constitution neither commands nor permits such a result. "Purchased at the price of immeasurable human suffering," the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. *Adarand Constructors, Inc.*, 515 U.S. at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment). Consequently, "*all*" racial classifications are "inherently suspect," *id.*, at 223–224, 115

S.Ct. 2097 (majority opinion) (emphasis added; internal quotation marks omitted), and must be subjected to the searching inquiry conducted by the Court, *ante*, at 2165 – 2173.

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U.S. at 328, 133 S.Ct. 2411 (THOMAS, J., concurring).

We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. "The ***262** Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.).

A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are created equal." Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the ****2194** foundation of a just government. See, *e.g.*, J. Locke, Second Treatise of Civil Government 48 (J. Gough ed. 1948); T. Hobbes, Leviathan 98 (M. Oakeshott ed. 1962); 1 B. Montesquieu, The Spirit of Laws 121 (T. Nugent transl., J. Prichard ed. 1914). Several Constitutions enacted by the newly independent States at the founding reflected this principle. For example, the Virginia Bill of Rights of 1776 explicitly affirmed "[t]hat all men are by nature equally free and independent, and have certain inherent rights." Ch. 1, § 1. The State Constitutions of Massachusetts, Pennsylvania, and New Hampshire adopted similar language. Pa. Const., Art. I (1776), in 2 Federal and State Constitutions 1541 (P. Poore ed. 1877); Mass. Const., Art. I (1780), in 1 *id.*, at 957; N. H. Const., Art. I (1784), in 2 *id.*, at 1280.[5] And, prominent Founders publicly mused ***263** about the need for equality as the foundation for government. *E.g.*, 1 Cong. Register 430 (T. Lloyd ed. 1789) (Madison, J.); 1 Letters and Other Writings of James Madison 164 (J. Lippincott ed. 1867); N. Webster, The Revolution in France, in 2 Political Sermons of the Founding Era, 1730–1805, pp. 1236–1299 (1998). As Jefferson declared in his first inaugural address, "the minority possess their equal rights, which equal law must protect." First Inaugural Address (Mar. 4, 1801), in 8 The Writings of Thomas Jefferson 4 (Washington ed. 1854).

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding. See Speech at Chicago, Ill. (July 10, 1858), in 2 The Collected Works of Abraham Lincoln 488–489, 499 (R. Basler ed. 1953). Thus, in Lincoln's view, " 'the natural rights enumerated in the Declaration of Independence' " extended to blacks as his " 'equal,' " and " 'the equal of every living man.' " The Lincoln-Douglas Debates 285 (H. Holzer ed. 1993).

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

***264** Of course, even the promise of the second founding took time to materialize. Seeking to perpetuate a segregationist system in the wake of the Fourteenth Amendment's ratification, proponents urged a "separate but equal" regime. They met with initial success, ossifying the

segregationist view for over a half century. As this Court said in *Plessy*:

> ****2195** "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." 163 U.S. at 543, 16 S.Ct.. 1138.

Such a statement, of course, is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law. Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.*, at 559, 16 S.Ct. 1138. Though Justice Harlan rightly predicted that *Plessy* would, "in time, prove to be quite as pernicious as the decision made ... in the *Dred Scott* case," the *Plessy* rule persisted for over a half century. *Ibid.* While it remained in force, Jim Crow laws prohibiting blacks from entering or utilizing public facilities such as schools, libraries, restaurants, and theaters sprang up across the South.

This Court rightly reversed course in *Brown* v. *Board of Education*. The *Brown* appellants—those challenging segregated schools—embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction." Brief for Appellants in ***265** *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 7 (citation omitted).[6] Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U.S. at 493, 495, 74 S.Ct. 686. Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of," *id.*, at 495, 74 S.Ct. 686 (emphasis added)—constituted a constitutional injury. See *ante*, at 2160 ("Separate cannot be equal").

Just a few years later, the Court's application of *Brown* made explicit what was already forcefully implied: "[O]ur decisions have foreclosed any possible contention that ... a statute or regulation" fostering segregation in public facilities "may stand consistently with the Fourteenth Amendment." *Turner v. Memphis*, 369 U.S. 350, 353, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962) (*per curiam*); cf. A. Blaustein & C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 145 (rev. 2d ed. 1962) (arguing that the Court in *Brown* had "adopt[ed] a constitutional standard" declaring "that all classification by race is unconstitutional *per se*").

Today, our precedents place this principle beyond question. In assessing racial segregation during a race-motivated prison riot, for example, this Court applied strict scrutiny without requiring an allegation of ****2196** unequal treatment among the segregated facilities. *Johnson v. California*, 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for making distinctions ***266** based on race had passed." *Ante*, at 2160. "What was wrong" when the Court decided *Brown* "in 1954 cannot be right today." *Parents Involved*, 551 U.S. at 778, 127 S.Ct. 2738 (THOMAS, J., concurring). Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742, 127 S.Ct. 2738 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, p. 94;

see also *id.*, at 79 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "). And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems. See Brief for Appellees in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, O. T. 1949, No. 34, p. 12 (claiming that a holding rejecting separate but equal would "necessarily result ... [i]n the *abandoning* of many of the ***267** state's existing educational establishments" and the "*crowding* of other such establishments"); Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. Brief for Respondents in *Sweatt* v. *Painter*, at 77–78 (requesting deference to a state law, observing that " 'the necessity for such separation [of the races] still exists in the interest of public welfare, safety, harmony, health, and recreation ...' " and remarking on the reasonableness of the position); Brief for Appellees in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 3, p. 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the ****2197** general welfare will be definitely harmed ... there would be more friction developed" (internal quotation marks omitted)). In fact, slaveholders once "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life," and "segregationists similarly asserted that segregation was not only benign, but good for black students." *Fisher I*, 570 U.S. at 328–329, 133 S.Ct. 2411 (THOMAS, J., concurring).

"Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." *Parents Involved*, 551 U.S. at 780–781, 127 S.Ct. 2738 (THOMAS, J., concurring). ***268** We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7] Then, as now, the views that motivated *Dred Scott* and *Plessy* have not been confined to the past, and we must remain ever vigilant against *all* forms of racial discrimination.

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T. Sowell, Affirmative Action Around the World 145–146 (2004). ***269** In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. *Ibid.* The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools ... in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (THOMAS, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately ****2198** large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. See, *e.g.*, R. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, Mismatch and Bar Passage:

A School-Specific Analysis (Oct. 6, 2017), https://ssrn.com/abstract=3054208. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference. F. Smith & J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges With Implications for Admission Policy and College Choice, 45 Research in Higher Ed. 353 (2004). "Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can ***270** mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, Race and Culture 176–177 (1994).[8]

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I*, 570 U.S. at 333, 133 S.Ct. 2411 (opinion of THOMAS, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement." *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (THOMAS, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination." *Ibid.*

***271** Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk ****2199** continuing to ignore the academic underperformance of "the purported 'beneficiaries' " of racial preferences and the racial stigma that those preferences generate. *Grutter*, 539 U.S. at 371, 123 S.Ct. 2325 (opinion of THOMAS, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." *Id.*, at 372, 123 S.Ct. 2325.

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*, 515 U.S. at 241, n. *, 115 S.Ct. 2097 (opinion of THOMAS, J.). And, even purportedly benign race-based discrimination has secondary effects on members of other races. The antisubordination view thus has never guided the Court's analysis because "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Ibid.* (citations and some internal quotation marks omitted). Courts are not suited to the impossible task of determining which racially discriminatory programs are helping ***272** which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. *Ante*, at 2168 – 2169.[9] Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992) (Civil Rights Issues); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at

blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7; see also S. Hinnershitz, A Different Shade of Justice: Asian American Civil Rights ***273** in the South 21 (2017) (explaining that while both Asians and blacks have at times fought "against similar forms of discrimination," "[t]he issues of citizenship and ****2200** immigrant status often defined Asian American battles for civil rights and separated them from African American legal battles"). Indeed, this Court even sanctioned this segregation —in the context of schools, no less. In *Gong Lum v. Rice*, 275 U.S. 78, 81–82, 85–87, 48 S.Ct. 91, 72 L.Ed. 172 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 C.F.R. 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese Americans did not close until 1948. National Park Service, Japanese American Life During Internment, www.nps.gov/articles/japanese-american-internment-archeology.htm. In the interim, this Court endorsed the practice. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.[10] But this problem is not limited to Asian Americans; more broadly, universities' discriminatory policies burden millions ***274** of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, "[i]n the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation." *Jenkins*, 515 U.S. at 137, 115 S.Ct. 2038 (THOMAS, J., concurring). Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*. See *ante*, at 2165 – 2166. Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In ****2201** his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only ***275** student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U.S. at 349, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. See Brief for Gail Heriot et al. as *Amici Curiae* 9. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019); see also D. Pierre, Demands for Segregated Housing at Williams College Are Not News, Nat. Rev., May 8, 2019. In addition to contradicting the universities' claims regarding the need for interracial interaction, see Brief for National Association of Scholars as *Amicus Curiae* 4–12, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory

affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*, 570 U.S. at 331, 133 S.Ct. 2411 (concurring opinion). Petitioner here clearly demonstrates this fact. Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.' " *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (opinion of THOMAS, J.) (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.) (alterations omitted)). Applicants denied admission to certain colleges may come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and ***276** others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see The Federalist No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," ****2202** "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? See *post*, at 2209 – 2211 (GORSUCH, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics ***277** somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. See *ante*, at 2169 – 2171 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping). Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

***278** B

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the

original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 2263 – 2277 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 2277. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2263 – 2264 (JACKSON, J., dissenting); see also *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). People ****2203** discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid.*

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of ***279** the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," *post*, at 2276 (JACKSON, J., dissenting), is to abdicate a sacred trust to ensure that our "honored dead ... shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, Justice JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. *Post*, at 2276 – 2277. This is so, she writes, because of statistical disparities among different racial groups. See *post*, at 2268 – 2270. Even if some whites have a lower household net worth than some blacks, what matters to Justice JACKSON is that the *average* white household has more wealth than the *average* black household. *Post*, at 2268 – 2269.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, Justice JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long odds.

Nor do Justice JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal ***280** link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. ****2204** What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, Justice JACKSON's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

Justice JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 2277; see also *post*, at 2209 – 2211 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). Then, after siloing us all into racial castes and pitting those ***281** castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. *Post*, at 2277 (opinion of JACKSON, J.). Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that Justice JACKSON draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the first in his family to attend UNC. *Post*, at 2264. Justice JACKSON argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? ***282** And what would Justice JACKSON say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ****2205** ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States —disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), Justice JACKSON ignores the experiences of other immigrant groups (like ***283** Asians, see *supra*, at 2199 – 2200) and white communities that have faced historic barriers.

Though Justice JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved*, 551 U.S. at 759, 127 S.Ct. 2738 (THOMAS, J., concurring) (citation omitted). Indeed, Justice JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would Justice JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission

in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to ****2206** continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

***284** C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter*, 539 U.S. at 371–372, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.*, at 350, 123 S.Ct. 2325. Meritocratic systems, with objective grading ***285** scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers." M. Hammond, L. ****2207** Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14; see also Brief for Oklahoma et al. as *Amici Curiae* 18. And, each of the

top 10 HBCUs have a success rate above the national average. Hammond 14.[12]

***286** Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U.S. at 122, 115 S.Ct. 2038 (THOMAS, J., concurring) (citing *Fordice*, 505 U.S. at 748, 112 S.Ct. 2727 (THOMAS, J., concurring)). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly. See *Parents Involved*, 551 U.S. at 765, 127 S.Ct. 2738 (THOMAS, J., concurring).

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

***287** The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U.S. at 298, 75 S.Ct. 753 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country ****2208** will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

Justice GORSUCH, with whom Justice THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1737, 207 L.Ed.2d 218 (2020). Title VI of that law contains terms as powerful as they are easy to understand: "No ***288** person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1738.

The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Id.*, at ——, 140 S.Ct., at 1740; see also Webster's New International Dictionary 745

(2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); Webster's Third New International Dictionary 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

***289** What does the statute's second critical phrase—"on the ground of "—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.,* Webster's New World Dictionary 640 (1960) ("because of "); Webster's Third New International Dictionary, at 1002 (defining "grounds" as "a logical condition, physical ****2209** cause, or metaphysical basis"). "Because of " is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346, 360, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013); some internal quotation marks omitted). The but-for-causation standard is a "sweeping" one too. *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739–1740. A defendant's actions need not be the primary or proximate cause of the plaintiff 's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff 's loss. *Id.*, at ——, 140 S.Ct., at 1739. All that matters is that the plaintiff 's injury would not have happened *but for* the defendant's conduct. *Ibid.*

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other ... factor" that contributed to its decision to disfavor that individual. *Id.,* at —— – ——, 140 S.Ct., at 1743–1745. It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.,* at ——, 140 S.Ct., at 1743; see also *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might "favor" the interests ***290** of that "class" as a whole or otherwise "promot[e] equality at the group level." *Bostock*, 590 U. S., at ——, ——, 140 S.Ct., at 1743, 1744. Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin —period.

If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful ... for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. See *Bostock*, 590 U. S., at —— – ——, 140 S.Ct., at 1738–1741. This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416, n. 19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion concurring in judgment in part and dissenting in part) (emphasis deleted).

B

Applying Title VI to the cases now before us, the result is plain. The parties ****2210** debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." § 2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally ***291** treat some applicants worse than others at least in part because of their race.

1

Start with how Harvard and UNC use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." 4 App. in No. 21–707, p. 1732. The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. *Ibid.*; see also 397 F.Supp.3d 126, 137 (Mass. 2019); 567 F.Supp.3d 580, 596 (MDNC 2021).

Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection. See D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021); see also 43 Fed. Reg. 19269 (1978). That commission acted "without any input from anthropologists, sociologists, ethnologists, or other experts." Brief for David E. Bernstein as *Amicus Curiae* 3 (Bernstein *Amicus* Brief). Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility for participation in any Federal program*." 43 Fed. Reg. 19269 (emphasis added). Despite that warning, others eventually used this classification system for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs ... and university admissions." H. Graham, The Origins of Official Minority Designation, in The New Race Question: How the Census Counts Multiracial Individuals 289 (J. Perlmann & M. Waters eds. 2002).

These classifications rest on incoherent stereotypes. Take the "Asian" category. It sweeps into one pile East ***292** Asians (*e.g.,* Chinese, Korean, Japanese) and South Asians (*e.g.,* Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. Bernstein *Amicus* Brief 2, 5. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. *Id.*, at 5–6. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 414, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (ALITO, J., dissenting). Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." Bernstein *Amicus* Brief 9–10. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander." See 4 App. in No. 21–707, at 1732.

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or ****2211** Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. See Bernstein *Amicus* Brief 10–11. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." *Id.*, at 14. That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb. See *id.,* at 15–16.

***293** If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group. There are decisions denying Hispanic status to someone of Italian-Argentine descent, *Marinelli Constr. Corp. v. New York*, 200 App.Div.2d 294, 296–297, 613 N.Y.S.2d 1000, 1002 (1994), as well as someone with one Mexican grandparent, *Major Concrete Constr., Inc. v. Erie County*, 134 App.Div.2d 872, 873, 521 N.Y.S.2d 959, 960 (1987). Yet there are also decisions granting Hispanic status to a Sephardic Jew whose ancestors fled Spain centuries ago, *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. 499, 1995 WL 542398, *2–*4 (Apr. 12, 1995), and bestowing a "sort of Hispanic" status on a person with one Cuban grandparent, Bernstein, 94 S. Cal. L. Rev., at 232 (discussing *In re Kist Corp.*, 99 F. C. C. 2d 173, 193 (1984)).

Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so? We are told, for example, that one effect of lumping so many people of so many disparate backgrounds into the "Asian" category is that many colleges consider "Asians" to be "overrepresented" in their admission pools. Brief for Asian American Coalition for Education et al. as *Amici Curiae* 12–14, 18–19. Paid advisors, in turn, tell high school students of Asian descent to downplay their heritage to maximize their odds of admission. " 'We will make them appear less Asian when they apply,' " one promises. *Id.,* at 16. " 'If you're given an option, don't attach a photograph to your application,' " another instructs. *Ibid.*[1] It is difficult ***294** to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that "race-conscious admissions benefit ... the Asian American community," *post*, at 2258 (SOTOMAYOR, J., dissenting). See 397 F.Supp.3d at 178 (district court finding that "overall" Harvard's race-conscious admissions policy "results in fewer Asian American[s]" being admitted). And it is hard not to wonder whether those left paying the steepest price are those least able to afford it—children of families with no chance of hiring ****2212** the kind of consultants who know how to play this game.[2]

2

Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to award a "tip" or a "plus" to applicants from certain racial groups but not others. These tips or plusses are just what they sound like—"factors that might tip an applicant into [an] admitted class." 980 F.3d 157, 170 (CA1 2020). And in a process where applicants compete for a limited pool of spots, "[a] tip for one race" necessarily works as "a penalty against other races." Brief for Economists as *Amici Curiae* 20. As the trial court in the Harvard case put it: "Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process." 397 F.Supp.3d at 202–203.

***295** Consider how this plays out at Harvard. In a given year, the university's undergraduate program may receive 60,000 applications for roughly 1,600 spots. Tr. of Oral Arg. in No. 20–1199, p. 60. Admissions officers read each application and rate students across several categories: academic, extracurricular, athletic, school support, personal, and overall. 980 F.3d at 167. Harvard says its admissions officers "should not" consider race or ethnicity when assigning the "personal" rating. *Id.,* at 169 (internal quotation marks omitted). But Harvard did not make this instruction explicit until *after* SFFA filed this suit. *Ibid.* And, in any event, Harvard concedes that its admissions officers "*can* and *do* take an applicant's race into account when assigning an *overall* rating." *Ibid.* (emphasis added). At that stage, the lower courts found, applicants of certain races may receive a "tip" in their favor. *Ibid.*

The next step in the process is committee review. Regional subcommittees may consider an applicant's race when deciding whether to recommend admission. *Id.*, at 169–170. So, too, may the full admissions committee. *Ibid.* As the Court explains, that latter committee "discusses the relative breakdown of applicants by race." *Ante*, at 2147 – 2149. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group." 397 F.Supp.3d at 146.

The last step is "lopping," where the admissions committee trims the list of "prospective admits" before settling on a final class. *Id.,* at 144 (internal quotation marks omitted). At this stage, again, the committee considers the "characteristics of the admitted class," including its "racial composition." *Ibid.* Once more, too, the committee may consider each applicant's race in deciding whom to "lop off." *Ibid.*

All told, the district court made a number of findings about Harvard's use of race-based tips. For example: "[T]he tip[s] ***296** given for race impac[t] who among the highly-qualified students in the applicant pool will be selected for admission." *Id.*, at 178. "At least 10% of Harvard's admitted class ... would most likely not be admitted ****2213** in the absence of Harvard's race-conscious admissions process." *Ibid.* Race-based tips are "determinative" in securing favorable decisions for a significant percentage of "African American and Hispanic applicants," the "primary beneficiaries" of this system. *Ibid.* There are clear losers too. "[W]hite and Asian American applicants are unlikely to receive a meaningful race-based tip," *id.,* at 190, n. 56, and "overall" the school's race-based practices "resul[t] in fewer Asian American and white students being admitted," *id.*, at 178. For these reasons and others still, the district court concluded that "Harvard's admissions process is not facially neutral" with respect to race. *Id.,* at 189–190; see also *id.*,

at 190, n. 56 ("The policy cannot ... be considered facially neutral from a Title VI perspective.").

Things work similarly at UNC. In a typical year, about 44,000 applicants vie for 4,200 spots. 567 F.Supp.3d at 595. Admissions officers read each application and rate prospective students along eight dimensions: academic programming, academic performance, standardized tests, extracurriculars, special talents, essays, background, and personal. *Id.,* at 600. The district court found that "UNC's admissions policies mandate that race is taken into consideration" in this process as a " 'plus' facto[r]." *Id.,* at 594–595. It is a plus that is "sometimes" awarded to "underrepresented minority" or "URM" candidates—a group UNC defines to include " 'those students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina,' " but not Asian or white students. *Id*., at 591–592, n. 7, 601.

At UNC, the admissions officers' decisions to admit or deny are " 'provisionally final.' " *Ante*, at 2155 – 2156 (opinion for the Court). The decisions become truly final only after a ***297** committee approves or rejects them. 567 F.Supp.3d at 599. That committee may consider an applicant's race too. *Id.*, at 607. In the end, the district court found that "race plays a role"—perhaps even "a determinative role"—in the decision to admit or deny some "URM students." *Id.,* at 634; see also *id.,* at 662 ("race may tip the scale"). Nor is this an accident. As at Harvard, officials at UNC have made a "deliberate decision" to employ race-conscious admissions practices. *Id.,* at 588–589.

While the district courts' findings tell the full story, one can also get a glimpse from aggregate statistics. Consider the chart in the Court's opinion collecting Harvard's data for the period 2009 to 2018. *Ante,* at 2171. The racial composition of each incoming class remained steady over that time—remarkably so. The proportion of African Americans hovered between 10% and 12%; the proportion of Hispanics between 8% and 12%; and the proportion of Asian Americans between 17% and 20%. *Ibid.* Might this merely reflect the demographics of the school's applicant pool? Cf. *post*, at 2244 (opinion of SOTOMAYOR, J.). Perhaps—at least assuming the applicant pool looks much the same each year and the school rather mechanically admits applicants based on objective criteria. But the possibility that it instead betrays the school's persistent focus on numbers of this race and numbers of that race is entirely consistent with the findings recounted above. See, *e.g.,* 397 F.Supp.3d at 146 ("if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group"); cf. *ante,* at 2171, n.7 (opinion for the Court).

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

***298** ****2214** For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. Both schools insist that they consider race as just one of many factors when making admissions decisions in their self-described "holistic" review of each applicant. SFFA responds with trial evidence showing that, whatever label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others. See Brief for Petitioner 20–35, 40–45.

The parties also debate the *reasons* both schools consult race. SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." *Id.*, at 12–13 (internal quotation marks omitted). Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without " 'stat[ing] frankly' " that they were " 'directly excluding all [Jews] beyond a certain percentage.' " *Id.,* at 12; see also 3 App. in No. 20–1199, pp. 1131–1133. SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits. Brief for Petitioner 12–14, 25–32. For its part, Harvard expresses regret for its past practices while denying that they resemble its current ones. Tr. of Oral Arg. in No. 20–1199, at 51. And both schools insist that their student bodies would lack sufficient diversity without race-conscious admissions. Brief for Respondent in No. 20–1199, pp. 52–54; Brief for University Respondents in No. 21–707, pp. 54–59.

When it comes to defining and measuring diversity, the parties spar too. SFFA observes that the racial categories ***299** the

universities employ in the name of diversity do not begin to reflect the differences that exist within each group. See Part I–B–1, *supra*. Instead, they lump together white and Asian students from privileged backgrounds with "Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination" and "descendants of those Japanese-American citizens interned during World War II." *Ante*, at 2200, n. 10 (THOMAS, J., concurring). Even putting all that aside, SFFA stresses that neither Harvard nor UNC is willing to quantify how much racial and ethnic diversity they think sufficient. And, SFFA contends, the universities may not wish to do so because their stated goal implies a desire to admit some fixed number (or quota) of students from each racial group. See Brief for Petitioner 77, 80; Tr. of Oral Arg. in No. 21–707, p. 180. Besides, SFFA asks, if it is diversity the schools are after, why do they exhibit so little interest in other (non-racial) markers of it? See Brief for Petitioner 78, 83–86. While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are "23 times as many rich kids on campus as poor kids." 2 App. in No. 20–1199, p. 756.[3]

**2215 Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like. Brief for Petitioner 85–86; see also Brief for *300 Oklahoma et al. as *Amici Curiae* 9–19.[4] As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty. Brief for Petitioner 33–34, 81; see 2 App. in No. 20–1199, at 763–765, 774–775. Doing these two things would barely affect the academic credentials of each incoming class. Brief for Petitioner 33–34. And it would not require Harvard to end tips for recruited athletes, who as a group are much weaker academically than non-athletes.[5]

*301 At trial, however, Harvard resisted this proposal. Its preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most. See 980 F.3d at 171. Still, Harvard stands by them. See Brief for Respondent in No. 20–1199, at 52–54; Tr. of Oral Arg. in No. 21–1199, at 48–49. As a result, athletes and the children of donors, alumni, and faculty—groups that together "make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year." 980 F.3d at 171.

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives **2216 for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI just the same. See Part I–A, *supra*; see also *Bostock*, 590 U. S., at ——, —— – ——, 140 S.Ct., at 1739–1740, 1742–1745.

D

The principal dissent contends that this understanding of Title VI is contrary to precedent. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). But the dissent does not dispute that everything said here about the meaning of Title VI tracks *302 this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination' " in Title VI but no ambiguity in the term "discriminate" in Title VII. Tr. of Oral Arg. in No. 21–707, at 164. Respectfully, I do not see it. The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.

Rather than engage with the statutory text or our precedent in *Bostock*, the principal dissent seeks to sow confusion about the facts. It insists that all applicants to Harvard and

UNC are "eligible" to receive a race-based tip. *Post*, at 2243, n. 27 (opinion of SOTOMAYOR, J.); cf. *post*, at 2272 (JACKSON, J., dissenting). But the question in these cases is not who could *hypothetically* receive a race-based tip. It is who *actually* receives one. And on that score the lower courts left no doubt. The district court in the Harvard case found that the school's admissions policy "cannot ... be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip." 397 F.Supp.3d at 190, n. 56; see also *id.*, at 189–190 ("Harvard's admissions process is not facially neutral."). Likewise, the district court in the UNC case found that admissions officers "sometimes" award race-based plusses to URM candidates—a category that excludes Asian American and white students. 567 F.Supp.3d at 591–592, n. 7, 601.[6]

***303** Nor could anyone doubt that these cases are about intentional discrimination just because Harvard in particular " 'does not *explicitly* prioritize any particular racial group over any other.' " *Post,* at 2243, n. 27 (opinion of SOTOMAYOR, J.) (emphasis ****2217** added). Forget for a moment the universities' concessions about how they deliberately consult race when deciding whom to admit. See *supra,* at 2213 – 2214.[7] Look past the lower courts' findings recounted above about how the universities intentionally give tips to students of some races and not others. See *supra,* at 2211 – 2214, 2215 – 2217. Put to the side telling evidence that came out in discovery.[8] Ignore, too, our many precedents holding that it does not matter how a defendant "label[s]" its practices, *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1743–1744; that intentional discrimination between individuals is unlawful whether "motivated by a wish to achieve classwide equality" or any other purpose, *id.*, at ——, 140 S.Ct., at 1743; and that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a [merely] discriminatory effect," *Johnson Controls*, 499 U.S. at 199, 111 S.Ct. 1196. ***304** Consider just the dissents in these cases. From start to finish and over the course of nearly 100 pages, they defend the universities' purposeful discrimination between applicants based on race. "[N]eutrality," they insist, is not enough. *Post,* at 2231, 2262 – 2263 (opinion of SOTOMAYOR, J.); cf. *post*, at 2274 – 2275 (opinion of JACKSON, J.). "[T]he use of race," they stress, "is critical." *Post,* at 2257 – 2258 (opinion of SOTOMAYOR, J.); see *id.,* at 2225 – 2226, 2243, 2246 – 2247, 2248 – 2250; cf. *post,* at 2263 – 2264, 2277 (opinion of JACKSON, J.). Plainly, Harvard and UNC choose to treat some students worse than others in part because of race. To suggest otherwise—or to cling to the fact that the schools do not always say the quiet part aloud—is to deny reality.[9]

II

So far, we have seen that Title VI prohibits a recipient of federal funds from discriminating against individuals even in part because of race. We have seen, too, that Harvard and UNC do just what the law forbids. One might wonder, then, why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

Bakke concerned admissions to the medical school at the University of California, ****2218** Davis. That school set aside a certain ***305** number of spots in each class for minority applicants. See 438 U.S. at 272–276, 98 S.Ct. 2733 (opinion of Powell, J.). Allan Bakke argued that the school's policy violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 270, 98 S.Ct. 2733. The Court agreed with Mr. Bakke. In a fractured decision that yielded six opinions, a majority of the Court held that the school's set-aside system went too far. At the same time, however, a different coalition of five Justices ventured beyond the facts of the case to suggest that, in other circumstances not at issue, universities may sometimes permissibly use race in their admissions processes. See *ante*, at 2162 – 2164 (opinion for the Court).

As important as these conclusions were some of the interpretive moves made along the way. Justice Powell (writing only for himself) and Justice Brennan (writing for himself and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. From there, however, their paths diverged. Justice Powell thought some racial preferences might be permissible but that the admissions program at issue violated the promise of equal protection. 438 U.S. at 315–320, 98 S.Ct. 2733. Justice Brennan would have given a

wider berth to racial preferences and allowed the challenged program to proceed. *Id.*, at 355–379, 98 S.Ct. 2733.

Justice Stevens (also writing for himself and three others) took an altogether different approach. He began by noting the Court's "settled practice" of "avoid[ing] the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.,* at 411, 98 S.Ct. 2733. He then turned to the "broad prohibition" of Title VI, *id.,* at 413, 98 S.Ct. 2733, and summarized his views this way: "The University ... excluded Bakke from participation in its program of medical education because of ***306** his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires" finding a Title VI violation. *Id.,* at 412, 98 S.Ct. 2733 (footnote omitted).

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Justice Stevens's statute-focused approach receded from view. As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.

And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection Clause requires any consideration of race to satisfy "strict scrutiny," meaning it must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325 (internal quotation marks omitted). Outside the context of higher education, "our precedents have identified only two" interests that meet this demanding standard: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons." ****2219** *Ante,* at 2161 – 2162 (opinion for the Court).

Within higher education, however, an entirely distinct set of rules emerged. Following *Bakke*, this Court declared that judges may simply "defer" to a school's assertion that "diversity is essential" to its "educational mission." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 724–725, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Only colleges and universities, the Court explained, "occupy a special niche in our constitutional tradition." ***307** *Grutter*, 539 U.S. at 329, 123 S.Ct. 2325. Yet even they (wielding their "special niche" authority) cannot simply assert an interest in diversity and discriminate as they please. *Fisher*, 579 U.S. at 381, 136 S.Ct. 2198. Instead, they may consider race only as a "plus" factor for the purpose of "attaining a critical mass of underrepresented minority students" or "a diverse student body." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325 (internal quotation marks omitted). At the same time, the Court cautioned, this practice "must have a logical end point." *Id.,* at 342, 123 S.Ct. 2325. And in the meantime, "outright racial balancing" and "quota system[s]" remain "patently unconstitutional." *Id.*, at 330, 334, 123 S.Ct. 2325. Nor may a college or university ever provide "mechanical, predetermined diversity bonuses." *Id.*, at 337, 123 S.Ct. 2325 (internal quotation marks omitted). Only a "tip" or "plus" is constitutionally tolerable, and only for a limited time. *Id.*, at 338–339, 341, 123 S.Ct. 2325.

If you cannot follow all these twists and turns, you are not alone. See, *e.g., Fisher*, 579 U.S. at 401–437, 136 S.Ct. 2198 (Alito, J., dissenting); *Grutter*, 539 U.S. at 346–349, 123 S.Ct. 2325 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a ... I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy.... I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when ***308** his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U.S. at 416, 98 S.Ct. 2733 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation ****2220** in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d. The Equal Protection Clause reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for ***309** classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U.S. at 376, 136 S.Ct. 2198; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion); *United States v. Virginia*, 518 U.S. 515, 555–556, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead, both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U.S. at 284–285, 98 S.Ct. 2733 (opinion of Powell, J.); *id.*, at 328–336, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417, 98 S.Ct. 2733. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.*, at 340, 98 S.Ct. 2733. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always ***310** been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883), and of the Constitution itself, see *Knowlton v. Moore*, 178 U.S. 41, 87, 20 S.Ct. 747, 44 L.Ed. 969 (1900). In this ****2221** country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1737. When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id.*, at ——, 140 S.Ct., at 1738.

Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. For years, they have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion. A proper respect for the law demands the opposite. Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference

to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose. Title VI is more consequential than that.

*

In the aftermath of the Civil War, Congress took vital steps toward realizing the promise of equality under the law. As important as those initial efforts were, much work remained to be done—and much remains today. But by any measure, the Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions. And when we look to the clear and powerful command Congress set forth in that law, these cases all but resolve themselves. Under Title VI, it is never permissible " 'to say "yes" to one person ... but to say "no" to another person' " even in part " 'because of the color of his skin.' " *Bakke*, 438 U.S. at 418, 98 S.Ct. 2733 (opinion of Stevens, J.).

Justice KAVANAUGH, concurring.

***311** I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. In accord with the Fourteenth Amendment's text and history, this Court considers all racial classifications to be constitutionally suspect. See *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Strauder v. West Virginia*, 100 U.S. 303, 306–308, 25 L.Ed. 664 (1880). As a result, the Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.

Under strict scrutiny, racial classifications are constitutionally prohibited unless they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U.S. at 326–327, 123 S.Ct. 2325. Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest. *Id.,* at 327, 339–340, 123 S.Ct. 2325; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a "deviation from the norm of equal treatment of all racial and ethnic groups" must be "a temporary matter"—or stated otherwise, ****2222** must be "limited in time." *Id.,* at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.); *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

In 1978, five Members of this Court held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI of the Civil Rights Act, ***312** so long as universities used race only as a factor in admissions decisions and did not employ quotas. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325–326, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.,* at 287, 315–320, 98 S.Ct. 2733 (opinion of Powell, J.). One Member of the Court's five-Justice majority, Justice Blackmun, added that race-based affirmative action should exist only as a temporary measure. He expressed hope that such programs would be "unnecessary" and a "relic of the past" by 1988—within 10 years "at the most," in his words—although he doubted that the goal could be achieved by then. *Id.,* at 403, 98 S.Ct. 2733 (opinion of Blackmun, J.).

In 2003, 25 years after *Bakke*, five Members of this Court again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." *Ibid.* And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

- Justice O'Connor's opinion for the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Ibid.*
- Justice THOMAS expressly concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.,* at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part).

- Justice THOMAS, joined here by Justice Scalia, reiterated "the Court's holding" that race-based affirmative action in higher education "will be unconstitutional in 25 years" and "that in 25 years the practices of the Law ***313** School will be illegal," while also stating that "they are, for the reasons I have given, illegal now." *Id.,* at 375–376, 123 S.Ct. 2325.

- Justice Kennedy referred to "the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.,* at 394, 123 S.Ct. 2325 (dissenting opinion).

- Justice Ginsburg, joined by Justice Breyer, acknowledged the Court's 25-year limit but questioned it, writing that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.,* at 346, 123 S.Ct. 2325 (concurring opinion).

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. See *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference ****2223** itself." *Id.,* at 341, 123 S.Ct. 2325 (internal quotation marks omitted). And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Ibid.* (internal quotation marks omitted).

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a " 'temporary matter,' " and "must be limited in time." *Id.,* at 342, 123 S.Ct. 2325 (quoting *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.)). The requirement of a time limit "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. ***314** Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Ibid.* The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Ibid.* (internal quotation marks and alteration omitted). The Court therefore concluded that race-based affirmative action programs in higher education, like other racial classifications, must be "limited in time." *Ibid.*

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely. For example, in the elementary and secondary school context after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court authorized race-based student assignments for several decades—but not indefinitely into the future. See, *e.g., Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247–248, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 433–434, 436, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31–32, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); cf. *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971).

In those decisions, this Court ruled that the race-based "injunctions entered in school desegregation cases" could not "operate in perpetuity." *Dowell*, 498 U.S. at 248, 111 S.Ct. 630. Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

***315** As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.), the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer. See Brief for Petitioner 21–22, 30–31, 33, 42, Brief for United States 26–27, in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241.

The *Grutter* Court rejected those arguments for ending race-based affirmative ****2224** action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore ruled that race-based affirmative action in higher education could continue *only* for another generation. 539 U.S. at 342–343, 123 S.Ct. 2325.

Harvard and North Carolina would prefer that the Court now ignore or discard *Grutter*'s 25-year limit on race-based affirmative action in higher education, or treat it as a mere aspiration. But the 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*. Indeed, four of the separate opinions in *Grutter* discussed the majority opinion's 25-year limit, which belies any suggestion that the Court's reference to it was insignificant or not carefully considered.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation. *Ibid.* (internal quotation marks omitted).

***316** A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.[1]

Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, cf. *Bakke*, 438 U.S. at 395–402, 98 S.Ct. 2733 (opinion of Marshall, J.), as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. See *Grutter*, 539 U.S. at 342–343, 123 S.Ct. 2325; *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630; *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.).

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action ***317** programs. ****2225** In the abstract, it might have been debatable how long those race-based admissions programs could continue under the "temporary matter"/"limited in time" equal protection principle recognized and applied by this Court. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325 (internal quotation marks omitted); cf. *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630. But in 2003, the *Grutter* Court applied that temporal equal protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. As I have explained, the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." *Croson*, 488 U.S. at 526, 109 S.Ct. 706 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.*, at 509, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) ("the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"); *ante,* at 2175 – 2176; Brief for Petitioner 80–86; Reply Brief in No. 20–1199, pp. 25–26; Reply Brief in No. 21–707, pp. 23–26.

In sum, the Court's opinion today is consistent with and follows from the Court's equal protection precedents, and I join the Court's opinion in full.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join,* dissenting.

***318** The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495, 74 S.Ct. 686. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous ****2226** progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic ***319** society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, § 9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, § 2, cl. 3, and gave enslavers the right to retrieve enslaved people who escaped to free States, Art. IV, § 2, cl. 3. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. See H. Williams, Self-Taught: African American Education in Slavery and Freedom 7, 203–213 (2005) (Self-Taught). Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished "slavery" and "involuntary servitude, except as a punishment for crime." § 1. "Like all great historical transformations," emancipation was a movement, "not a single event" owed to any single individual, institution, ***320** or political party. E. Foner, The Second Founding 21, 51–54 (2019) (The Second Founding).

The fight for equal educational opportunity, however, was a key driver. Literacy was an "instrument of resistance and liberation." Self-Taught 8. Education "provided the means to write a pass to freedom" and "to learn of abolitionist activities." *Id.*, at 7, 91 S.Ct. 1267. It allowed enslaved Black people "to disturb the power relations between master and slave," which "fused their desire for literacy with their desire for freedom." *Ibid*. Put simply, "[t]he very feeling of inferiority which slavery forced upon [Black people] fathered an intense desire to rise out of their condition by means of education." W. E. B. Du Bois, Black Reconstruction in America 1860–1880, 111 S.Ct. 1196, p. 638 (1935); see J. Anderson, The Education of Blacks in the South 1860–1935, p. 7 (1988). Black Americans thus insisted, in the words of Frederick Douglass, "that in a country governed by the people, like ours, education of the youth of all classes is vital

to its welfare, prosperity, and to its existence." Address to the People of the United States (1883), in 4 P. Foner, The Life and Writings of Frederick Douglass 386 (1955). Black people's yearning for freedom of thought, and ****2227** for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, the Southern States replaced slavery with "a system of 'laws which imposed upon [Black people] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.' " *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.) (quoting *Slaughter-House Cases*, 16 Wall. 36, 70, 83 U.S. 36, 21 L.Ed. 394 (1873)). Those so-called "Black Codes" discriminated against Black people on ***321** the basis of race, regardless of whether they had been previously enslaved. See, *e.g.*, 1866 N. C. Sess. Laws pp. 99, 102.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal laws, which in turn "permitted involuntary servitude as a punishment" for convicted Black persons. D. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans From the Civil War to World War II, pp. 7, 53 (2009) (Slavery by Another Name). States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." The Second Founding 48. State laws then forced Black convicted persons to labor in "plantations, mines, and industries in the South." *Id.*, at 50. This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. See Slavery by Another Name 5–6, 53. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. Those efforts included the appointment of a Committee, the Joint Committee on Reconstruction, "to inquire into the condition of the Confederate States." Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 1 (1866) (hereinafter Joint Comm. Rep.). Among other things, the Committee's Report to Congress documented the "deep-seated prejudice" against emancipated Black people in the Southern States and the lack of a "general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality." *Id.*, at 11. In light of its findings, the Committee proposed amending the Constitution to secure the equality of "rights, civil and political." *Id.*, at 7.

***322** Congress acted on that recommendation and adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy v. Ferguson*, 163 U.S. 537, 555–556, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That Clause commands that "[n]o State shall ... deny to any person ****2228** within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State ... shall ... recognize any distinction between citizens ... on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173. For the Bureau, education "was ***323** the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 144 (1988). Consistent

with that view, the Bureau provided essential "funding for black education during Reconstruction." *Id.*, at 97.

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). *Ibid.*; see also Brief for HBCU Leaders et al. as *Amici Curiae* 13 (HBCU Brief). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. 2 O. Howard, Autobiography 397–401 (1907). Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen 60 (July 1, 1868).[1] The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870. Schnapper, 71 Va. L. Rev., at 798, n. 149.

***324** Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act ****2229** created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," 6 Messages and Papers of the Presidents 1789–1897, p. 425 (J. Richardson ed. 1897) (Messages & Papers) (A. Johnson to House of Rep. July 16, 1866), but Congress overrode his veto. Cong. Globe 3849–3850. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. See *id.*, at 474. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and ***325** color ... shall have the same right[s]" as those "enjoyed by white citizens." Act of Apr. 9, 1866, 14 Stat. 27. Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment ... by reason of ... color or race, than is prescribed for the punishment of white persons." *Ibid.* In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is designed "to afford discriminating protection to colored persons," and its "distinction of race and color ... operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. Cong. Globe 1861. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, see Act of May 31, 1870, § 16, 16 Stat. 144, where it remains today, see 42 U.S.C. §§ 1981(a) and 1982 (Rev. Stat. §§ 1972, 1978).

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for " 'the relief of destitute colored women and children,' " without regard to prior enslavement. Act of July 28, 1866, 14 Stat. 317. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. 14 Stat. 357, Res. No. 46, June 15, 1866; Act of Mar. 3, 1869, ch. 122,

15 Stat. 301; Act of Mar. 3, 1873, 17 Stat. 528. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not ... to the white people." Cong. Globe, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious ***326** college admissions are unconstitutional. ****2230** *Bakke*, 438 U.S. at 398, 98 S.Ct. 2733 (opinion of Marshall, J.).[2]

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." *Id.*, at 391, 98 S.Ct. 2733. In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. *Id.*, at 391–392, 98 S.Ct. 2733 (collecting cases). That endeavor culminated with the Court's shameful decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which established that "equality of treatment" exists "when the races are provided substantially equal facilities, even though these facilities be separate." *Brown*, 347 U.S. at 488, 74 S.Ct. 686. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from bathrooms to military units and, crucially, schools. See *Bakke*, 438 U.S. at 393–394, 98 S.Ct. 2733 (opinion of Marshall, J.); see also generally R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. 163 U.S. at 559–560, 16 S.Ct. 1138. Although the State argued that the law ***327** "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." *Id.*, at 557, 16 S.Ct. 1138. That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560, 16 S.Ct. 1138. Although "[t]he white race deems itself to be the dominant race ... in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior, dominant, ruling class of citizens" in the eyes of the law. *Id.*, at 559, 16 S.Ct. 1138. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." *Ibid.*

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." *Ibid.* Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U.S. at 492–495, 74 S.Ct. 686. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." ****2231** *Id.*, at 494–495, 74 S.Ct. 686. The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities ***328** "solely because of their race," denoting "inferiority as to their status in the community." 347 U.S. at 494, and n. 10, 74 S.Ct. 686. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493, 74 S.Ct. 686. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.*

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), for example, the Court held that the New Kent County School Board's "freedom

of choice" plan, which allegedly allowed "every student, regardless of race, ... 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." *Id.*, at 437, 441–442, 88 S.Ct. 1689. That command, the Court explained, was that schools dismantle "well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." *Id.*, at 435–436, 88 S.Ct. 1689. That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. *Id.*, at 437, 88 S.Ct. 1689. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. *Id.*, at 440–442, 88 S.Ct. 1689 (noting that 85% of Black children in the school system were still attending an all-Black school). Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438, 88 S.Ct. 1689. Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See ***329** *Green*, 391 U.S. at 440–442, 88 S.Ct. 1689; see also *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*"); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (school board "had to do more than abandon its prior discriminatory purpose"; it "had an affirmative responsibility" to integrate); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 200, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) ("[T]he State automatically assumes an affirmative duty" under *Brown* to eliminate ****2232** the vestiges of segregation).[3]

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695, p. 6 (*Green* Brief). Those opponents argued that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." *Id.*, at 11 (emphasis deleted). Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the " 'Constitution is colorblind.' " *Green* Brief 6, n. 6 (quoting *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting)). They also incorrectly claimed that their views aligned with those of the *Brown* litigators, arguing that the *Brown* plaintiffs "understood" that *Brown*'s "mandate" ***330** was colorblindness. *Green* Brief 17. This Court rejected that characterization of "the thrust of *Brown*." *Green*, 391 U.S. at 437, 88 S.Ct. 1689. It made clear that indifference to race "is not an end in itself " under that watershed decision. *Id.*, at 440, 88 S.Ct. 1689. The ultimate goal is racial equality of opportunity.

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students be admitted " 'on a racially nondiscriminatory basis.' " *Ante*, at 2160. It distorts the dissent in *Plessy* to advance a colorblindness theory. *Ante*, at 2175 – 2176; see also *ante*, at 2219 (GORSUCH, J., concurring) ("[T]oday's decision wakes the echoes of Justice John Marshall Harlan [in *Plessy*]"); *ante*, at 2177 (THOMAS, J., concurring) (same). The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued." *Ante*, at 2160; *ante*, at 2194 - 2196, 2197, n. 7 (opinion of THOMAS, J.).

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U.S. at 400, 98 S.Ct. 2733. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402, 98 S.Ct. 2733 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice ***331** Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

****2233** C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for an institution of higher education." 438 U.S. at 311–315, 98 S.Ct. 2733. Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318, 98 S.Ct. 2733.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, 123 S.Ct. 2325, and held that race may be used in a narrowly tailored manner to achieve this interest, *id.*, at 333–344, 123 S.Ct. 2325; see also *Gratz v. Bollinger*, 539 U.S. 244, 268, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is " 'too open-ended, ill-defined, and indefinite to constitute a compelling interest' ").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher v. University of Texas at Austin*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." *Id.*, at 314, 337, 133 S.Ct. 2411. Several years later, in ***332** *Fisher v. University of Texas at Austin*, 579 U.S. 365, 376, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework. *Id.*, at 380–388, 136 S.Ct. 2198.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that " 'experience lend[s] support to the view that the contribution of diversity is substantial.' " *Grutter*, 539 U.S. at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 313, 98 S.Ct. 2733). Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace ... through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U.S. at 330, 123 S.Ct. 2325. More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. *Id.*, at 332, 123 S.Ct. 2325. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." *Id.*, at 331–332, 123 S.Ct. 2325. It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races. *Id.*, at 328–333, 123 S.Ct. 2325.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but ****2234** also in principles of "academic freedom," which " 'long [have] been viewed as a special concern of the First Amendment.' " *Id.*, at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733). In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. 539 U.S. at 329, 123 S.Ct. 2325. Consistent ***333** with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection. " *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (internal quotation marks omitted). Indeed, as the Court recently reaffirmed in another school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society' " under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ——, ——, 142 S.Ct. 2407, 2430–2431, 213 L.Ed.2d 755 (2022); cf. *Khorrami* v. *Arizona*, 598 U. S. ——, ——, 143 S.Ct. 22, 26–27, 214 L.Ed.2d 224 (2022) (GORSUCH, J., dissenting from denial of certiorari) (collecting research showing that larger juries are more likely to be racially diverse and "deliberate longer, recall information better, and pay greater attention to dissenting voices").

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college

admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, see *supra*, at 2225 - 2234, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University ***334** of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased. ****2235** [5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See ***335** *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 72–86, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation).[8] In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses.[9] It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.[10]

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend ***336** preschool and other early childhood education programs that increase educational attainment.[13] All of these interlocked factors ****2236** place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed. v. State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed. v. State*, 382 N.C. 386, 388–390, 879 S.E.2d 193, 197–198 (2022).

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 32. "Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process." Brief for Harvard Student and Alumni Organizations as *Amici Curiae* 16. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14]

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce ***337** other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev. 2382, 2416 (2021) ("[E]ducational opportunities ... allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates,[15] income levels,[16] wealth and homeownership,[17] and healthcare access.[18] See also *Schuette v. BAMN*, 572 U.S. 291, 380–381, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting) (noting the "persistent racial inequality in society"); *Gratz*, 539 U.S. at 299–301, 123 S.Ct. 2411 (Ginsburg, J., dissenting) (cataloging racial disparities in employment, poverty, healthcare, housing, consumer transactions, and education).

Put simply, society remains "inherently unequal." *Brown*, 347 U.S. at 495, 74 S.Ct. 686. Racial inequality runs deep to this very day. That is particularly true in education, the " 'most vital civic institution for the preservation of a democratic system of government.' " *Plyler v. Doe*, 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal ****2237** protection." *Schuette*, 572 U.S. at 381, 134 S.Ct. 1623 (dissenting opinion).

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

***338** i

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born.[19] *Id.*, at 1688–1690. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 *id.*, at 781–784; 3 *id.*, at 1689.

***339** To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. *Id.*, at 1683. Students of color also continue to experience racial harassment, isolation, and tokenism.[20] Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. *Id.*, at 1647. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population. *Id.*, at 1648.

****2238** ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report).
***340** Harvard suppressed antislavery views, and enslaved

persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. *Id.*, at 7, 15.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted " 'race science,' " racist eugenics, and other theories rooted in racial hierarchy. *Id.*, at 11. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. *Ibid.* The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." *Id.*, at 44. By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. *Id.*, at 45. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. *Ibid*. Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. *Id.*, at 51, 91 S.Ct. 1284. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963." *Ibid.*; see also S. Bradley, Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League 17 (2018) (noting that the historical discussion of racial integration at the Ivy League "is necessarily male-centric," given the historical exclusion of women of color from these institutions).

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each ***341** year. App. to Pet. for Cert. in No. 20–1199, p. 112. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31; 2 App. 823, 961. For years, the university has reported that inequities on campus remain. See, *e.g.*, 4 App. 1564–1601. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," 3 *id.*, at 1308, and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds," *id.*, at 1309.

* * *

****2239** These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their] highest ideals." Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application ***342** of "established law and move on." *Kennedy*, 597 U. S., at ——, 142 S.Ct., at 2450 (SOTOMAYOR, J., dissenting). As Justice THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*, at 2207.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.[21]

***343** A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture ****2240** of these cases and because of the narrow scope of the

issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).[22]

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. Brief for Petitioner 20, 40. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. *Ibid*.

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F.Supp.3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F.Supp.3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F.3d 157, 204 (2020) (*Harvard II*). SFFA then filed petitions for a writ of certiorari in both cases, which the Court granted. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).[23]

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and *Fisher*; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions ***344** program is narrowly tailored. See Brief for Petitioner in No. 20–1199, p. i; Brief for Respondent in No. 20–1199, p. i; Brief for University Respondents in No. 21–707, p. i. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief. Brief for Petitioner 83–86.

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at " 'tolerable administrative expense.' " *Fisher I*, 570 U.S. at 312, 133 S.Ct. 2411 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)). Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's ****2241** proposed race-neutral alternatives do not meet those criteria. *UNC*, 567 F.Supp.3d at 648. All of SFFA's proposals are methodologically flawed because they rest on " 'terribly unrealistic' " assumptions about the applicant pools. *Id.*, at 643–645, 647. For example, as to ***345** one set of proposals, SFFA's expert "unrealistically assumed" that "all of the top students in the candidate pools he use[d] would apply, be admitted, and enroll." *Id.*, at 647. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, *id.*, at 643–645, n. 43, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U.S. at 386–387, 136 S.Ct. 2198. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F.Supp.3d at 647. SFFA's proposed top percentage plans,[24] for example, are based on a made-up and complicated admissions index that requires UNC to "access ... real-time data for all high school students." *Ibid.* UNC is then supposed to use that index, which "would change every time any student took a standardized test," to rank students based on grades and test scores. *Ibid.* One of SFFA's top percentage plans would even "nearly erase the Native American incoming class" at UNC. *Id*., at 646. The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

***346** 2

Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." Brief for Petitioner 75–83. As the First Circuit concluded, there was "no error" in the District

Court's findings on any of these issues. *Harvard II*, 980 F.3d at 204.[26]

**2242 Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. *Id.*, at 193. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." *Id.*, at 193–194. SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. *Id.*, at 193; Brief for Petitioner 81. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. 980 F.3d at 194. SFFA's proposal, echoed by Justice GORSUCH, *ante*, at 2214 – 2215, requires Harvard to "make sacrifices on almost every dimension important to its admissions process," *347 980 F.3d at 194, and forces it "to choose between a diverse student body and a reputation for academic excellence," *Fisher II*, 579 U.S. at 385, 136 S.Ct. 2198. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." *Id.*, at 375, 136 S.Ct. 2198. The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." *Ibid.* After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be " 'decisive' for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U.S. at 272, 123 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733).

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. 980 F.3d at 165. The admissions process is exceedingly competitive; it involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. *Id.*, at 165–166. Consistent with that "individualized, holistic review process," admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. *Id.*, at 166, 169, 180. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. *Id.*, at 170. To choose among those highly qualified candidates, Harvard considers "plus factors," which *348 can help "tip an applicant into Harvard's admitted class." *Id.*, at 170, 191. To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. *Ibid.*

There is "no evidence of any mechanical use of tips." *Id.*, at 180. Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." **2243 *Id.*, at 190.[27] Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." *Id.*, at 191.

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. See Brief for Petitioner 79. That 45% figure shows that eliminating the use of race in admissions "would reduce African American representation ... from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F.3d at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. *349 539 U.S. at 320, 123 S.Ct. 2325. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U.S. at 384, 136 S.Ct. 2198.[28]

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges **2244 and universities cannot define their diversity interest

"as 'some specified percentage of a particular group merely because ***350** of its race or ethnic origin.' " *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733). Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not offer expert testimony to support its racial balancing claim." *Harvard II*, 980 F.3d at 180, 186–187. Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." *Harvard I*, 397 F.Supp.3d at 176–177; see *Harvard II*, 980 F.3d at 180, 188–189.

Similarly, Harvard's use of "one-pagers" containing "a snapshot of various demographic characteristics of Harvard's applicant pool" during the admissions review process is perfectly consistent with this Court's precedents. *Id.*, at 170–171, 189. Consultation of these reports, with no "specific number firmly in mind," "does not transform [Harvard's] program into a quota." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325. Rather, Harvard's ongoing review complies with the Court's command that universities periodically review the necessity of the use of race in their admissions programs. *Id.*, at 342, 123 S.Ct. 2325; *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198.

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." *Ante*, at 2171. Because SFFA failed to offer an expert and to prove its claim below, the majority is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. Compare *ibid.* (citing Brief for Petitioner in No. 201199, p. 23) with 4 App. in No. 20–1199, p. 1770. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review. See *Harvard II*, 980 F.3d at 180–182, 188–189.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports ***351** to summarize. *Id.*, at 188. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." *Id.*, at 180, 188. The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." *Id.*, at 188. Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." *Ibid.* The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Id.*, at 188–189. Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." *Id.*, at 189.[29]

***352** ****2245** III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. *Ante*, at 2165 - 2173, 2175 - 2176. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. *Ante*, at 2166. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante*, at 2219 (GORSUCH, J., concurring).

There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. "Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases" the majority now overrules. *Payne v. Tennessee*, 501 U.S. 808, 846, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Marshall, J., dissenting); see, *e.g.*, *Grutter*, 539 U.S. at 354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) ("Unlike the majority, I seek to define with precision the interest being asserted"); *Fisher II*, 579 U.S. at 389, 136 S.Ct. 2198 (THOMAS, J., dissenting) (race-conscious admissions programs "res[t] on pernicious assumptions about race"); *id.*, at 403, 136 S.Ct. 2198 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting) (diversity interests "are laudable goals, but they are not concrete or precise"); *id.*, at 413, 136 S.Ct. 2198 (race-conscious college admissions plan "discriminates against Asian-American students"); *id.*, at 414, 136 S.Ct. 2198 (race-conscious admissions plan is unconstitutional because it "does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White' "); *id.*, at 419, 136 S.Ct.

2198 (race-conscious college admissions policies rest on "pernicious stereotype[s]").

Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number ***353** on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that "bedrock principles are founded ... in the proclivities of individuals" on this Court, not in the law, and it degrades "the integrity of our constitutional system of government." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy.

The Court offers no justification, much less "a 'special justification,' " for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2334, 213 L.Ed.2d 545 (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1969, 204 L.Ed.2d 322 (2019)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and ****2246** *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at ——, 142 S.Ct., at 2334 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting); *id.*, at —— – ——, 142 S.Ct., at 2306–2308 (KAVANAUGH, J., concurring). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See *supra*, at 2225 - 2230. ***354** Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). The Court has thus upheld the use of race in a variety of contexts. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("[T]he obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect"); *Johnson v. California*, 543 U.S. 499, 512, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (use of race permissible to further prison's interest in " 'security' " and " 'discipline' "); *Cooper v. Harris*, 581 U.S. 285, 291–293, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (use of race permissible when drawing voting districts in some circumstances).[30]

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." *Id.*, at 884–887, 95 S.Ct. 2574; see also *id.*, at 882, 95 S.Ct. 2574 (recognizing that "the border" includes entire metropolitan areas such as San Diego, El Paso, and the South Texas Rio Grande Valley).[31] The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The ***355** Court later extended this reasoning to border patrol agents selectively referring motorists for secondary ****2247** inspection at a checkpoint, concluding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation." *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–563, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (footnote omitted).

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at 2161 - 2162. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at 2166, n. 4. To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at 2166, n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious missions); see also ***356** *Harvard II*, 980 F.3d at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

The concurring opinions also agree that the Constitution tolerates some racial classifications. Justice GORSUCH agrees with the majority's conclusion that racial classifications are constitutionally permissible if they advance a compelling interest in a narrowly tailored way. *Ante*, at 2220. Justice KAVANAUGH, too, agrees that the Constitution permits the use of race if it survives strict scrutiny. *Ante*, at 2221 - 2222.[32] Justice THOMAS offers an "originalist defense of the colorblind Constitution," but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. *Ante*, at 2177. Like the majority opinion, Justice THOMAS agrees that race can be used to remedy past discrimination and "to equalize treatment against a concrete baseline of government-imposed inequality." ****2248** *Ante*, at 2187. He also argues that race can be used if it satisfies strict scrutiny more broadly, and he considers compelling interests those that prevent anarchy, curb violence, and segregate prisoners. *Ante*, at 2189 - 2190. Thus, although Justice THOMAS at times suggests that the Constitution only permits "directly remedial" measures that benefit "identified victims of discrimination," *ante*, at 2186, he agrees that the Constitution tolerates a much wider range of race-conscious measures.

***357** In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, *ante*, at 2167, even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. *Fisher II*, 579 U.S. at 382, 136 S.Ct. 2198; see, *e.g.*, *UNC*, 567 F.Supp.3d at 598 ("the [university's admissions policy] repeatedly cites Supreme Court precedent as guideposts").[33] At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level ***358** of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447, 454, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (ROBERTS, C. J., for the Court); see also, *e.g.*, *Ramirez* v. *Collier*, 595 U. S. ——, ——, 142 S.Ct. 1264, 1281, 212 L.Ed.2d 262 (2022) (ROBERTS, C. J., for the Court) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States v. Alvarez*, 567 U.S. 709, 725, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion)

("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although the Members of this majority pay lip service to respondents' "commendable" ****2249** and "worthy" racial diversity goals, *ante*, at 2166 – 2167, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2443 (dissenting opinion).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*, at 2172 – 2174. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. 438 U.S. at 311–315, 98 S.Ct. 2733. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, see *supra*, at 2232 – 2233, that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been ***359** working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "advantages" underrepresented minority students "at the expense of" other students. *Ante*, at 2169.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, ***360** applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." *Harvard II*, 980 F.3d at 171 (noting also that "SFFA does not challenge the admission of this large group"). ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. *Ibid.* By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are ****2250** Black, and 12.6% are Latino. *Ibid.* Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." *Ibid.* Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, see *supra*, at 2234 – 2237, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity

and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. *Ante*, at 2169. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate ***361** against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*, at 2175.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. *Supra*, at 2225 – 2234. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King, "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325.[34]

****2251** By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized ***362** consideration" of the whole person. *Id.*, at 334, 123 S.Ct. 2325. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves. For example, Rimel Mwamba, a Black UNC alumna, testified that it was "really important" that UNC see who she is "holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing." 2 App. in No. 21–707, p. 1033. Itzel Vasquez-Rodriguez, who identifies as Mexican-American of Cora descent, testified that her ethnoracial identity is a "core piece" of who she is and has impacted "every experience" she has had, such that she could not explain her "potential contributions to Harvard without any reference" to it. 2 App. in No. 20–1199, at 906, 908. Sally Chen, a Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was "really fundamental to explaining who" she is. *Id.*, at 968–969. Thang Diep, a Harvard alumnus, testified that his Vietnamese identity was "such a big part" of himself that he needed to discuss it in his application. *Id.*, at 949. And Sarah Cole, a Black Harvard alumna, emphasized that "[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, no part of [her] life that has been untouched by [her] race." *Id.*, at 932.

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits ***363** universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*, at 2176. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 2247 – 2249. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante*, at 2170, 2175 - 2176; see also *ante*, at 2169, n. 6 (claiming without support that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants"). The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor.

Grutter, 539 U.S. at 334, 123 S.Ct. 2325; see Brief for Students and Alumni of Harvard College as *Amici Curiae* 15–17 (Harvard College Brief) (describing how ****2252** the dozens of application files in the record "uniformly show that, in line with Harvard's 'whole-person' admissions philosophy, Harvard's admissions officers engage in a highly nuanced assessment of each applicant's background and qualifications"). After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law ***364** applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*, at 2169 - 2170.

It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah v. Strieff*, 579 U.S. 232, 254, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) (SOTOMAYOR, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood ... people don't see [him] as someone that is relatively affluent; they see [him] as a black man." 2 App. in No. 21–707, at 951–952.

The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [respondents'] mission, and one that [they] cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority ***365** viewpoint' but rather a variety of viewpoints among minority students." *Id.*, at 319–320, 123 S.Ct. 2325. By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. *UNC*, 567 F.Supp.3d at 643; see, *e.g.*, 2 App. in No. 21–707, at 975–976 (Laura Ornelas, a UNC alumna, testifying that her Latina identity, socioeconomic status, ****2253** and first-generation college status are all important but different "parts to getting a full picture" of who she is and how she "see[s] the world"). At SFFA's own urging, those efforts remain constitutionally permissible. See Brief for Petitioner 81–86 (emphasizing "race-neutral" alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools); see also *ante*, at 2203 - 2204, 2204, 2205 - 2206 (THOMAS, J., concurring) (arguing universities can consider "[r]ace-neutral policies" similar to those adopted in States such as California and Michigan, and that universities can consider "status as a first-generation college applicant," "financial means," and "generational inheritance or otherwise"); *ante*, at 2225 (KAVANAUGH, J., concurring) (citing SFFA's briefs and concluding that universities can use "race-neutral" ***366** means); *ante*, at 2215, n. 4 (GORSUCH, J., concurring) ("recount[ing] what SFFA has argued every step of the way" as to "race-neutral tools").

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education. Such a

system "would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class." *Fisher II*, 579 U.S. at 386, 136 S.Ct. 2198. A myopic focus on academic ratings "does not lead to a diverse student body." *Ibid.*[35]

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." *Ante*, at 2166 - 2167, 2168, 2175 - 2176. How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious ***367** plans fail. Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies with no " 'specified percentage[s]' " and no "specific number[s] firmly in mind." *Grutter*, 539 U.S. at 324, 335, 123 S.Ct. 2325. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render ****2254** strict scrutiny " 'fatal in fact.' " *Id.*, at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc.*, 515 U.S. at 237, 115 S.Ct. 2097). Indeed, the Court gives the game away when it holds that, to the extent respondents are actually measuring their diversity objectives with any level of specificity (for example, with a "focus on numbers" or specific "numerical commitment"), their plans are unconstitutional. *Ante*, at 2171; see also *ante*, at 2191 (THOMAS, J., concurring) ("I highly doubt any [university] will be able to" show a "measurable state interest").

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." *Ante*, at 2167 - 2168. To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. See, *e.g.*, 62 Fed. Reg. 58786–58790 (1997). Surely, not all " 'federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies' " that flow from census data collection, *Department of Commerce* v. *New York*, 588 U. S. ——, ——, 139 S.Ct. 2551, 2561, 204 L.Ed.2d 978 (2019), are constitutionally suspect.

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a ***368** higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. See *Harvard I*, 397 F.Supp.3d at 137; *UNC*, 567 F.Supp.3d at 596. To the extent students need to convey additional information, students can select subcategories or provide more detail in their personal statements or essays. See *Harvard I*, 397 F.Supp.3d at 137. Students often do so. See, *e.g.*, 2 App. in No. 20–1199, at 906–907 (student respondent discussing her Latina identity on her application); *id.*, at 949 (student respondent testifying he "wrote about [his] Vietnamese identity on [his] application"). Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.[36]

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 2170 – 2173. This new durational requirement is also not grounded in law, facts, or common ****2255** sense. ***369** *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U.S. at 343, 123 S.Ct. 2325. As even SFFA acknowledges, those remarks were

nothing but aspirational statements by the *Grutter* Court. Tr. of Oral Arg. in No. 21707, p. 56.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years. *Grutter*, according to the majority, requires that universities identify a specific "end point" for the use of race. *Ante*, at 2172. Justice KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of 2028" or "the college class of 2032." *Ante*, at 2224, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vaccum, as the Court suggests. *Id.*, at 342, 123 S.Ct. 2325. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Ibid.* *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop." *Ibid.* That is precisely how this Court has previously interpreted *Grutter*'s command. See *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies").

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded in the need to ensure that race is "employed no more broadly than the interest demands." ***370** 539 U.S. at 343, 123 S.Ct. 2325. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. See *supra*, at 2234 – 2239. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.[37]

Harvard and UNC engage in the ongoing review that the Court's precedents demand. They "use [their] data to scrutinize ****2256** the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary." *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198. The Court holds, however, that respondents' attention to numbers amounts to unconstitutional racial balancing. *Ante*, at 2170 – 2172. But " '[s]ome attention to numbers' " is both necessary and permissible. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting ***371** *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733). Universities cannot blindly operate their limited race-conscious programs without regard for any quantitative information. "Increasing minority enrollment [is] instrumental to th[e] educational benefits" that respondents seek to achieve, *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198, and statistics, data, and numbers "have some value as a gauge of [respondents'] ability to enroll students who can offer underrepresented perspectives." *Id.*, at 383–384, 136 S.Ct. 2198. By removing universities' ability to assess the success of their programs, the Court obstructs these institutions' ability to meet their diversity goals.

5

Justice THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 2197. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (concurring opinion). Justice THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice THOMAS relies, *ante*, at 2197 – 2198, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae* 3, 9–25. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more

selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students —conclusions directly contrary to mismatch." *Id.*, at 7–9 (collecting studies). ***372** This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

Justice THOMAS claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante*, at 2198, n. 8. That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.*, at 6 ("economists should be very ****2257** skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as Justice THOMAS seems to recognize.

Citing nothing but his own long-held belief, Justice THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.' " *Ante*, at 2198 (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment)). Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008); see, *e.g.*, *id.*, at 1343–1344 (study of seven law schools showing that stigma results from "racial stereotypes that have ***373** attached historically to different groups, regardless of affirmative action's existence"). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by " 'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.' " 347 U.S. at 494, 74 S.Ct. 686. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. These two uses of race are not created equal. They are not "equally objectionable." *Id.*, at 327, 123 S.Ct. 2325.

Relatedly, Justice THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 2201. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but Justice THOMAS points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are ***374** misguided because those spaces allow students "to come together ... to deal with intellectual, emotional, and social challenges").

Citing no evidence, Justice THOMAS also suggests that race-conscious admissions programs discriminate against Asian American students. *Ante*, at 2199 – 2200. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante*, at 2199. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F.3d at 196; see Brief for ****2258** Professors of Economics as *Amici Curiae* 24. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. Justice THOMAS points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[38] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F.3d at 195, n. 34, 202; see *id.*, at 195–204.

***375** There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 2233 - 2234. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F.3d at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F.Supp.3d at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*, at 195. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." AALDEF Brief 4–14. Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences." Harvard College Brief 23.

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F.3d at 198.[39] By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. See AALDEF Brief 27; Brief for 25 Diverse, California-Focused Bar Associations et al. as *Amici Curiae* 19–20, 23. At bottom, race-conscious ***376** admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, Justice THOMAS belies reality by suggesting that "experts and elites" ****2259** with views similar to those "that motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*, at 2197. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. See *supra*, at 2250 – 2251; see also *infra*, at 2260 – 2262 (discussing numerous *amici* from many sectors of society supporting respondents' policies). Not a single student—let alone any racial minority —affected by the Court's decision testified in favor of SFFA in these cases.

C

In its "radical claim to power," the Court does not even acknowledge the important reliance interests that this Court's precedents have generated. *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2346 (dissenting opinion). Significant rights and expectations will be affected by today's decision nonetheless. Those interests supply "added force" in favor of *stare decisis*. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991).

Students of all backgrounds have formed settled expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world." Brief for Respondent-Students in No. 21–707, at 45; see Harvard College Brief 6–11 (collecting student testimony).

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents. "Universities have designed courses that draw on the benefits of a diverse student body," "hired faculty whose research is enriched by the diversity of the student body," and "promoted their learning environments to prospective students ***377** who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds." Brief for Respondent in No. 20–1199, at 40–41 (internal quotation marks omitted). Universities also have "expended vast financial and other resources" in "training

thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions." Brief for University Respondents in No. 21707, p. 44. Yet today's decision abruptly forces them "to fundamentally alter their admissions practices." *Id.*, at 45; see also Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 25–26; Brief for Amherst College et al. as *Amici Curiae* 23–25 (Amherst Brief). As to Title VI in particular, colleges and universities have relied on *Grutter* for decades in accepting federal funds. See Brief for United States as *Amicus Curiae* in No. 20–1199, p. 25 (United States Brief); Georgetown Brief 16.

The Court's failure to weigh these reliance interests "is a stunning indictment of its decision." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2347 (dissenting opinion).

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County v. Holder*, 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

****2260** Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented ***378** minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. See *Schuette*, 572 U.S. at 384–390, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting statistics from States that have banned the use of race in college admissions); see also Amherst Brief 13 (noting that eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s).

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups "dropped by 50% or more." *Id.*, at 4, 12. At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. *Id.*, at 12–13. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. *Id.*, at 13. To this day, the student population at California universities still "reflect[s] a persistent inability to increase opportunities" for all racial groups. *Id.*, at 23. For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. *Ibid*. Latinos composed about 15% of freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates. *Id.*, at 24; see also Brief for University of Michigan as *Amicus Curiae* 21–24 (noting similar trends at the University of Michigan from 2006, the last admissions cycle before Michigan's ban on race-conscious ***379** admissions took effect, through present); *id.*, at 24–25 (explaining that the university's "experience is largely consistent with other schools that do not consider race as a factor in admissions," including, for example, the University of Oklahoma's most prestigious campus).

The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse

forces." *Id.*, at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training ****2261** Corps (ROTC) programs and educate students who go on to become officers." *Ibid.* Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and performance of the Nation's military" because it fueled "perceptions ***380** of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g.*, R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 2166, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can "identify, understand, and respond to perspectives" in "our increasingly diverse communities." Brief for Southern Governors as *Amici Curiae* 5–8 (Southern Governors Brief). Likewise, increasing the number of students from underrepresented backgrounds who join "the ranks of medical professionals" improves "healthcare access and health outcomes in medically underserved communities." Brief for Massachusetts et al. as *Amici Curiae* 10; see Brief for Association of American Medical Colleges et al. as *Amici Curiae* 5 (noting also that *all* physicians become better practitioners when they learn in a racially diverse environment). So too, greater diversity within the teacher workforce improves student academic achievement in primary public schools. Brief ***381** for Massachusetts et al. as *Amici Curiae* 15–17; see Brief for American Federation of Teachers as *Amicus Curiae* 8 ("[T]here are few professions with broader social impact than teaching"). A diverse pipeline of college graduates also ensures a diverse legal profession, which demonstrates that "the justice system serves the public in a fair and inclusive manner." Brief for American Bar Association as *Amicus Curiae* 18; see also Brief for Law Firm Antiracism Alliance as *Amicus Curiae* 1, 6 (more than 300 law firms in all 50 States supporting race-conscious college admissions in light of the "influence and power" that lawyers wield "in the American system of government").

Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy. Brief for Major American Business Enterprises as *Amici Curiae* 5–27. A ****2262** diverse pipeline of college graduates also improves research by reducing bias and increasing group collaboration. Brief for Individual Scientists as *Amici Curiae* 13–14. It creates a more equitable and inclusive media industry that communicates diverse viewpoints and perspectives. Brief for Multicultural Media, Telecom and Internet Council, Inc., et al. as *Amici Curiae* 6. It also drives innovation in an increasingly global science and technology industry. Brief for Applied Materials, Inc., et al. as *Amici Curiae* 11–20.

Today's decision further entrenches racial inequality by making these pipelines to leadership roles less diverse. A college degree, particularly from an elite institution, carries with it the benefit of powerful networks and the opportunity for socioeconomic mobility. Admission to college is therefore often the entry ticket to top jobs in workplaces where important decisions are made. The overwhelming majority ***382** of Members of Congress have a college degree.[40] So do most business leaders.[41] Indeed, many state and local leaders in North Carolina attended college in the UNC system. See Southern Governors Brief 8. More than half of judges on the North Carolina Supreme Court and Court of Appeals graduated from the UNC system, for example, and nearly a third of the Governor's cabinet attended UNC. *Ibid.* A less diverse pipeline to these top jobs accumulates wealth

and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. "[G]ross disparity in representation" leads the public to wonder whether they can ever belong in our Nation's institutions, including this one, and whether those institutions work for them. Tr. of Oral Arg. in No. 21–707, p. 171 ("The Court is going to hear from 27 advocates in this sitting of the oral argument calendar, and two are women, even though women today are 50 percent or more of law school graduates. And I think it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?" (remarks of Solicitor General Elizabeth Prelogar)).[42]

***383** By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, ****2263** reserving "positions of influence, affluence, and prestige in America" for a predominantly white pool of college graduates. *Bakke*, 438 U.S. at 401, 98 S.Ct. 2733 (opinion of Marshall, J.). At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial ***384** segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.[*]

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution ***385** (as has long been evident to historians, sociologists, and policymakers alike).

Justice SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. ****2264** I write separately to expound upon the universal benefits of considering race in this context,

in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their ***386** State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–388, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help ... the Rebels might have succeeded in breaking up the Union."[2] After the war, Senator John Sherman defended the proposed Fourteenth ****2265** Amendment in a manner that encapsulated ***387** our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[3]

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott v. Sandford*, 19 How. 393, 60 U.S. 393, 15 L.Ed. 691 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society.[4] Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] ... in favor of the negro."[5]

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all ... keep up this discrimination, and crush to death the hated freedmen."[6] And this Court facilitated that retrenchment.[7] Not just in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding."[8] Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), our predecessors on this ***388** Court invalidated Congress's attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875,

lecturing that "there must be some stage ... when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id.*, at 25, 3 S.Ct.18. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61, 3 S.Ct. 18 (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers.[9] No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security.[10] Still, White southerners often "simply refused to sell land to blacks," even when not ****2266** selling was economically foolish.[11] To bolster private exclusion, States sometimes passed laws forbidding such sales.[12] The inability to build wealth through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.[13]

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the ***389** progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords.[14] Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers.[15] A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere.[16] And when statutes did not ensure compliance, state-sanctioned (and private) violence did.[17]

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation.[18] Meanwhile, as Jim Crow ossified, the Federal Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure.[19] Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.[20]

***390** Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War.[21] Like clockwork, American cities responded with racially exclusionary zoning (and similar policies).[22] As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.[23] Nor did migration ****2267** make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged.[24] With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.[25]

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example, the federal Home Owners' Loan Corporation (HOLC), created in 1933.[26] HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place.[27] Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[28] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation."[29] Green meant safe; red ***391** meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.[30]

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk.[31] But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness.[32] No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible

for FHA intervention on racial grounds.[33] The Veterans Administration operated similarly.[34]

One more example: the Federal Home Loan Bank Board "chartered, insured, and regulated savings and loan associations from the early years of the New Deal."[35] But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).[36]

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans."[37] Thus, based on their race, Black people were "[l]ocked out of the greatest ****2268** mass-based ***392** opportunity for wealth accumulation in American history."[38]

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.[39]

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of ... middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth.[42] Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines.[43] And I could not possibly discuss every way in ***393** which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).[44]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U.S. at 61, 3 S.Ct. 18 (dissenting opinion).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median ****2269** wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees ***394** have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points.[51] Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.[52]

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State.[53] Black Americans in their late twenties are about half as ***395** likely as their White counterparts to have college degrees.[54] And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.[55]

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.[56] Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of ****2270** 2022, only six are Black).[57] Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.[58]

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children —"irreversible" contamination working irremediable harm on developing brains.[59] Black (and Latino) children with heart conditions are more likely to die than their White counterparts.[60] Race-linked mortality-rate disparity has also persisted, and is highest among infants.[61]

***396** So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates.[62] Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group."[63] Black mothers are up to four times more likely than White mothers to die as a result of childbirth.[64] And COVID killed Black Americans at higher rates than White Americans.[65]

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma."[66] These and other disparities —the predictable result of opportunity disparities—lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans.[67] That is 80 million excess years of life lost from just 1999 through 2020.[68]

Amici tell us that "race-linked health inequities pervad[e] nearly every index of human health" resulting "in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics."[69] Meanwhile—tying health and wealth together—while she lays dying, the typical Black American "pay[s] more for medical care and incur[s] more medical debt."[70]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to ***397** graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

****2271** Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship.[71] Five generations ago, the North Carolina Red Shirts finished the job.[72] Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against " 'integration for integration's sake' "—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains ***398** *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information.[76] But applicants are *not* required to submit demographic information like gender and race.[77] UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[78]

Drawing on those 40 criteria, a UNC staff member evaluating John and James would consider, with respect to each, his "engagement outside the classroom; persistence of commitment; demonstrated capacity ****2272** for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests."[79] Relevant, too, would be his "relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of ***399** parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or step-child of Carolina alumni."[80] The list goes on. The process is holistic, through and through.

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity.[81] And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application."[82] Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.[83]

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based ***400** quotas in UNC's holistic review process.[85] In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.[86]

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally.[87] And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents."[88]

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced).[89] ****2273** And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there.[90] A reader of today's majority opinion could be forgiven for misunderstanding how UNC's program really works, or for missing that, under UNC's holistic review process, a White student could receive a diversity plus while a Black student might not.[91]

***401** UNC does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious institution, and thus merits admission.[92] And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit. In this way, UNC is able to value what

it means for James, whose ancestors received no race-based advantages, to make himself competitive for admission to a flagship school nevertheless. Moreover, recognizing this aspect of James's story does not preclude UNC from valuing John's legacy or any obstacles that his story reflects.

So, to repeat: UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment."[93] It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation ***402** White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth ****2274** plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. For example, as the District Court found, a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants.[94] That, if ***403** nothing else, is indicative of a genuinely holistic process; it is evidence that, both in theory and in practice, UNC recognizes that race—like any other aspect of a person—may bear on where both John and James start the admissions relay, but will not fully determine whether either eventually crosses the finish line.

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

***404** To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better. ****2275** [95] But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA's complaint about the "indefinite" use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

Accordingly, while there are many perversities of today's judgment, the majority's failure to recognize that programs like UNC's carry with them the seeds of their own destruction is surely one of them. The ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps discussed in Part I, *supra*, so that he, his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows

that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic.[96] Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand ***405** each other's stories, which *amici* tell us improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.[97]

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients' pain tolerance and treat them accordingly (including, for example, prescribing them appropriate amounts of pain medication).[98] For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die.[99] Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC's—which, beyond diversifying the medical profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.[100]

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to ****2276** their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality. ***406** [101] The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates).[102]

Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this. The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation. Surely that is progress for a university that once engaged in the kind of patently offensive race-dominated admissions process that the majority decries.

With its holistic review process, UNC now treats race as merely one aspect of an applicant's life, when race played a totalizing, all-encompassing, and singularly determinative role for applicants like James for most of this country's history: No matter what else was true about him, being Black meant he had no shot at getting in (the ultimate race-linked uneven playing field). Holistic programs like UNC's reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all. Such programs also reflect universities' clear-eyed optimism that, one day, race *will* no longer matter.

So much upside. Universal benefits ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race), and that thereby facilitate diverse student populations. Once trained, those UNC students who have thrived in the university's diverse learning ***407** environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations. Fortunately, UNC and other institutions of higher learning are already on this beneficial path. In fact, all that they have needed to continue moving this country forward (toward full achievement of our Nation's founding promises) is for this Court to get out of the way and let them do their jobs. To our great detriment, the majority cannot bring itself to do so.

B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. See, *e.g.*, *ante*, at 2159 - 2160. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define ****2277** our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not

make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of ***408** race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.[103]

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

***409**
* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, " 'placing us where we could reap the fruit of our own labor, and take care of ourselves ... to have land, and turn it and till it by our own labor.' "[104]

Today's gaps exist because that freedom was denied far longer than it was ever ****2278** afforded. Therefore, as Justice SOTOMAYOR correctly and amply explains, UNC's holistic review program pursues a righteous end—legitimate " 'because it is defined by the Constitution itself. The end is the maintenance of freedom.' " *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–444, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes ***410** that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—

pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-class educational institutions about who they need to bring onto their campuses ***411** right now to benefit every American, no matter their race.[105]

****2279** The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[106] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). *Post*, at 2274 (dissenting opinion); see also 3 App. in No. 21–707, pp. 1078–1080. It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic [admissions] process," as Justice JACKSON contends. *Post*, at 2274. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. 3 App. in No. 21–707, at 1078–1083. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. *Ibid.* The dissent does not dispute the accuracy of these figures. See *post*, at 2774, n. 94 (opinion of JACKSON, J.). And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. *Post*, at 2273.

The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)." (emphasis added)); see also 4 App. in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

2 Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

3 The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), in the infamous case *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217, 223, 65 S.Ct. 193. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 585 U. S. ——, ——, 138 S.Ct. 2392, 2448, 201 L.Ed.2d

775 (2018). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 236, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (internal quotation marks omitted).

The principal dissent, for its part, claims that the Court has also permitted "the use of race when that use burdens minority populations." *Post*, at 2246 (opinion of SOTOMAYOR, J.). In support of that claim, the dissent cites two cases that have nothing to do with the Equal Protection Clause. See *ibid.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (Fourth Amendment case), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (another Fourth Amendment case)).

4 The United States as *amicus curiae*contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

5 For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post*, at 2276, 2277 - 2278 (opinion of JACKSON, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

6 Justice JACKSON contends that race does not play a "determinative role for applicants" to UNC. *Post*, at 2276. But even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year. *Post*, at 2243, n. 28 (opinion of SOTOMAYOR, J.); see also *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Dec. 21, 2020), ECF Doc. 233, at 23–27 (UNC expert testifying that race explains 1.2% of in state and 5.1% of out of state admissions decisions); 3 App. in No. 21–707, at 1069 (observing that UNC evaluated 57,225 in state applicants and 105,632 out of state applicants from 2016–2021). The suggestion by the principal dissent that our analysis relies on extra-record materials, see *post*, at 2241,, n. 25 (opinion of SOTOMAYOR, J.), is simply mistaken.

7 The principal dissent claims that "[t]he fact that Harvard's racial shares of admitted applicants varies relatively little ... is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Post*, at 2244 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise racial preferences year in and year out to maintain the unyielding demographic composition of its class. The dissent is thus left to attack the numbers themselves, arguing they were "handpicked" "from a truncated period." *Ibid.*, n. 29 (opinion of SOTOMAYOR, J.). As supposed proof, the dissent notes that the share of Asian students at Harvard varied significantly from 1980 to 1994—a 14-year period that ended nearly three decades ago. 4 App. in No. 20–1199, at 1770. But the relevance of that observation—handpicked and truncated as it is—is lost on us. And the dissent does not and cannot dispute that the share of black and Hispanic students at Harvard—"the primary beneficiaries" of its race-based admissions policy—has remained consistent for decades. 397 F.Supp.3d at 178; 4 App. in No. 20–1199, at 1770. For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.

8 Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 2237 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.).

9 The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 2164 - 2165. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2221 - 2223 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly

overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 201199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

1 In fact, Indians would not be considered citizens until several decades later. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (declaring that all Indians born in the United States are citizens).

2 There is "some support" in the history of enactment for at least "four interpretations of the first section of the proposed amendment, and in particular of its Privileges [or] Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states." D. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (citing sources). Notably, those four interpretations are all colorblind.

3 UNC asserts that the Freedmen's Bureau gave money to Berea College at a time when the school sought to achieve a 50–50 ratio of black to white students. Brief for University Respondents in No. 21707, p. 32. But, evidence suggests that, at the relevant time, Berea conducted its admissions without distinction by race. S. Wilson, Berea College: An Illustrated History 2 (2006) (quoting Berea's first president's statement that the school "would welcome 'all races of men, without distinction' ").

4 The Court has remarked that Title VI is coextensive with the Equal Protection Clause. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause"). As Justice GORSUCH points out, the language of Title VI makes no allowance for racial considerations in university admissions. See *post*, at 2208 – 2209 (concurring opinion). Though I continue to adhere to my view in *Bostock* v. *Clayton County*, 590 U. S. ——, —— – ——, 140 S.Ct. 1731, 1754–1784, 207 L.Ed.2d 218 (2020) (ALITO, J., dissenting), I agree with Justice GORSUCH's concurrence in this case. The plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.

5 In fact, the Massachusetts Supreme Court in 1783 declared that slavery was abolished in Massachusetts by virtue of the newly enacted Constitution's provision of equality under the law. See *The Quock Walker Case*, in 1 H. Commager, Documents of American History 110 (9th ed. 1973) (Cushing, C. J.) ("[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty .... And upon this ground our Constitution of Government ... sets out with declaring that all men are born free and equal ... and in short is totally repugnant to the idea of being born slaves").

6 Briefing in a case consolidated with *Brown* stated the colorblind position forthrightly: Classifications "[b]ased [s]olely on [r]ace or [c]olor" "can never be" constitutional. Juris. Statement in *Briggs* v. *Elliott*, O. T. 1951, No. 273, pp. 20–21, 25, 29; see also Juris. Statement in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action.... For this reason alone, we submit, the state separate school laws in this case must fall").

7 Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief "); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). In fact, Justice Marshall viewed Justice Harlan's *Plessy* dissent as "a 'Bible' to which he turned during his most depressed moments"; no opinion "buoyed Marshall more in his pre-*Brown* days." In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley).

8 Justice SOTOMAYOR rejects this mismatch theory as "debunked long ago," citing an *amicus* brief. *Post*, at 2256. But, in 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was "fairly convincing." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Tradeoff, 54 J. Econ. Lit. 3, 20 (Arcidiacono & Lovenheim). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. See Brief for Richard Sander as *Amicus Curiae* 16–19 (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes); accord, Arcidiacono & Lovenheim 20 ("Our hope is that better datasets soon will become available").

9 Justice SOTOMAYOR apparently believes that race-conscious admission programs can somehow increase the chances that members of certain races (blacks and Hispanics) are admitted without decreasing the chances of admission for members of other races (Asians). See *post*, at 2257 – 2258. This simply defies mathematics. In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way, see *post*, at 2277 – 2278 (opinion of JACKSON, J.) (defending such a system), has discriminated based on race to the benefit of some races and the detriment of others. And, the universities here admit that race is determinative in at least some of their admissions decisions. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d 580, 633 (MDNC 2021); see also 397 F.Supp.3d 126, 178 (Mass. 2019) (noting that, for Harvard, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants"); *ante*, at 2156, n. 1 (describing the role that race plays in the universities' admissions processes).

10 Even beyond Asian Americans, it is abundantly clear that the university respondents' racial categories are vastly oversimplistic, as the opinion of the Court and Justice GORSUCH's concurrence make clear. See *ante*, at 2167 – 2168; *post*, at 2209 – 2211 (opinion of GORSUCH, J.). Their "affirmative action" programs do not help Jewish, Irish, Polish, or other "white" ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese-American citizens interned during World War II.

11 Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.

12 Such black achievement in "racially isolated" environments is neither new nor isolated to higher education. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). As I have previously observed, in the years preceding *Brown*, the "most prominent example of an exemplary black school was Dunbar High School," America's first public high school for black students. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 763, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (concurring opinion). Known for its academics, the school attracted black students from across the Washington, D. C., area. "[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan." Sowell, Education: Assumptions Versus History, at 29. Dunbar produced the first black General in the U. S. Army, the first black Federal Court Judge, and the first black Presidential Cabinet member. A. Stewart, First Class: The Legacy of Dunbar 2 (2013). Indeed, efforts towards racial integration ultimately precipitated the school's decline. When the D. C. schools moved to a neighborhood-based admissions model, Dunbar was no longer able to maintain its prior admissions policies—and "[m]ore than 80 years of quality education came to an abrupt end." T. Sowell, Wealth, Poverty and Politics 194 (2016).

1 See also A. Qin, Aiming for an Ivy and Trying to Seem 'Less Asian,' N. Y. Times, Dec. 3, 2022, p. A18, col. 1 ("[T]he rumor that students can appear 'too Asian' has hardened into a kind of received wisdom within many Asian American communities," and "college admissions consultants [have] spoke[n] about trying to steer their Asian American clients away from so-called typically Asian activities such as Chinese language school, piano and Indian classical instruments.").

2 Though the matter did not receive much attention in the proceedings below, it appears that the Common Application has evolved in recent years to allow applicants to choose among more options to describe their backgrounds. The decisions below do not disclose how much Harvard or UNC made use of this further information (or whether they make use of it now). But neither does it make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.

3 See also E. Bazelon, Why Is Affirmative Action in Peril? One Man's Decision, N. Y. Times Magazine, Feb. 15, 2023, p. 41 ("In the Ivy League, children whose parents are in the top 1 percent of the income distribution are 77 times as likely to attend as those whose parents are in the bottom 20 percent of the income bracket."); *ibid.* ("[A] common critique ... is that schools have made a bargain with economic elites of all races, with the exception of Asian Americans, who are underrepresented compared with their level of academic achievement.").

4 The principal dissent chides me for "reach[ing] beyond the factfinding below" by acknowledging SFFA's argument that other universities have employed various race-neutral tools. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.). Contrary to the dissent's suggestion, however, I do not purport to find facts about those practices; all I do here is recount what SFFA has argued every step of the way. See, *e.g.,* Brief for Petitioner 55, 66–67; 1 App. in No. 20–1199, pp. 415–416, 440; 2 App. in No. 21–707, pp. 551–552. Nor, of course, is it somehow remarkable to acknowledge the parties' arguments. The principal dissent itself recites SFFA's arguments about Harvard's and other universities' practices too. See, *e.g., post,* at 2241 – 2242, 2252 – 2253 (opinion of SOTOMAYOR, J.). In truth, it is the dissent that reaches beyond the factfinding below when it argues from studies recited in a dissenting opinion in a different case decided almost a decade ago. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.); see also *post,* at 2241 – 2242 (opinion of SOTOMAYOR, J.) (further venturing beyond the trial records to discuss data about employment, income, wealth, home ownership, and healthcare).

5 See Brief for Defense of Freedom Institute for Policy Studies as *Amicus Curiae* 11 (recruited athletes make up less than 1% of Harvard's applicant pool but represent more than 10% of the admitted class); P. Arcidiacono, J. Kinsler, & T. Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 141, n. 17 (2021) (recruited athletes were the only applicants admitted with the lowest possible academic rating and 79% of recruited athletes with the next lowest rating were admitted compared to 0.02% of other applicants with the same rating).

6 The principal dissent suggests "some Asian American applicants are actually advantaged by Harvard's use of race." *Post,* at 2258 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). What is the dissent's basis for that claim? The district court's finding that "considering applicants' race *may* improve the admission chances of *some* Asian Americans *who connect their racial identities with particularly compelling narratives*." 397 F.Supp.3d at 178 (emphasis added). The dissent neglects to mention those key qualifications. Worse, it ignores completely the district court's further finding that "*overall*" Harvard's race-conscious admissions policy "results in fewer Asian American[s] ... being admitted." *Ibid*. (emphasis added). So much for affording the district court's "careful factfinding" the "deference it [is] owe[d]." *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.).

7 See also, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67, 84, 91; Tr. of Oral Arg. in No. 21–707, at 70–71, 81, 84, 91–92, 110.

8 Messages among UNC admissions officers included statements such as these: "[P]erfect 2400 SAT All 5 on AP one B in 11th [grade]." "Brown?!" "Heck no. Asian." "Of course. Still impressive."; "If it[']s brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."; "I just opened a brown girl who's an 810 [SAT]."; "I'm going through this trouble because this is a bi-racial (black/white) male."; "[S]tellar academics for a Native Amer[ican]/African Amer[ican] kid." 3 App. in No. 21–707, pp. 1242–1251.

9 Left with no reply on the statute or its application to the facts, the principal dissent suggests that it violates "principles of party presentation" and abandons "judicial restraint" even to look at the text of Title VI. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). It is a bewildering suggestion. SFFA sued Harvard and UNC under Title VI. And when a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them when Congress enacted them. *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1738–1739, 207 L.Ed.2d 218 (2020). To be sure, parties are free to frame their arguments. But they are not free to stipulate to a statute's meaning and no party may "waiv[e]" the proper interpretation of the law by "fail[ing] to invoke it." *EEOC v. FLRA*, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (*per curiam*) (internal quotation marks omitted); see also *Young v. United States*, 315 U.S. 257, 258–259, 62 S.Ct. 510, 86 L.Ed. 832 (1942).

1 The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that *Grutter*'s 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set

forth in *Grutter*, neither university embraced *any* temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions. *Ante,* at 2170 – 2173.

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

1 As Justice THOMAS acknowledges, the HBCUs, including Howard University, account for a high proportion of Black college graduates. *Ante*, at 2206 – 2207 (concurring opinion). That reality cannot be divorced from the history of anti-Black discrimination that gave rise to the HBCUs and the targeted work of the Freedmen's Bureau to help Black people obtain a higher education. See HBCU Brief 13–15.

2 By the time the Fourteenth Amendment was ratified by the States in 1868, "education had become a right of state citizenship in the constitution of every readmitted state," including in North Carolina. D. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1089 (2019); see also Brief for Black Women Scholars as *Amici Curiae* 9 ("The herculean efforts of Black reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education").

3 The majority suggests that "it required a Second Founding to undo" programs that help ensure racial integration and therefore greater equality in education. *Ante*, at 2175. At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system. Cf. *Dred Scott v. Sandford*, 19 How. 393, 405, 60 U.S. 393, 15 L.Ed. 691 (1857). *Brown* and its progeny recognized the need to take affirmative, race-conscious steps to eliminate that system.

4 See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022) (hereinafter GAO Report).

5 G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

6 *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

7 GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

8 See also L. Clark, Barbed Wire Fences: The Structural Violence of Education Law, 89 U. Chi. L. Rev. 499, 502, 512–517 (2022); Albert Shanker Institute, B. Baker, M. DiCarlo, & P. Greene, Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity 17–19 (Apr. 2022).

9 See Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 6–15 (collecting sources).

10 GAO Report 7; see also Brief for Council of the Great City Schools as *Amicus Curiae* 11–14 (collecting sources).

11 See J. Okonofua & J. Eberhardt, Two Strikes: Race and the Disciplining of Young Students, 26 Psychol. Sci. 617 (2015) (a national survey showed that "Black students are more than three times as likely to be suspended or expelled as their White peers"); Brief for Youth Advocates and Experts on Educational Access as *Amici Curiae* 14–15 (describing investigation in North Carolina of a public school district, which found that Black students were 6.1 times more likely to be suspended than white students).

12 See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70) (showing that 59% of white students and 78% of Asian students have a parent with a bachelor's degree or higher, while the same is true for only 25% of Latino students and 33% of Black students).

13 R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, The Selection of Children From Low-Income Families into Preschool, 52 J. Developmental Psychology 11 (2016); A. Kenly & A. Klein, Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb, 24 J. African American Studies 130, 136 (2020).

14 Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

15 ProQuest Statistical Abstract of the United States: 2023, p. 402 (Table 622) (noting Black and Latino adults are more likely to be unemployed).

16 *Id.*, at 173 (Table 259).

17 A. McCargo & J. Choi, Closing the Gaps: Building Black Wealth Through Homeownership (2020) (fig. 1).

18 Dept. of Commerce, Census Bureau, Health Insurance Coverage in the United States: 2021, p. 9 (fig. 5); *id.*, at 29 (Table C–1), https://www.census.gov/library/publications/2022/demo/p60-278.html (noting racial minorities, particularly Latinos, are less likely to have health insurance coverage).

19 In 1979, prompted by lawsuits filed by civil rights lawyers under Title VI, the U. S. Department of Health, Education, and Welfare "revoked UNC's federal funding for its continued noncompliance" with *Brown*. 3 App. 1688; see *Adams v. Richardson*, 351 F.Supp. 636, 637 (DC 1972); *Adams v. Califano*, 430 F.Supp. 118, 121 (DC 1977). North Carolina sued the Federal Government in response, and North Carolina Senator Jesse Helms introduced legislation to block federal desegregation efforts. 3 App. 1688. UNC praised those actions by North Carolina public officials. *Ibid.* The litigation ended in 1981, after the Reagan administration settled with the State. See *North Carolina* v. *Department of Education*, No. 79–217–CIV–5 (EDNC, July 17, 1981) (Consent Decree).

20 See 1 App. 20–21 (campus climate survey showing *inter alia* that "91 percent of students heard insensitive or disparaging racial remarks made by other students"); 2 *id.*, at 1037 (Black student testifying that a white student called him "the N word" and, on a separate occasion at a fraternity party, he was "told that no slaves were allowed in"); *id.*, at 955 (student testifying that he was "the only African American student in the class," which discouraged him from speaking up about racially salient issues); *id.*, at 762–763 (student describing that being "the only Latina" made it "hard to speak up" and made her feel "foreign" and "an outsider").

21 The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. See *ante*, at 2156 - 2157, n. 2; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Brennan, J., concurring). Justice GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. *Ante*, at 2221. Because no party advances Justice GORSUCH's argument, see *ante*, at 2156 - 2157, n. 2, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 590 U. S. ——, ——, 140 S.Ct. 1575, 1578–1579, 206 L.Ed.2d 866 (2020). Indeed, Justice GORSUCH's approach calls for even more judicial restraint. If petitioner could prevail under Justice GORSUCH's statutory analysis, there would be no reason for this Court to reach the constitutional question. See *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*). In a statutory case, moreover, *stare decisis* carries "enhanced force," as it would be up to Congress to "correct any mistake it sees" with "our interpretive decisions." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). Justice GORSUCH wonders why the dissent, like the majority, does not "engage" with his statutory arguments. *Ante*, at 2215 - 2216. The answer is simple: This Court plays "the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). Petitioner made a strategic litigation choice, and in our adversarial system, it is not up to this Court to come up with "wrongs to right" on behalf of litigants. *Id.*, at 244, 128 S.Ct. 2559 (internal quotation marks omitted).

22 SFFA is a 501(c)(3) nonprofit organization founded after this Court's decision in *Fisher I*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). App. to Pet. for Cert. in No. 20–1199, p. 10. Its original board of directors had three self-appointed members: Edward Blum, Abigail Fisher (the plaintiff in *Fisher*), and Richard Fisher. See *ibid.*

23 Bypassing the Fourth Circuit's opportunity to review the District Court's opinion in the *UNC* case, SFFA sought certiorari before judgment, urging that, "[p]aired with *Harvard*," the *UNC* case would "allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution." Pet. for Cert. in No. 21–707, p. 27.

24 Generally speaking, top percentage plans seek to enroll a percentage of the graduating high school students with the highest academic credentials. See, *e.g.*, *Fisher II*, 579 U.S. at 373, 136 S.Ct. 2198 (describing the University of Texas' Top Ten Percent Plan).

25 SFFA and Justice GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Brief for Petitioner 85–86; *ante*, at 2214 - 2215. Data from those States disprove that theory. Institutions in those States experienced " 'an immediate and precipitous decline in the rates at which underrepresented-minority students applied ... were admitted ... and enrolled.' " *Schuette v. BAMN*, 572 U.S. 291, 384–390, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting); see *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. In addition, UNC "already engages" in race-neutral efforts focused on socioeconomic status, including providing "exceptional levels of financial aid" and "increased and targeted recruiting." *UNC*, 567 F.Supp.3d at 665.

Justice GORSUCH argues that he is simply "recount[ing] what SFFA has argued." *Ante*, at 2215, n. 4. That is precisely the point: SFFA's arguments were not credited by the court below. "[W]e are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Justice GORSUCH also suggests it is inappropriate for the dissent to respond to the majority by relying on materials beyond the findings of fact below. *Ante*, at 2215, n. 4. There would be no need for the dissent to do that if the majority stuck to reviewing the District Court's careful factfinding with the deference it owes to the trial court. Because the majority has made a different choice, the dissent responds.

26 SFFA also argues that Harvard discriminates against Asian American students. Brief for Petitioner 72–75. As explained below, this claim does not fit under *Grutter*'s strict scrutiny framework, and the courts below did not err in rejecting that claim. See *infra*, at 2257 – 2259, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

27 Justice GORSUCH suggests that only "applicants of certain races may receive a 'tip' in their favor." *Ante*, at 2212. To the extent Justice GORSUCH means that some races are not eligible to receive a tip based on their race, there is no evidence in the record to support this statement. Harvard "does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances." *Harvard I*, 397 F.Supp.3d 126, 190, n. 56 (Mass. 2019).

28 Relying on a single footnote in the First Circuit's opinion, the Court claims that Harvard's program is unconstitutional because it "has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard." *Ante*, at 2168. The Court of Appeals, however, merely noted that the United States, at the time represented by a different administration, argued that "absent the consideration of race, [Asian American] representation would increase from 24% to 27%," an 11% increase. *Harvard II*, 980 F.3d at 191, n. 29. Taking those calculations as correct, the Court of Appeals recognized that such an impact from the use of race on the overall makeup of the class is consistent with the impact that this Court's precedents have tolerated. *Ibid.*

The Court also notes that "race is determinative for at least some—if not many—of the students" admitted at UNC. *Ante*, at 2169. The District Court in the *UNC* case found that "race plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students." 567 F.Supp.3d 580, 634 (MDNC 2021). The limited use of race at UNC thus has a smaller effect than at Harvard and is also consistent with the Court's precedents. In addition, contrary to the majority's suggestion, such effect does not prove that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants to UNC each year." *Ante,* at 2169, n. 6. As the District Court found, UNC (like Harvard) "engages a highly individualized, holistic review of each applicant's file, which considers race flexibly as a 'plus factor' as one among many factors in its individualized consideration of each and every applicant." 567 F.Supp.3d at 662; see *id.,* at 658 (finding that UNC "rewards different kinds of diversity, and evaluates a candidate within the context of their lived experience"); *id.,* at 659 ("The parties stipulated, and the evidence shows, that readers evaluate applicants by taking into consideration dozens of criteria," and even SFFA's expert "concede[d] that the University's admissions process is

individualized and holistic"). Stated simply, race is not "a defining feature of any individual application." *Id.,* at 662; see also *infra*, at 2251 - 2252.

29 The majority does not dispute that it has handpicked data from a truncated period, ignoring the broader context of that data and what the data reflect. Instead, the majority insists that its selected data prove that Harvard's "precise racial preferences" "operate like clockwork." *Ante*, at 2171, n. 7. The Court's conclusion that such racial preferences must be responsible for an "unyielding demographic composition of [the] class," *ibid.*, misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same "unyielding demographic composition of [the] class." *Ibid.* That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court's inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

30 In the context of policies that "benefit rather than burden the minority," the Court has adhered to a strict scrutiny framework despite multiple Members of this Court urging that "the mandate of the Equal Protection Clause" favors applying a less exacting standard of review. *Schuette*, 572 U.S. at 373–374, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting cases).

31 The Court's "dictum" that Mexican appearance can be one of many factors rested on now-outdated quantitative premises. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (CA9 2000).

32 Justice KAVANAUGH agrees that the effects from the legacy of slavery and Jim Crow continue today, citing Justice Marshall's opinion in *Bakke*. *Ante*, at 2224 - 2225 (citing 438 U.S. at 395–402, 98 S.Ct. 2733). As explained above, Justice Marshall's view was that *Bakke* covered only a portion of the Fourteenth Amendment's sweeping reach, such that the Court's higher education precedents must be expanded, not constricted. See 438 U.S. at 395–402, 98 S.Ct. 2733 (opinion dissenting in part). Justice Marshall's reading of the Fourteenth Amendment does not support Justice KAVANAUGH's and the majority's opinions.

33 There is no dispute that respondents' compelling diversity objectives are "substantial, long-standing, and well documented." *UNC*, 567 F.Supp.3d at 655; *Harvard II*, 980 F.3d at 186–187. SFFA did not dispute below that respondents have a compelling interest in diversity. See *id.*, at 185; *Harvard I*, 397 F.Supp.3d at 133; Tr. of Oral Arg. in No. 21–707, p. 121. And its expert agreed that valuable educational benefits flow from diversity, including richer and deeper learning, reduced bias, and more creative problem solving. 2 App. in No. 21–707, p. 546. SFFA's counsel also emphatically disclaimed the issue at trial. 2 App. in No. 20–1199, p. 548 ("Diversity and its benefits are not on trial here").

34 The Court suggests that promoting the Fourteenth Amendment's vision of equality is a "radical" claim of judicial power and the equivalent of "pick[ing] winners and losers based on the color of their skin." *Ante*, at 2175. The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination"). Moreover, in ordering the admission of Black children to all-white schools "with all deliberate speed" in *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), this Court did not decide that the Black children should receive an "advantag[e] ... at the expense of" white children. *Ante*, at 2169. It simply enforced the Equal Protection Clause by leveling the playing field.

35 Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

36 The Court suggests that the term "Asian American" was developed by respondents because they are "uninterested" in whether Asian American students "are adequately represented." *Ante*, at 2167; see also *ante*, at 2209 - 2210 (GORSUCH,

J., concurring) (suggesting that "[b]ureaucrats" devised a system that grouped all Asian Americans into a single racial category). That argument offends the history of that term. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 9 (AALDEF Brief).

37 Justice KAVANAUGH's reading, in particular, is quite puzzling. Unlike the majority, which concludes that respondents' programs should have an end point, Justice KAVANAUGH suggests that *Grutter* itself has an expiration date. He agrees that racial inequality persists, *ante*, at 2224 - 2225, but at the same time suggests that race-conscious affirmative action was only necessary in "another generation," *ante*, at 2222. He attempts to analogize expiration dates of court-ordered injunctions in desegregation cases, *ante*, at 2223, but an expiring injunction does not eliminate the underlying constitutional principle. His musings about different college classes, *ante*, at 2224, n. 1, are also entirely beside the point. Nothing in *Grutter*'s analysis turned on whether someone was applying for the class of 2028 or 2032. That reading of *Grutter* trivializes the Court's precedent by reducing it to an exercise in managing academic calendars. *Grutter* is no such thing.

38 Before 2018, Harvard's admissions procedures were silent on the use of race in connection with the personal rating. *Harvard II*, 980 F.3d at 169. Harvard later modified its instructions to say explicitly that " 'an applicant's race or ethnicity should not be considered in assigning the personal rating.' " *Ibid.*

39 At Harvard, "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States population is Asian American." *Harvard I*, 397 F.Supp.3d at 203.

40 K. Schaeffer, Pew Research Center, The Changing Face of Congress in 8 Charts (Feb. 7, 2023).

41 See J. Martelli & P. Abels, The Education of a Leader: Educational Credentials and Other Characteristics of Chief Executive Officers, J. of Educ. for Bus. 216 (2010); see also J. Moody, Where the Top Fortune 500 CEOs Attended College, U. S. News & World Report (June 16, 2021).

42 Racial inequality in the pipeline to this institution, too, will deepen. See J. Fogel, M. Hoopes, & G. Liu, Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals 7–8 (2022) (noting that from 2005 to 2017, 85% of Supreme Court law clerks were white, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale); Brief for American Bar Association as *Amicus Curiae* 25 (noting that more than 85% of lawyers, more than 70% of Article III judges, and more than 80% of state judges in the United States are white, even though white people represent about 60% of the population).

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

1 M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

2 An Appeal to Congress for Impartial Suffrage, Atlantic Monthly (Jan. 1867), in 2 The Reconstruction Amendments: The Essential Documents 324 (K. Lash ed. 2021) (Lash).

3 Speech of Sen. John Sherman (Sept. 28, 1866) (Sherman), in *id.*, at 276; see also W. Du Bois, Black Reconstruction in America 162 (1998) (Du Bois).

4 See Sherman 276; M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48, 71–75, 91, 173 (1986).

5 Message Accompanying Veto of the Civil Rights Bill (Mar. 27, 1866), in Lash 145.

6 Speech Introducing the [Fourteenth] Amendment (May 8, 1866), in *id.*, at 159; see Du Bois 670–710.

7 E. Foner, The Second Founding 125–167 (2019) (Foner).

8 *Id.*, at 128.

9 M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 9–11 (2017) (Baradaran).

10 Foner 179; see also Baradaran 15–16; I. Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 37 (2010) (Wilkerson).

11 Baradaran 18.

12 *Ibid.*

13 R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154 (2017) (Rothstein); Baradaran 33–34; Wilkerson 53–55.

14 Baradaran 20–21; Du Bois 173–179, 694–696, 698–699; R. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L. J. 1609, 1656–1659 (2001) (Goluboff); Wilkerson 152 (noting persistence of this practice "well into the 1940s").

15 Baradaran 20.

16 Goluboff 1656–1659 (recounting presence of these practices well into the 20th century); Wilkerson 162–163.

17 Rothstein 154.

18 C. Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Foner 47–48; Du Bois 179, 696; Baradaran 38–39.

19 T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks); see also Baradaran 18.

20 Shanks 32–37; Oliver & Shapiro 37–38.

21 Wilkerson 8–10; Rothstein 155.

22 *Id.*, at 43–50; Baradaran 90–92.

23 *Ibid.*; Rothstein 172–173; Wilkerson 269–271.

24 Baradaran 90.

25 I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005) (Katznelson).

26 D. Massey & N. Denton, American Apartheid: Segregation and the Making of the Underclass 51–53 (1993); Oliver & Shapiro 16–18.

27 Rothstein 63.

28 *Id.*, at 63–64.

29 *Id.*, at 64; see Oliver & Shapiro 16–18; Baradaran 105.

30 Rothstein 64.

31 *Ibid.*

32 *Id.*, at 67.

33 Baradaran 108; see Rothstein 69–75.

34 *Id.*, at 9, 13, 70.

35 *Id.*, at 108.

36 *Ibid.*

37 R. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 411, n. 144 (2001); see also Rothstein 182–183.

38 Oliver & Shapiro 18.

39 *Id.*, at 43–44; Baradaran 109, 253–254; A. Dickerson, Shining a Bright Light on the Color of Wealth, 120 Mich. L. Rev. 1085, 1100 (2022) (Dickerson).

40 Katznelson 53; see *id.*, at 22, 29, 42–48, 53–61; Rothstein 31, 155–156.

41 Katznelson 113–114; see *id.*, at 113–141; see also, *e.g.*, *id.*, at 139–140 (Black veterans, North and South, were routinely denied loans that White veterans received); Rothstein 167.

42 Baradaran 112–113.

43 Katznelson 22–23; Rothstein 167.

44 *Id.*, at 54–56, 65, 127–131, 217; Stanford Institute for Economic Policy Research, Measuring and Mitigating Disparities in Tax Audits 1–7 (2023); Dickerson 1096–1097.

45 What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, in 4 The Frederick Douglass Papers 68 (J. Blassingame & J. McKivigan eds. 1991).

46 Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

47 Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

48 Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

49 See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

50 *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

51 *Id.*, at 87; Wealth of Two Nations 77–79.

52 *Id.*, at 78, 89; Bollinger & Stone 94–95; Dickerson 1101.

53 Bollinger & Stone 99–100.

54 *Id.*, at 99, and n. 58.

55 Dickerson 1088; Bollinger & Stone 100, and n. 63.

56 ABA, Profile of the Legal Profession 33 (2020).

57 Bollinger & Stone 106; Brief for HR Policy Association as *Amicus Curiae* 18–19.

58 Dickerson 1102.

59 Rothstein 230.

60 Brief for Association of American Medical Colleges et al. as *Amici Curiae* 8 (AMC Brief).

61 C. Caraballo et al., Excess Mortality and Years of Potential Life Lost Among the Black Population in the U. S., 1999–2020, 329 JAMA 1662, 1663, 1667 (May 16, 2023) (Caraballo).

62 Bollinger & Stone 101.

63 S. Whetstone et al., Health Disparities in Uterine Cancer: Report From the Uterine Cancer Evidence Review Conference, 139 Obstetrics & Gynecology 645, 647–648 (2022).

64 AMC Brief 8–9.

65 Bollinger & Stone 101; Caraballo 1663–1665, 1668.

66 Bollinger & Stone 101 (footnotes omitted).

67 Caraballo 1667.

68 *Ibid.*

69 AMC Brief 9.

70 Bollinger & Stone 100.

71 See Report on the Alleged Outrages in the Southern States, S. Rep. No. 1, 42d Cong., 1st Sess., I–XXXII (1871).

72 See D. Tokaji, Realizing the Right To Vote: The Story of *Thornburg v. Gingles*, in Election Law Stories 133–139 (J. Douglas & E. Mazo eds. 2016); see Foner xxii.

73 3 App. 1683.

74 *Id.*, at 1687–1688.

75 See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

76 567 F.Supp.3d 580, 595 (MDNC 2021).

77 *Id.*, at 596; 1 App. 348; Decl. of J. Rosenberg in No. 1:14–cv–954 (MDNC, Jan. 18, 2019), ECF Doc. 154–7, ¶10 (Rosenberg).

78 1 App. 350; see also 3 *id.*, at 1414–1415.

79 *Id.*, at 1414.

80 *Id.*, at 1415.

81 *Id.*, at 1416; see also 2 *id.*, at 706; Rosenberg ¶22.

82 3 App. 1416 (emphasis added); see also 2 *id.*, at 631–639.

83 567 F.Supp.3d at 591, 595; 2 App. 638 (Farmer, when asked how race could "b[e] a potential plus" for "students other than underrepresented minority students," pointing to a North Carolinian applicant, originally from Vietnam, who identified as "Asian and Montagnard"); *id.*, at 639 (Farmer stating that "the whole of [that student's] background was appealing to us when we evaluated her applicatio[n]," and noting how her "story reveals sometimes how hard it is to separate race out from other things that we know about a student. That was integral to that student's story. It was part of our understanding of her, and it played a role in our deciding to admit her").

84 3 *id.*, at 1416; Rosenberg ¶25.

85 2 App. 631.

86 *Id.*, at 636–637, 713.

87 3 *id.*, at 1416; 2 *id.*, at 699–700.

88 *Id.*, at 699; see also Rosenberg ¶24.

89 2 App. 706, 708; 3 *id.*, at 1415–1416.

90 2 *id.*, at 706, 708; 3 *id.*, at 1415–1416.

91 A reader might miss this because the majority does not bother to drill down on how UNC's holistic admissions process operates. Perhaps that explains its failure to apprehend (by reviewing the evidence presented at trial) that everyone, no matter their race, is eligible for a diversity-linked plus. Compare *ante*, at 2156, and n. 1, with 3 App. 1416, and *supra*, at 2272. The majority also repeatedly mischaracterizes UNC's holistic admissions-review process as a "race-based admissions system," and insists that UNC's program involves "separating students on the basis of race" and "pick[ing only certain] races to benefit." *Ante*, at 2156, and n. 1, 2168, 2175. These claims would be concerning if they had any basis in the record. The majority appears to have misunderstood (or categorically rejected) the established fact that UNC treats race as merely one of the many aspects of an applicant that, in the real world, matter to understanding the whole person. Moreover, its holistic review process involves reviewing a wide variety of personal criteria, not just race. Every applicant competes against thousands of other applicants, each of whom has personal qualities that are taken into account and that other applicants do not—and could not—have. Thus, the elimination of the race-linked plus would *still* leave SFFA's members competing against thousands of other applicants to UNC, each of whom has potentially plus-conferring qualities that a given SFFA member does not.

92 See 3 App. 1409, 1414, 1416.

93 *Id.*, at 1414–1415.

94 See 567 F.Supp.3d at 617, 619; 3 App. 1078–1080. The majority cannot deny this factual finding. Instead, it conducts its own back-of-the-envelope calculations (its numbers appear nowhere in the District Court's opinion) regarding "the *overall* acceptance rates of academically excellent applicants to UNC," in an effort to trivialize the District Court's conclusion. *Ante*, at 2156, n. 1. I am inclined to stick with the District Court's findings over the majority's unauthenticated calculations. Even when the majority's ad hoc statistical analysis is taken at face value, it hardly supports what the majority wishes to intimate: that Black students are being admitted based on UNC's myopic focus on "race—and race alone." *Ante*, at 2169, n. 6. As the District Court observed, if these Black students "were largely defined in the admissions process by their race, one would expect to find that *every*" such student "demonstrating academic excellence ... would be admitted." 567 F.Supp.3d at 619 (emphasis added). Contrary to the majority's narrative, "race does not even act as a tipping point for some students with otherwise exceptional qualifications." *Ibid.* Moreover, as the District Court also found, UNC does not even use the bespoke "academic excellence" metric that SFFA's expert " 'invented' " for this litigation. *Id.*, at 617, 619; see also *id.*, at 624–625. The majority's calculations of overall acceptance rates by race on *that* metric bear scant relationship to, and thus are no indictment of, how UNC's admissions process actually works (a recurring theme in its opinion).

95 See Bollinger & Stone 86, 103.

96 See, *e.g.*, Brief for University of Michigan as *Amicus Curiae* 6, 24; Brief for President and Chancellors of University of California as *Amici Curiae* 20–29; Brief for American Psychological Association et al. as *Amici Curiae* 14–16, 21–23 (APA Brief).

97 *Id.*, at 14–20, 23–27.

98 AMC Brief 4, 14; see also Brief for American Federation of Teachers as *Amicus Curiae* 10 (AFT Brief) (collecting further studies on the "tangible benefits" of patients' access to doctors who look like them).

99 AMC Brief 4.

100 National Research Council, New Horizons in Health: An Integrative Approach 100–111 (2001); Pollack et al., Should Health Studies Measure Wealth? A Systematic Review, 33 Am. J. Preventative Med. 250, 252, 261–263 (2007); see also Part I–B, *supra*.

101 See APA Brief 14–20, 23–27 (collecting studies); AFT Brief 11–12 (same); Brief for National School Boards Association et al. as *Amici Curiae* 6–11 (same); see also 567 F.Supp.3d at 592–593, 655–656 (factual findings in this case with respect to these benefits).

102 LaVeist et al., The Economic Burden of Racial, Ethnic, and Educational Health Inequities in the U. S., 329 JAMA 1682, 1683–1684, 1689, 1691 (May 16, 2023).

103 Justice THOMAS's prolonged attack, *ante*, at 2202 – 2206 (concurring opinion), responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of "individual achievement," *ante*, at 2203. Justice THOMAS's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences. How else can one explain his detection of "an organizing principle based on race," a claim that our society is "fundamentally racist," and a desire for Black "victimhood" or racial "silo[s]," *ante*, at 2202 – 2204, in this dissent's approval of an admissions program that advances all Americans' shared pursuit of true equality by treating race "on par with" other aspects of identity, *supra*, at 2272? Justice THOMAS ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation's full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of "social racism" and "government-imposed racism," *ante*, at 2205 (THOMAS, J., concurring), thereby deterring our collective progression toward becoming a society where race no longer matters.

104 Foner 179.

105 Justice SOTOMAYOR has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection. "[T]he potential consequences of the [majority's] approach, as measured against the Constitution's objectives ... provides further reason to believe that the [majority's] approach is legally unsound." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 858, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Breyer, J., dissenting). I fear that the Court's folly brings our Nation to the brink of coming "full circle" once again. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 402, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.).

106 Compare *ante*, at 2166, n. 4, with *ante*, at 2166 – 2171, and *supra*, at 2264 – 2265, and nn. 2–3.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Doe v. BlueCross BlueShield of Tennessee, Inc., 6th Cir.(Tenn.), June 4, 2019

135 S.Ct. 2507
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al., Petitioners
v.
The INCLUSIVE COMMUNITIES PROJECT, INC., et al.

No. 13–1371
|
Argued Jan. 21, 2015.
|
Decided June 25, 2015.

Synopsis

Background: Non-profit organization brought housing-discrimination action under Fair Housing Act (FHA) against Texas Department of Housing and Community Affairs (TDHCA) and its officers, alleging their allocation of low income housing tax credits resulted in a disparate impact on African–American residents. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, Chief Judge, 749 F.Supp.2d 486, granted partial summary judgment to organization, and, after bench trial, 860 F.Supp.2d 312, found discriminatory impact, and, 2012 WL 3201401, adopted remedial plan and awarded attorney fees to organization, which ruling it later amended in part, 2012 WL 5458208, and 2013 WL 598390. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, James E. Graves, Jr., Circuit Judge, 747 F.3d 275, held that disparate-impact claims were cognizable under the FHA, but reversed and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that disparate-impact claims are cognizable under the FHA.

Affirmed and remanded.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion in which Chief Justice Roberts, Justice Scalia, and Justice Thomas joined.

West Headnotes (25)

[1] **Civil Rights** Discrimination in General

In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.

151 Cases that cite this headnote

[2] **Civil Rights** Discrimination in General

Antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.

8 Cases that cite this headnote

[3] **Civil Rights** Discrimination in General
Civil Rights Disparate impact

Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.

6 Cases that cite this headnote

[4] **Civil Rights** Discrimination in General
Civil Rights Public Services, Programs, and Benefits

Before rejecting a business justification in a discrimination case brought under disparate-impact theory, or, in the case of a governmental entity, an analogous public interest, a court must determine that a plaintiff has shown that there is an available alternative practice that

has less disparate impact and serves the entity's legitimate needs.

34 Cases that cite this headnote

[5] **Civil Rights** Housing

Disparate-impact claims are cognizable under the Fair Housing Act (FHA). Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

137 Cases that cite this headnote

[6] **Statutes** Legislative Construction

If a word or phrase in a statute has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.

19 Cases that cite this headnote

[7] **Civil Rights** Housing

The Fair Housing Act (FHA), like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the nation's economy. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Civil Rights Act of 1968, § 801, 42 U.S.C.A. § 3601.

28 Cases that cite this headnote

[8] **Civil Rights** Public regulation; zoning

Unlawful practices under the Fair Housing Act (FHA) include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

20 Cases that cite this headnote

[9] **Civil Rights** Public Services, Programs, and Benefits

Disparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies.

18 Cases that cite this headnote

[10] **Civil Rights** Public regulation; zoning

The Fair Housing Act (FHA) is not an instrument to force housing authorities to reorder their priorities; rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

7 Cases that cite this headnote

[11] **Civil Rights** Housing

Civil Rights Public regulation; zoning

An important and appropriate means of ensuring that disparate-impact liability under the Fair Housing Act (FHA) is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

14 Cases that cite this headnote

[12] **Civil Rights** Housing

Civil Rights Public regulation; zoning

Housing authorities and private developers must be allowed under the Fair Housing Act (FHA) to maintain a policy if they can prove it is necessary to achieve a valid interest. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[13] **Civil Rights** Public regulation; zoning

Objective factors such as cost and traffic patterns and, at least to some extent, subjective factors such as preserving historic architecture contribute to a community's quality of life and are legitimate concerns for housing authorities

under the Fair Housing Act (FHA). Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[14] **Civil Rights** Public regulation; zoning

The Fair Housing Act (FHA) does not decree a particular vision of urban development. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[15] **Civil Rights** Discrimination in General

Civil Rights Weight and Sufficiency of Evidence

A disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.

103 Cases that cite this headnote

[16] **Civil Rights** Discrimination in General

A robust causality requirement for disparate-impact claims ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create.

168 Cases that cite this headnote

[17] **Civil Rights** Discrimination in General

Courts must examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important.

93 Cases that cite this headnote

[18] **Civil Rights** Complaint in general

Civil Rights Weight and Sufficiency of Evidence

A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.

125 Cases that cite this headnote

[19] **Civil Rights** Housing

Civil Rights Public regulation; zoning

Governmental or private policies are not contrary to the Fair Housing Act's (FHA) disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

30 Cases that cite this headnote

[20] **Civil Rights** Housing

Courts should avoid interpreting disparate-impact liability under the Fair Housing Act (FHA) to be so expansive as to inject racial considerations into every housing decision. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

47 Cases that cite this headnote

[21] **Civil Rights** Public regulation; zoning

Governmental entities must not be prevented, through disparate-impact liability under the Fair Housing Act (FHA), from achieving legitimate objectives, such as ensuring compliance with health and safety codes. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

18 Cases that cite this headnote

[22] **Civil Rights** Judgment and relief in general

Even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution.

23 Cases that cite this headnote

[23] **Civil Rights** Judgment and relief in general

Remedial orders in disparate-impact cases should concentrate on the elimination of the

offending practice that arbitrarily operates invidiously to discriminate on the basis of race; if additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.

7 Cases that cite this headnote

[24] **Civil Rights** Housing

In public and private transactions covered by the Fair Housing Act (FHA), race may be considered in certain circumstances and in a proper fashion. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[25] **Civil Rights** Public regulation; zoning

When setting their larger goals, local housing authorities may, consistent with the Fair Housing Act (FHA), choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

8 Cases that cite this headnote

****2510** *Syllabus*[*]

***519** The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§ 804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered non-discriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of "race, color, religion, or national origin." In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

Held : Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 2516 – 2526.

***520** (a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both § 703(a)(2) of Title VII of the Civil Rights Act of 1964 and § 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under ****2511** *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci v. DeStefano,* 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490. These cases provide essential

background and instruction in the case at issue. Pp. 2516 – 2518.

(b) Under the FHA it is unlawful to "refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic, § 804(a), or "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic, § 805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States v. Giles,* 300 U.S. 41, 48, 57 S.Ct. 340, 81 L.Ed. 493. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

***521** The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, *e.g., Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 16–18, 109 S.Ct. 276, 102 L.Ed.2d 180. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory ****2512** intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e.g.,* if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. ***522** These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special

dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 2518 – 2525.

747 F.3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and SCALIA and THOMAS, JJ., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

[1] ***524** The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale. ***525** *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (internal quotation marks omitted). The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq.*

I

A

Before turning to the question presented, it is necessary to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U.S.C. § 42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. § 42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, § 42(m)(1)(C), as well as certain preferences, including that low-income housing units "contribut[e] to a concerted community revitalization plan" and be built in census tracts populated predominantly by low-income residents. §§ 42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer's application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. ****2514** Tex. Govt.Code Ann. §§ 2306.6710(a)-(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points

than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, *4–*6.

***526** The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§ 804(a) and 805(a) of the FHA. The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found "from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." 749 F.Supp.2d 486, 499 (N.D.Tex.2010) (footnote omitted). Second, it found "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP's prima facie showing of disparate impact. 860 F.Supp.2d 312, 322–323 (2012). After assuming the Department's proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove "that there are no other less discriminatory alternatives to advancing their proffered interests," *ibid.* Because, in its view, the Department "failed to meet [its] burden of proving that there are no less discriminatory alternatives," the District Court ruled for the ICP. *Id.*, at 331.

***527** The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7, 2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed.Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR § 100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing ****2515** of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed.Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable ***528** under the FHA. 747 F.3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (*per curiam*), and certiorari followed, 573 U.S. ——, 135 S.Ct. 46, 189 L.Ed.2d 896 (2014). It is now appropriate to provide a brief history of the FHA's enactment and its later amendment.

B

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid–20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, ***529** sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, *e.g.,* M. Klarman, Unfinished Business: Racial Equality in American History 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. ****2516** See K. Clark, Dark Ghetto: Dilemmas of Social Power 11, 21–26 (1965).

The mid–1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight." *Id.,* at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.,* at 1. To reverse "[t]his deepening racial division," *ibid.,* it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing ... ***530** on the basis of race, creed, color, or national origin." *Id.,* at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued § 703(a)(2) covers the discriminatory

effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

> "It shall be an unlawful employer practice for an employer —
>
> ***531** "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment ****2517** in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on § 703(a)(2). *Griggs,* 401 U.S., at 426, n. 1, 91 S.Ct. 849.

In interpreting § 703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in § 703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.,* at 431, 91 S.Ct. 849. For that reason, as the Court noted, "Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.,* at 432, 91 S.Ct. 849. In light of the statute's goal of achieving "equality of employment opportunities and remov[ing] barriers that have operated in the past" to favor some races over others, the Court held § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.,* at 429–430, 91 S.Ct. 849.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under § 703(a)(2). In this respect, the Court held that "business necessity" constitutes a defense to disparate-impact claims. *Id.,* at 431, 91 S.Ct. 849. This rule provides, for example, that in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a "manifest relationship" to job performance. *Id.,* at 432, 91 S.Ct. 849; see also *Ricci,* 557 U.S., at 587–589, 129 S.Ct. 2658 (emphasizing the importance of the business necessity defense ***532** to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U.S., at 431–432, 91 S.Ct. 849.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.,* as amended. Section 4(a) of the ADEA provides:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* "represented the better reading of [Title VII's] statutory text," 544 U.S., at 235, 125 S.Ct. 1536 a plurality of the Court concluded that the same reasoning pertained to § 4(a)(2) of the ADEA. The *Smith* plurality emphasized that both § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language ****2518** "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' ***533** race or age." 544 U.S., at 235, 125 S.Ct. 1536. As the plurality observed, the text of these provisions "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore compels recognition of disparate-impact liability. *Id.,* at 236, 125 S.Ct. 1536. In a separate opinion, Justice SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA

to impose disparate-impact liability, see 544 U.S., at 243–247, 125 S.Ct. 1536 (opinion concurring in part and concurring in judgment).

[2] **[3]** **[4]** Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci, supra,* at 578, 129 S.Ct. 2658. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

[5] Turning to the FHA, the ICP relies on two provisions. Section 804(a) provides that it shall be unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

***534** Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.
Section 805(a), in turn, provides:

> "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." § 3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States v. Giles,* 300 U.S. 41, 48, 57 S.Ct. 340, 81 L.Ed. 493 (1937) (explaining that the "word 'make' has many meanings, among them '[t]o cause to exist, appear or occur' " (quoting Webster's New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith, supra,* at 236, 125 S.Ct. 1536. The Court has construed statutory language similar to § 805(a) to include disparate-impact liability. See, *e.g.,* ****2519** *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 140–141, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979) (holding the term "discriminat[e]" encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with ***535** prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. " Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell [,] ... or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith,* however, dispose of this argument. Both Title VII and the ADEA contain identical

"because of" language, see 42 U.S.C. § 2000e–2(a)(2); 29 U.S.C. § 623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See ***536** *Huntington Branch, NAACP v. Huntington,* 844 F.2d 926, 935–936 (C.A.2 1988); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 146 (C.A.3 1977); *Smith v. Clarkton,* 682 F.2d 1055, 1065 (C.A.4 1982); *Hanson v. Veterans Administration,* 800 F.2d 1381, 1386 (C.A.5 1986); *Arthur v. Toledo,* 782 F.2d 565, 574–575 (C.A.6 1986); *Metropolitan Housing Development Corp. v. Arlington Heights,* 558 F.2d 1283, 1290 (C.A.7 1977); *United States v. Black Jack,* 508 F.2d 1179, 1184–1185 (C.A.8 1974); *Halet v. Wend Investment Co.,* 672 F.2d 1305, 1311 (C.A.9 1982); *United States v. Marengo Cty. Comm'n,* 731 F.2d 1546, 1559, n. 20 (C.A.11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H.R.Rep. No. 100–711, p. 21, n. 52 (1988), 1988 U.S.C.C.A.N. 2173 (H.R. Rep.) (discussing suits premised on ****2520** disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H.R. Rep., at 89–93.

[6] Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been ... given a uniform interpretation by inferior courts ..., a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The ***537** Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist. v. T.A.,* 557 U.S. 230, 244, n. 11, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"); *Manhattan Properties, Inc. v. Irving Trust Co.,* 291 U.S. 320, 336, 54 S.Ct. 385, 78 L.Ed. 824 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government").

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First, Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. § 3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." § 3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable ... restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact ***538** liability did not exist under the FHA. See *Gustafson v. Alloyd Co.,* 513 U.S. 561, 574, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment ****2521** claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment

liability. See, *e.g., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, *e.g., Kimbrough v. United States,* 552 U.S. 85, 98, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the exemption from liability for real-estate appraisers is in the same section as § 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under § 805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith* 's discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the ***539** *Smith* plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' " 544 U.S., at 239, 125 S.Ct. 1536. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.,* at 238, 125 S.Ct. 1536.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U.S.C. § 3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

[7] Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith, supra,* at 235, 125 S.Ct. 1536 (plurality opinion); *Griggs,* 401 U.S., at 432, 91 S.Ct. 849. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H.R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

[8] These unlawful practices include zoning laws and other housing restrictions ****2522** that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, *e.g., Huntington,* 488 U.S., at 16–18, 109 S.Ct. 276 (invalidating zoning law preventing construction ***540** of multifamily rental units); *Black Jack,* 508 F.2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish,* 641 F.Supp.2d 563, 569, 577–578 (E.D.La.2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only " 'blood relative[s]' " in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, *e.g., Huntington, supra,* at 18, 109 S.Ct. 276. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

[9] **[10]** But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary,

and unnecessary barriers," not the displacement of valid governmental policies. *Griggs, supra,* at 431, 91 S.Ct. 849. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this ***541** case involves a novel theory of liability. See Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

[11] **[12]** An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed.Reg. 11470 (explaining that HUD did not use the phrase "business necessity" because that "phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities"). As the Court explained in *Ricci,* an entity "could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity." ****2523** 557 U.S., at 587, 129 S.Ct. 2658. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," *Griggs, supra,* at 436, 91 S.Ct. 849 so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

[13] **[14]** It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must ***542** be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed.Reg. 11476.

[15] **[16]** In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U.S., at 653, 109 S.Ct. 2115.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge ***543** without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

[17] **[18]** Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another

will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because **2524 of the multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F.3d, at 283–284 (specially concurring opinion).

[19] [20] The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

[21] *544 The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici,* in addition to the well-stated principal dissenting opinion in this case, see *post,* at 2532 – 2533, 2548 – 2549 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher v. Magner,* 619 F.3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] ... artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

[22] [23] It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar [ily] ... operate[s] invidiously to discriminate on the basis of rac[e]." *Ibid.* If additional measures are adopted, courts should *545 strive to design them to eliminate racial disparities through race-neutral means. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 510, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

**2525 [24] [25] While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 789, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (KENNEDY, J., concurring in part and concurring in judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods"). Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," *Ricci,* 557 U.S., at 585, 129 S.Ct. 2658 it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of ***546** disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 ("Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address"). Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to ... dire consequences." *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 710, 181 L.Ed.2d 650 (2012).

Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," *Parents Involved, supra,* at 797, 127 S.Ct. 2738 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The ***547** Court acknowledges the Fair ****2526** Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

I join Justice ALITO's dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.,* at 429–431, 91 S.Ct. 849 represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis,* I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I

A

We should drop the pretense that *Griggs* ' interpretation of Title VII was legitimate. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). It did not include an implicit one either. Instead, Title VII's operative provision, 42 U.S.C. § 2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That provision made it "an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> ***548** "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such

individual's race, color, religion, sex, or national origin." § 703, 78 Stat. 255 (emphasis added).[1]

Each paragraph in § 2000e–2(a) is limited to actions taken "because of" a protected trait, and "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,' " *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2527, 186 L.Ed.2d 503 (2013) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic "was the 'reason' that the employer decided to act." *Id.,* at ——, 133 S.Ct., at 2527 (some internal quotation marks omitted).[2] In ****2527** other words, "to take action against an individual *because of*" a protected trait "plainly requires discriminatory intent." See *Smith v. City of Jackson,* 544 U.S. 228, 249, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e.g., Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

***549** No one disputes that understanding of § 2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision " must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci, supra,* at 577, 129 S.Ct. 2658 (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). The only dispute is whether the same language—"because of"—means something different in § 2000e–2(a)(2) than it does in § 2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that "identical words used in different parts of the same act are intended to have the same meaning," *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (internal quotation marks omitted), and § 2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph "uses the phrase 'because of ... [a protected characteristic]' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's [protected characteristic]." *Smith, supra,* at 249, 125 S.Ct. 1536 (opinion of O'Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between § 2000e–2(a)(1) and § 2000e–2(a)(2) is the type of employment decisions they address. See *Smith, supra,* at 249, 125 S.Ct. 1536 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas § 2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs "*because of* such individual's race, color, religion, sex, or national origin." §§ 2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority's assumption, see *ante,* at 2517 – 2520, the fact that § 2000e–2(a)(2) uses the phrase "otherwise adversely affect" in defining the employment decisions targeted ***550** by that paragraph does not eliminate its mandate that the prohibited decision be made "because of" a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that "limit, segregate, or classify ... employees ... in any way which would ... otherwise adversely affect [an individual's] status as an employee," but those that "otherwise adversely affect [an individual's] status as an employee, *because of such individual's race, color, religion, sex, or national origin*." (Emphasis added); accord, 78 Stat. 255. Reading § 2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the ****2528** Title VII enacted by Congress did not permit disparate-impact claims.[3]

B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, The Civil Rights Era: Origins and Development of National Policy 1960–1972, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, ***551** EEOC vs. Discrimination, Inc., 75 The Crisis 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.,* at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation

of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra,* at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, Black Employment and the Law 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.,* at 59.

EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher v. Boca Raton,* 524 U.S. 775, 811, n. 1, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice ... to give and to act upon the results of any professionally developed ability test provided that such test ... is not *designed, intended, or used* to discriminate because of race, color, religion, sex, or national origin," § 2000e–2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2–4 (Aug. 24, ***552** 1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment ****2529** or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed.Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed " 'that the record in the case present[ed] a most unappealing situation for finding tests unlawful,' " even though he found the lower court's adherence to an intent requirement to be " 'tragic.' " Graham, *supra,* at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.[4]

EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's position ***553** was "entitled to great deference." See *Griggs,* 401 U.S., at 433–434, 91 S.Ct. 849. With only a brief nod to the text of § 2000e–2(a)(2) in a footnote, *id.,* at 426, n. 1, 91 S.Ct. 849 the Court tied this novel theory of discrimination to "the statute's perceived *purpose* " and EEOC's view of the best way of effectuating it, *Smith,* 544 U.S., at 262, 125 S.Ct. 1536 (opinion of O'Connor, J.); see *id.,* at 235, 125 S.Ct. 1536 (plurality opinion). But statutory provisions —not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth v. Levine,* 555 U.S. 555, 586, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez v. Mortgage Bankers Assn.,* 575 U.S. ——, —— – ——, 135 S.Ct. 1199, 1216–1220, 191 L.Ed.2d 186 (2015) (THOMAS, J., concurring in judgment).

II

Griggs ' disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, Intellectuals and Race 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to ****2530** believe, that a practice is "discriminatory," 401 U.S., at 431, 91 S.Ct. 849. "Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions." *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 750, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (THOMAS, J., concurring) (emphasis added).[5] ***554** We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law's usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society. But the absence of racial disparities in multi-ethnic societies has been the exception, not the rule. When it comes to "proportiona[l] represent [ation]" of ethnic groups, "few, if any, societies have ever approximated this description." D. Horowitz, Ethnic Groups in Conflict 677 (1985). "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy." Weiner, The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective, in From Independence to Statehood 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, "racial or ethnic minorities ... have owned or directed more than half of whole industries in particular nations." Sowell 8. These minorities "have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others." *Ibid.* (footnotes omitted). "In the seventeenth century Ottoman Empire," this phenomenon was seen in the palace itself, where the "medical staff consisted of 41 Jews and 21 Muslims." *Ibid*. And in our own ***555** country, for roughly a quarter-century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, Institute for Diversity and Ethics in Sport, U. of Central Fla., The 2014 Racial and Gender Report Card: National Basketball Association 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaffirmed that " 'racial balancing' " by state actors is " 'patently unconstitutional,' " even when it supposedly springs from good intentions. ****2531** *Fisher v. University of Tex. at Austin,* 570 U.S. ——, ——, 133 S.Ct. 2411, 2419, 186 L.Ed.2d 474 (2013). And if that "racial balancing" is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: "Government action that classifies individuals on the basis of race is inherently suspect." *Schuette v. BAMN,* 572 U.S. ——, ——, 134 S.Ct. 1623, 1634–1635, 188 L.Ed.2d 613 (2014) (plurality opinion); accord, *id.,* at ——, 134 S.Ct., at 1643–1644 (SCALIA, J., concurring in judgment). That is no less true when judges are the ones doing the classifying. See *id.,* at ——, 134 S.Ct., at 1634–1635 (plurality opinion); *id.,* at ——, 134 S.Ct., at 1643–1644 (SCALIA, J., concurring in judgment). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

III

The decision in *Griggs* was bad enough, but this Court's subsequent decisions have allowed it to move to other areas of the law. In ***556** *Smith,* for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the ADEA. See 544 U.S., at 236, 125 S.Ct. 1536. As both I and the author of today's majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.,* at 248–249, 125 S.Ct. 1536 (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that "there [wa]s no reason to suppose that Congress in 1967"—four years before *Griggs*—"could have foreseen the interpretation of Title VII that was to come." *Smith, supra,* at 260, 125 S.Ct. 1536 (opinion of O'Connor, J.). It made little sense to repeat *Griggs* ' error in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis,* we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith, supra,* at 260, 125 S.Ct. 1536 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that "the logic of *Griggs* and *Smith* " leads to the conclusion that "the FHA encompasses disparate-impact claims." *Ante,* at 2518. Justice ALITO ably dismantles this argument. *Post,* at

2543 – 2547 (dissenting opinion). But, even if the majority were correct, I would not join it in following that "logic" here. "[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis,* designed to be a principle of stability and repose, would become a vehicle of change ... distorting the law." *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 469–470, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

***557** That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. ****2532** HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas, any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not " 'dire consequences,' " see *ante,* at 2525, is cold comfort for those who actually need a home.

* * *

I agree with the majority that *Griggs* "provide[s] essential background" in this case, *ante,* at 2517: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

No one wants to live in a rat's nest. Yet in *Gallagher v. Magner,* 619 F.3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U.S.C. § 3601 *et seq.,* could be ***558** used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F.3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.,* at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.,* at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i.e.,* there was a "disparate impact." *Id.,* at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner.*[1] This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

****2533** I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone "less favorably than others because of a protected trait" is " 'the most easily understood type of discrimination.' " ***559** *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (quoting *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination —called disparate treatment—is the only one prohibited by the Constitution itself. See, *e.g., Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264–265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci, supra,* at 577, 129 S.Ct. 2658. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

A

I begin with the text. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). Similarly, § 805(a) prohibits any party "whose business includes engaging in residential real estate-related transactions" from "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." § 3605(a) (emphasis added).

In both sections, the key phrase is "because of." These provisions list covered actions ("refus[ing] to sell or rent ... a dwelling," "refus[ing] to negotiate for the sale or rental of ... a dwelling," "discriminat[ing]" in a residential real estate transaction, etc.) and protected characteristics ("race," "religion," ***560** etc.). The link between the actions and the protected characteristics is "because of."

What "because of" means is no mystery. Two Terms ago, we held that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2527, 186 L.Ed.2d 503 (2013) (quoting *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); some internal quotation marks omitted). A person acts "because of" something else, we explained, if that something else " 'was the "reason" that the [person] decided to act.' " 570 U.S., at ——, 133 S.Ct., at 2527.

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) "because of" religion. See *EEOC v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. ——, ——, 135 S.Ct. 2028, 2032–2033, ——L.Ed.2d —— (2015). The Court wrote: " 'Because of' in § 2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it." *Ibid.*

****2534** Nor is this understanding of "because of" an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase "because of" appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.[2]

***561** Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of," *Nassar, supra,* at 2530, 133 S.Ct., at 2527—race, religion, etc. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts ... that the Act makes unlawful." *American Ins. Assn. v. Department of Housing and Urban Development,* —— F.Supp.3d ——, —— n. 20, 2014 WL 5802283, at *8, n. 20 (D.D.C.2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits ***562** actions taken "because of" protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on " 'subjective intent.' " *Raytheon Co. v. Hernandez,* 540 U.S. 44, 53, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003). Instead, " 'treat[ing] [a] particular person less favorably than others *because of*' a protected trait" is " 'disparate treatment,' " *not disparate impact. Ricci,* 557 U.S., at 577, 129 S.Ct. 2658 (emphasis added). See ****2535** also, *e.g., Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (explaining the difference between "because of" and "in spite of"); *Hernandez v. New York,* 500 U.S. 352, 359–360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (same); *Alexander v. Sandoval,* 532 U.S. 275, 278, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that it is "beyond dispute" that banning

discrimination " 'on the ground of race' " "prohibits only intentional discrimination").

This is precisely how Congress used the phrase "because of" elsewhere in the FHA. The FHA makes it a crime to willfully "interfere with ... any person because of his race" (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as "selling, purchasing, [or] renting" a dwelling. 42 U.S.C. § 3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted "because of," *i.e.,* on account of or by reason of, one of the protected characteristics. But the critical language in this section—"because of"—is identical to the critical language in the sections at issue in this case. "One ordinarily assumes" Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group v. EPA,* 573 U.S. ——, ——, 134 S.Ct. 2427, 2441–2442, 189 L.Ed.2d 372 (2014). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase "because of" to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U.S.C. § 249, authorizes enhanced sentences for defendants convicted of committing certain crimes "because of" race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these ***563** laws. See, *e.g., Wisconsin v. Mitchell,* 508 U.S. 476, 484–485, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) ("[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status"). All of this confirms that "because of" in the FHA should be read to mean what it says.

B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase "make unavailable." Under § 804(a), it is unlawful "[t]o ... make unavailable ... a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). See also § 3605(a) (barring "discriminat[ion] against any person in making available such a [housing] transaction ... because of race, color, religion, sex, handicap, familial status, or national origin"). The Solicitor General argues that "[t]he plain meaning of the phrase 'make unavailable' includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result." Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General's argument accurately captures the "plain meaning" of the phrase "make unavailable" even when that phrase is not linked to the phrase "because of." "[M]ake unavailable" must be viewed together with the rest of the actions covered by § 804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable* " a dwelling. ****2536** § 3604(a) (emphasis added). When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to ***564** the Acts of Congress.' " *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (quoting *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)). See also, *e.g., Yates v. United States,* 574 U.S. ——, ——, 135 S.Ct. 1074, 1085–1086, 191 L.Ed.2d 64 (2015) (plurality opinion); *id.*, at ——, 135 S.Ct., at 1089 (ALITO, J., concurring in judgment). Here, the phrases that precede "make unavailable" unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.,* —— F.Supp.3d, at ——, 2014 WL 5802283, at *8 (citing Webster's Third New International Dictionary 603, 848, 1363, 1910 (1966)). Section 804(a), moreover, prefaces "make unavailable" with "or otherwise," thus creating a catchall. Catchalls must be read "restrictively" to be "like" the listed terms. *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384–385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). The result of these ordinary rules of interpretation is that even without "because of," the phrase "make unavailable" likely would require intentionality.

The FHA's inclusion of "because of," however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable "because of" race or another protected characteristic. In ordinary English usage, when a person makes something unavailable "because of" some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for "unskilled

workers," Fuller & Geide–Stevenson, Consensus Among Economists: Revisited, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, *e.g.,* Dept. of Commerce, Bureau of Census, Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2014, online at http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables. html (all Internet materials as visited ***565** June 23, 2015, and available in Clerk of Court's case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African–Americans or Latinos "because of" their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, http://www.nfl.com/draft/2015. See also Miller, Powerful Sports Agents Representing Color, Los Angeles Sentinel, Feb. 6, 2014, p. B3 (noting "there are 96 players (76 of whom are African–American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts"). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players "because of" their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General's Office who argued cases in this Court, it appears that all but 5(76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys "because of" their age?

****2537** The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done "because of race, color, religion, sex, familial status, or national origin."

II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, "the predominant focus of antidiscrimination law was on intentional discrimination." *Smith v. City of Jackson,* 544 U.S. 228, 258, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., concurring in judgment). The very "concept of disparate impact liability, by contrast, was quite novel." *Ibid.* (collecting ***566** citations). See also Tr. of Oral Arg. 15 ("JUSTICE GINSBURG: ... If we're going to be realistic about this, ... in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact"). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text.

Eradicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all. The Court recalls the country's shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combatting that evil. *Ante,* at 2534 – 2536. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA's text plainly identifies the weapon Congress chose—outlawing disparate treatment "because of race" or another protected characteristic. 42 U.S.C. §§ 3604(a), 3605(a). Accordingly, in any FHA claim, "[p]roof of discriminatory motive is critical." *Teamsters,* 431 U.S., at 335, n. 15, 97 S.Ct. 1843.

III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§ 804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U.S.C. §§ 3604(a), (f)(1). Congress ***567** also gave the Department of Housing and Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§ 3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (a) certain actions taken by real property appraisers, (b) certain occupancy requirements, and (c) the treatment

of persons convicted of manufacturing or distributing illegal drugs.[3]

**2538 According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are "of crucial importance." *Ante,* at 2519. This "crucial" argument, however, cannot stand.

A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress *568 silently ratified those decisions. See *ante,* at 2519 – 2520; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the judiciary's interpretation of the FHA. The Court writes that by 1988, "all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Ante,* at 2519 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have " 'consistently' " done so for " '30 years.' " *Milner v. Department of Navy,* 562 U.S. 562, 575–576, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). See also, *e.g., CSX Transp., Inc. v. McBride,* 564 U.S. ——, ——, 131 S.Ct. 2630, 2650, 180 L.Ed.2d 637 (2011) (ROBERTS, C.J., dissenting) (explaining that this Court does not interpret statutes by asking for "a show of hands" (citing *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001); *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§ 804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: the official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington v. Huntington Branch, NAACP,* O.T. 1988, No. 87–1961, p. 15 ("An action taken because of some factor other than race, *i.e.,* financial *569 means, even if it causes a discriminatory effect, is not **2539 an example of the intentional discrimination outlawed by the statute"); *id.,* at 14 ("The words 'because of' plainly connote a causal connection between the housing-related action and the person's race or color").[4] This was the same position that the United States had taken in lower courts for years. See, *e.g., United States v. Birmingham,* 538 F.Supp. 819, 827, n. 9 (E.D.Mich.1982) (noting positional change), aff'd, 727 F.2d 560, 565–566 (C.A.6 1984) (adopting United States' "concession" that there must be a " 'discriminatory motive' "). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called "prior-construction canon"—does not apply where lawyers cannot "justifiably regard the point as settled" or when "other sound rules of interpretation" are implicated. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress' failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante,* at 2519 – 2520.[5] To change the meaning of language in an already *570 enacted law, Congress must pass a new law amending that language. See, *e.g., West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 100, 101, and n. 7, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Intent that finds no expression in a statute is irrelevant. See, *e.g., New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519, 544–545, 99

S.Ct. 1328, 59 L.Ed.2d 553 (1979); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock,* 309 U.S. 106, 121, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in ****2540** *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), a party argued that § 10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because "Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under § 10(b)." *Id.,* at 186, 114 S.Ct. 1439. "From that," a party asked the Court to "infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of § 10(b)." *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

> " 'It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance ***571** that congressional failure to act represents" affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.' *Patterson v. McLean Credit Union,* 491 U.S. 164, 175, n. 1 [109 S.Ct. 2363, 105 L.Ed.2d 132] (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 672 [107 S.Ct. 1442, 94 L.Ed.2d 615] (1987) (SCALIA, J., dissenting))." *Ibid.* (alterations omitted).

We made the same point again in *Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.,* at 292–293, 121 S.Ct. 1511.

Without explanation, the Court ignores these cases.

B

The Court contends that the 1988 amendments provide "convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA" because the three safe-harbor provisions included in those amendments "would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA." *Ante,* at 2520, 2521. As just explained, however, what matters is what Congress *did,* not what it might have "assumed." And although the Court characterizes these provisions as "exemptions," that characterization is inaccurate. They make no reference to § 804(a) or § 805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E.g.,* 42 U.S.C. § 3607(b)(4) ("Nothing in this subchapter prohibits ..."). The Court should read these amendments to mean what they say.

***572** In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante,* at 2519 – 2520; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H.R.Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of ****2541** 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact" because the FHA "speaks only to intentional discrimination").[6]

The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do provide ***573** additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We "must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States' argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.[7]

**2542 *574 On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O'Gilvie v. United States,* 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed.2d 454 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: "Why ... would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment's absence, punitive damages did fall within the provision's coverage?" *Id.,* at 89, 117 S.Ct. 452. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O'Gilvie,* the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed that, in the amendments' absence, disparate-impact claims did fall within the FHA's coverage?

The Court rejected the argument in *O'Gilvie*. "The short answer," the Court wrote, is that Congress might have simply wanted to "clarify the matter in respect to nonphysical injuries" while otherwise "leav[ing] the law where it found it." *Ibid.* Although other aspects of *O'Gilvie* triggered a dissent, see *id.,* at 94–101, 117 S.Ct. 452 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court's analysis. Nor was the *O'Gilvie* Court troubled that Congress' amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

*575 The Court saw the flaw in the argument in *O'Gilvie,* and the same argument is no better here. It is true that *O'Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent's attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 ("[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice").

C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' " *Christopher v. SmithKline Beecham Corp.,* 567 U.S. ——, ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the "rodent infestation" case), HUD proposed "to prohibit **2543 housing practices with a discriminatory effect, even where there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed.Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* 568 U.S. ——, 133 S.Ct. 569, 184 L.Ed.2d 336 (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed.Reg. 11460 (2013). The Solicitor General then urged HUD's *576 rule as a reason to deny certiorari. We granted certiorari anyway, 570 U.S. ——, 133 S.Ct. 2824, 186 L.Ed.2d 883 (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference

may be unwarranted. Cf. *Young v. United Parcel Service, Inc.*, 575 U.S. ——, ——, 135 S.Ct. 1338, 1352, 191 L.Ed.2d 279 (2015) (refusing to defer where "[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari" (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).[8]

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group*, 573 U.S., at ——, 134 S.Ct., at 2446. This rule makes even more sense where the agency's view would open up a deeply disruptive avenue of liability that Congress never contemplated.

IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court's decision today reads far too much into *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and far too little into *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). In *Smith*, the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded —*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

***577** A

Rather than focusing on the text of the FHA, much of the Court's reasoning today turns on *Griggs*. In *Griggs*, the Court held that black employees who sued their employer under § 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(2), could recover without proving that the employer's conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were "job related," the plaintiffs could recover by showing that ****2544** the requirements "operated to render ineligible a markedly disproportionate number of Negroes." 401 U.S., at 429, 91 S.Ct. 849.

Griggs was a case in which an intent to discriminate might well have been inferred. The company had "openly discriminated on the basis of race" prior to the date on which the 1964 Civil Rights Act took effect. *Id.*, at 427, 91 S.Ct. 849. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428, 91 S.Ct. 849. These new hurdles disproportionately burdened African–Americans, who had "long received inferior education in segregated schools." *Id.*, at 430, 91 S.Ct. 849. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428, 91 S.Ct. 849. By convention, we do not overturn a finding of fact accepted by two lower courts, see, *e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Blau v. Lehman*, 368 U.S. 403, 408–409, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which ***578** the plaintiffs' claims were based. The only reference to § 703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U.S., at 426, n. 1, 91 S.Ct. 849. Instead, the Court based its decision on the "objective" of Title VII, which the Court described as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430, 91 S.Ct. 849.

That text-free reasoning caused confusion, see, *e.g.*, *Smith, supra*, at 261–262, 125 S.Ct. 1536 (O'Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in this line, *United States v. Black Jack*, 508 F.2d 1179 (C.A.8 1974), the heart of the court's analysis was this: "Just as Congress

requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing." *Id.,* at 1184 (quoting *Griggs, supra,* at 430–431, 91 S.Ct. 849; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, *e.g., Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 607, n. 27, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (holding that Title VI, 42 U.S.C. § 2000d *et seq.,* does "not allow compensatory relief in the absence of proof of discriminatory intent"); *Sandoval,* 532 U.S., at 280, 121 S.Ct. 1511 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters,* the Court rejected "the *Griggs* rationale" in evaluating a company's seniority rules. 431 U.S., at 349–350, 97 S.Ct. 1843. And because *Griggs* was focused ****2545** on a particular problem, the Court ***579** had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), or Title VII, even if a plan has a "disproportionately heavy impact on male employees." 435 U.S. at 711, n. 20, 98 S.Ct. 1370. We explained that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Ibid.*

B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally required to face that task in *Smith,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.,* authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§ 4(a)(1) and 4(a)(2), 29 U.S.C. §§ 623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, § 4(a)(1), does not authorize disparate-impact claims. See 544 U.S., at 236, n. 6, 125 S.Ct. 1536 (plurality opinion); *id.,* at 243, 125 S.Ct. 1536 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality's reasoning); *id.,* at 249, 125 S.Ct. 1536 (O'Connor, J., concurring in judgment) (reasoning that this provision "obvious[ly]" does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of § 4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of Justice SCALIA). See 544 U.S., at 233–240, 125 S.Ct. 1536 (plurality opinion); *id.,* at 243–247, 125 S.Ct. 1536 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that § 4(a)(2) of the ADEA was modeled on and is virtually identical ***580** to the provision in *Griggs,* 42 U.S.C. § 2000e–2(a)(2). Section 4(a)(2) provides as follows:

> "It shall be unlawful for an employer—
>
> . . .
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*." 29 U.S.C. § 623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

> "It shall be an unlawful employment practice for an employer—
>
> . . .
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin*." 42 U.S.C. § 2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to "age" and the Title VII provision refers to "race, color, religion, or national origin." Because identical language in two statutes ****2546** having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith,* echoed by

Justice SCALIA, saw *Griggs* as "compelling" support for the conclusion that § 4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U.S., at 233–234, 125 S.Ct. 1536 (plurality opinion) (citing *Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith,* namely, § 4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

> "It shall be unlawful for an employer—
>
> ***581** "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U.S.C. § 623(a)(1) (emphasis added).

The plurality opinion's reasoning, with which Justice SCALIA agreed, can be summarized as follows. Under § 4(a)(1), *the employer* must act because of age, and thus must have discriminatory intent. See 544 U.S., at 236, n. 6, 125 S.Ct. 1536.[9] Under § 4(a)(2), on the other hand, it is enough if the *employer's actions* "adversely affect" an individual "because of ... age." 29 U.S.C. § 623(a).

This analysis of §§ 4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble § 4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like § 4(a)(1) of the ADEA, a defendant must act "because of" race or one of the other prohibited grounds. That is, it is unlawful for a person or entity to "[t]o refuse to sell or rent," "refuse to negotiate," " otherwise ***582** make unavailable," etc. for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or § 4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality's analysis, moreover, also depended on other language, unique to the ADEA, declaring that "it shall not be unlawful for an employer 'to take any action *otherwise prohibited* ... where the differentiation is based on reasonable factors other than age.' " 544 U.S., at 238, 125 S.Ct. 1536 (quoting 81 Stat. 603; emphasis added). This "otherwise prohibited" language was key to the plurality opinion's reading of the statute because it arguably suggested disparate-impact liability. See 544 U.S., at 238, 125 S.Ct. 1536. This language, moreover, was *essential* to Justice SCALIA's controlling ****2547** opinion. Without it, Justice SCALIA would have agreed with Justices O'Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.,* at 245–246, 125 S.Ct. 1536. In fact, even with this "otherwise prohibited" language, Justice SCALIA merely concluded that § 4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.,* at 243, 125 S.Ct. 1536.

The FHA does not contain any phrase like "otherwise prohibited." Such language certainly is nowhere to be found in §§ 804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

C

This discussion of our cases refutes any notion that "[t]ogether, *Griggs* holds[10] and the plurality in *Smith* instructs ***583** that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Ante,* at 2517. The Court stumbles in concluding that § 804(a) of the FHA is more like § 4(a)(2) of the ADEA than § 4(a)(1). The operative language in § 4(a)(1) of the ADEA—which, per *Smith,* does not authorize disparate-impact claims—is materially indistinguishable from the operative language in § 804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court's conclusion that § 805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is "*discriminat[ion]* ... because of" race, religion, etc. 42 U.S.C. § 3605(a) (emphasis added). This is precisely the formulation used in § 4(a)(1) of the ADEA, which prohibits "*discriminat[ion]* ... because of such individual's age," 29 U.S.C. § 623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why § 805(a)'s reference to "discrimination" allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), "statutory language similar to § 805(a) [was construed] to include disparate-impact liability." *Ante,* at 2518. In fact, the statutory language in *Harris* was quite different. The law there was § 706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that " 'had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation ... *or* otherwise engaged in discrimination based upon race, color, or national ***584** origin in the hiring, promotion, or assignment of employees.' " 444 U.S., at 132–133, 142, 100 S.Ct. 363 (emphasis added).

After stating that the first clause in that unusual statute referred to a "disparate-impact ****2548** test," the *Harris* Court concluded that "a similar standard" should apply to the textually "closely connected" second clause. *Id.,* at 143, 100 S.Ct. 363. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory "intent." *Id.,* at 139, 100 S.Ct. 363. The Court explained that the Act's "less than careful draftsmanship" regarding the relationship between the clauses made the "wording of the statute ... ambiguous" about teacher assignments, thus forcing the Court to "look closely at the structure and context of the statute and to review its legislative history." *Id.,* at 138–140, 100 S.Ct. 363. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

Harris, in other words, has nothing to do with § 805(a) of the FHA. The "wording" is different; the "structure" is different; the "context" is different; and the "legislative history" is different. *Id.,* at 140, 100 S.Ct. 363. Rather than digging up a 36–year–old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phase "because of" means.

V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "discriminatory." ***585** 619 F.3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis,* 426 U.S. 229, 248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs (the Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.[11]

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates "the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal ****2549** law often favors projects that revitalize low-income communities. See *ante,* at 2513.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress ***586** surely did not mean to put local governments in such a position.

The Solicitor General's answer to such problems is that HUD will come to the rescue. In particular, HUD regulations provide a defense against disparate-impact liability if a defendant can show that its actions serve "substantial, legitimate, nondiscriminatory interests" that "necessar[ily]"

cannot be met by "another practice that has a less discriminatory effect." 24 CFR § 100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a "substantial" interest? Is there a difference between a "legitimate" interest and a "nondiscriminatory" interest? To what degree must an interest be met for a practice to be "necessary"? How are parties and courts to measure "discriminatory effect"?

These questions are not answered by the Court's assurance that the FHA's disparate-impact "analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.' " *Ante,* at 2514 (quoting 78 Fed.Reg. 11470). See also *ante,* at 2522 (likening the defense to "the business necessity standard"). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody's guess. What is the FHA analogue of "job related"? Is it "housing related"? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of "business necessity"? "Housing-policy necessity"? What does that mean?

Compounding the problem, the Court proclaims that "governmental entities ... must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Ante,* at 2524. But what does the ***587** Court mean by a "legitimate" objective? And does the Court mean to say that there can be no disparate-impact lawsuit if the objective is " legitimate"? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD's regulations and the Court's pronouncements are so "hazy," *Central Bank,* 511 U.S., at 188–189, 114 S.Ct. 1439 courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante,* at 2522 – 2523. Certainly Congress did not intend to "engage the federal courts in an endless exercise of second-guessing" local programs. *Canton v. Harris,* 489 U.S. 378, 392, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit ****2550** is fully litigated, the costs of litigation, including the expense of discovery and experts, may "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 559, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Defendants may feel compelled to "abandon substantial defenses and ... pay settlements in order to avoid the expense and risk of going to trial." *Central Bank, supra,* at 189, 114 S.Ct. 1439. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci,* 557 U.S., at 563, 129 S.Ct. 2658. All the while, similar dynamics may drive litigation against private actors. *Ante,* at 2522.

This is not the Fair Housing Act that Congress enacted.

VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

***588** A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 541–542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion of KENNEDY, J.); *Hunter v. Underwood,* 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

B

The Court also stresses that "many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Ante,* at 2525 – 2526.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation's municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court's position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U.S.C. § 3615 (recognizing local authority).

The Court also claims that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades" has not created " 'dire consequences.' " *Ante,* at 2526. But the Court concedes that disparate impact can be dangerous. See *ante,* at 2522 – 2525. Compare *Magner,* 619 F.3d, at 833–838 (holding that efforts to prevent violations of the housing code may violate the ***589** FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including "rat problem[s]"). In the Court's words, it is "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing." *Ante,* at 2522. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the "purpose" driving the Court's analysis: the desire to eliminate ****2551** the "vestiges" of "residential segregation by race." *Ante,* at 2515, 2525. We agree that all Americans should be able "to buy decent houses without discrimination ... *because of* the color of their skin." 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U.S.C. §§ 3604(a), 3605(a) ("because of race"). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, " '[w]hat the legislative intention was, can be derived only from the words ... used; and we cannot speculate beyond the reasonable import of these words.' " *Nassar,* 570 U.S., at ——, 133 S.Ct., at 2528–2529 (quoting *Gardner v. Collins,* 2 Pet. 58, 93, 7 L.Ed. 347 (1829)). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 526, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (*per curiam*). See also, *e.g., Board of Governors, FRS v. Dimension Financial Corp.,* 474 U.S. 361, 373–374, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) (explaining that " 'broad purposes' " arguments "ignor[e] the complexity of the problems Congress is called upon to address").

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based considerations rather than move beyond them." *Ante,* at 2524. ***590** And it agrees that "racial quotas ... rais[e] serious constitutional concerns." *Ante,* at 2523. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such " difficult constitutional questions." *Ante,* at 2524. By any measure, the Court today makes a serious mistake.

* * *

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The current version of § 2000e–2(a) is almost identical, except that § 2000e–2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

2 In 1991, Congress added § 2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted "because of" a protected characteristic by showing that the characteristic was "a motivating factor" in the employer's decision. Civil Rights Act of 1991, § 107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-treatment liability precisely because the former does not require any discriminatory motive.

3 Even "[f]ans ... of *Griggs [v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent." Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision's defenders, *Griggs* "was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress." W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

4 Efforts by Executive Branch officials to influence this Court's disparate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner v. Gallagher,* 564 U.S. ——, 132 S.Ct. 548, 181 L.Ed.2d 395 (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., pp. 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner,* and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed.Reg. 70921 (2011).

5 It takes considerable audacity for today's majority to describe the origins of racial imbalances in housing, *ante,* at 2515 – 2516, without acknowledging this Court's role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal courts contributed to " 'white flight' " from our Nation's cities, see *Missouri v. Jenkins,* 515 U.S. 70, 95, n. 8, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995); *id.,* at 114, 115 S.Ct. 2038 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today's majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

1 We granted certiorari in *Magner v. Gallagher,* 565 U.S. ——, 132 S.Ct. 548, 181 L.Ed.2d 395 (2011). Before oral argument, however, the parties settled. 565 U.S. ——, 132 S.Ct. 994, 1306, 181 L.Ed.2d 1035, 725 (2012). The same thing happened again in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* 571 U.S. ——, 133 S.Ct. 2824, 186 L.Ed.2d 883 (2013).

2 See al-Mujahed & Naylor, Rebels Assault Key Sites in Yemen, pp. A1, A12 ("A government official ... spoke on the condition of anonymity because of concern for his safety"); Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ("Jury selection is expected to last four to five months because of a massive pool of potential jurors"); Davidson, Some VA Whistleblowers Get Relief From Retaliation, p. A18 ("In April, they moved to fire her because of an alleged 'lack of collegiality' "); Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ("The Postal Service lost $5.5 billion in 2014, in large part because of continuing declines in first-class mail volume"); Editorial, Last Responders, p. A20 ("Metro's initial emergency call mentioned only smoke but no stuck train [in part] ... because of the firefighters' uncertainty that power had been shut off to the third rail"); Letter to the Editor, Metro's Safety Flaws, p. A20 ("[A] circuit breaker automatically opened because of electrical arcing"); Bernstein, He Formed Swingle Singers and Made Bach Swing, p. B6 ("The group retained freshness because of the 'stunning musicianship of these singers' "); Schudel, TV Producer, Director Invented Instant Replay, p. B7 ("[The 1963 Army–Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy"); Contrera & Thompson, 50 Years On, Cheering a Civil Rights Matriarch, pp. C1, C5 ("[T]he first 1965

protest march from Selma to Montgomery ... became known as 'Bloody Sunday' because of state troopers' violent assault on the marchers"); Pressley, 'Life Sucks': Aaron Posner's Latest Raging Riff on Chekhov, pp. C1, C9 (" 'The Seagull' gave Posner ample license to experiment because of its writer and actress characters and its pronouncements on art"); A Rumpus on 'The Bachelor,' p. C2 ("Anderson has stood out from the pack ... mostly because of that post-production censoring of her nether regions" (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter "asked that his name not be used because of his real job"); Boren, Former FSU Boss Bowden Wants 12 Wins to Be Restored, p. D2 ("[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal"); Oklahoma City Finally Moves Past .500 Mark, p. D4 ("Trail Blazers all-star LaMarcus Aldridge won't play in Wednesday night's game against the Phoenix Suns because of a left thumb injury").

3 These new provisions state:

"Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." § 3605(c).

"Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." § 3607(b)(1).

"Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21." § 3607(b)(4).

4 In response to the United States' argument, we reserved decision on the question. See *Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 18, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (*per curiam*) ("Since appellants conceded the applicability of the disparate-impact test ... we do not reach the question whether that test is the appropriate one").

5 In any event, the Court overstates the importance of that failed amendment. The amendment's sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it "left to caselaw and eventual Supreme Court resolution whether a discriminatory intent or discriminatory effects standard is appropriate ... [in] all situations but zoning." H.R.Rep. No. 100–711, p. 89 (1988), 1988 U.S.C.C.A.N. 2173, 2224. Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us "little" about what a statute means. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante,* at 2519 – 2520.

6 At the same hearings to which the Court refers, *ante,* at 2519, Senator Hatch stated that if the "intent test versus the effects test" were to "becom[e] an issue," a "fair housing law" might not be enacted at all, and he noted that failed legislation in the past had gotten "bogged down" because of that "battle." Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did "not really go one way or the other" on disparate impact since the sponsors were content to "rely" on the lower court opinions. *Ibid*. And he emphasized that "the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court." *Ibid*. See also *id.,* at 2517 ("It is not always a violation to refuse to sell, but only to refuse to sell 'because of' another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate.... To use any standard other than discriminatory intent ... would jeopardize many kinds of beneficial zoning and local ordinances" (statement of Sen. Hatch)).

7 In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect "the burden-shifting framework" in disparate-treatment cases. *American Ins. Assn. v. Department of Housing and Urban Development,* —— F.Supp.3d ——, 2014 WL 5802283, *10 (D.D.C.2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), which some courts have applied in disparate-treatment housing cases, see, *e.g., 2922 Sherman Avenue Tenants' Assn. v. District of Columbia,* 444 F.3d 673, 682 (C.A.D.C.2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-

treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc. v. Richmond Heights,* 209 F.3d 626, 636–637, and n. 7 (C.A.6 2000).

Even if they were superfluous, moreover, our "preference for avoiding surplusage constructions is not absolute." *Lamie v. United States Trustee,* 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). We "presume that a legislature says in a statute what it means," notwithstanding "[r]edundanc[y]." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

8 At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 ("[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days"). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

9 The plurality stated:

"Paragraph (a)(1) makes it unlawful for an employer 'to fail or refuse to hire ... *any individual* ... because of *such individual* 's age.' (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer 'to limit ... his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual* 's age.' (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." 544 U.S., at 236, n. 6, 125 S.Ct. 1536.

10 *Griggs,* of course, "holds" nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of Justice SCALIA's controlling opinion or Justice O'Connor's opinion concurring in the judgment) did not understand *Griggs* to create such a rule. See 544 U.S., at 240, 125 S.Ct. 1536 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

11 Tr. of Oral Arg. 44–45 ("Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position ... that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right").

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106 S.Ct. 2752
Supreme Court of the United States

Lacy H. THORNBURG, et al., Appellants
v.
Ralph GINGLES et al.

No. 83–1968
|
Argued Dec. 4, 1985.
|
Decided June 30, 1986.

Synopsis

Action was brought challenging use of multimember districts in North Carolina legislative apportionment. The United States District Court for the Eastern District of North Carolina, 590 F.Supp. 345, found the plan to violate the Voting Rights Act and state officials appealed. The Supreme Court, Justice Brennan, J., held that: (1) plaintiffs claiming impermissive vote dilution must demonstrate that voting devices resulted in unequal access to electoral process; (2) use of multimember districts does not impede the ability of minority voters to elect representatives of their choice unless a bloc voting majority will usually be able to defeat candidates supported by a politically cohesive, geographically insular minority; (3) District Court applied proper standard in determining whether there was racial polarization and voting; (4) legal concept of racially polarized voting incorporates neither causation nor intent; (5) some electoral success by minority group does not foreclose successful section 2 claim; (6) finding of impermissible dilution was supported by the evidence; but (7) claim of dilution with respect to one multimember district was defeated by evidence that last six elections resulted in proportional representation for black residents.

Affirmed in part and reversed in part.

Justice White filed a concurring opinion.

Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

Justice Stevens filed an opinion concurring in part and dissenting in part in which Justice Marshall and Justice Blackmun joined.

West Headnotes (26)

[1] **Election Law** Discriminatory practices proscribed in general

Election Law Dilution of voting power in general

Subsection 2(a) of the Voting Rights Act prohibits all state and political subdivisions from imposing any voting qualifications or prerequisites to voting or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Voting Rights Act of 1965, § 2(a), as amended, 42 U.S.C.A. § 1973(a).

84 Cases that cite this headnote

[2] **Election Law** Discriminatory practices proscribed in general

Section 2 of the Voting Rights Act prohibits all forms of voting discrimination, not just vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

31 Cases that cite this headnote

[3] **Election Law** Judicial Review or Intervention

Electoral devices such as at-large elections may not be considered per se violative of section 2 of the Voting Rights Act; parties challenging electoral devices must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

12 Cases that cite this headnote

[4] **Election Law** Dilution of voting power in general

The conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation of a minority does not, alone, establish a violation of section 2 of the Voting Rights Act. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

47 Cases that cite this headnote

[5] **Election Law** Judicial Review or Intervention

The results test under section 2 of the Voting Rights Act does not assume the existence of racial bloc voting; plaintiffs must prove it. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

14 Cases that cite this headnote

[6] **Election Law** Dilution of voting power in general

Essence of a claim under section 2 of the Voting Rights Act is that a certain electoral law, practice, or structure interacts with social and historial conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

123 Cases that cite this headnote

[7] **States** Political subdivisions; multi-member districts

Factors bearing on challenges under section 2 of the Voting Rights Act to multimember legislative districts are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the state or political subdivision is racially polarized; other factors such as the lingering effects of past discrimination, use of appeals to racial bias in election campaigns, and use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists are supportive of, but not essential to, a minority voter's claim of dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

197 Cases that cite this headnote

[8] **Election Law** Racially polarized or bloc voting

Bloc voting majority must be able to usually defeat candidates supported by politically cohesive, geographically insular minority group in order for there to be a showing of vote dilution through the use of multimember districts. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

431 Cases that cite this headnote

[9] **Election Law** Compactness and cohesiveness of minority group

If minority group claiming dilution of its vote in violation of section 2 of the Voting Rights Act through use of multimember district is not sufficiently large and geographically compact to constitute a majority in a single-member district, the multimember form of the district cannot be responsible for minority voters' inability to elect their candidates. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

346 Cases that cite this headnote

[10] **Election Law** Compactness and cohesiveness of minority group

If minority group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember district is not able to show that it is politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

41 Cases that cite this headnote

[11] **Election Law** Racially polarized or bloc voting

If minority voting group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember districts is not able to demonstrate that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, it has not shown that the multimember district impedes the minority group's ability to elect its chosen representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

505 Cases that cite this headnote

[12] **Election Law** Compactness and cohesiveness of minority group

Election Law Racially polarized or bloc voting

Question whether multimember district experiences legally significant racially polarized voting, so that use of multimember district dilutes minority voting strength in violation of section 2, requires discrete inquiries into minority and white voting practices, showing that significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim; white bloc vote that normally will defeat combined strength of minority plus white crossover votes rises to the level of legally significant white voting bloc. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

340 Cases that cite this headnote

[13] **Election Law** Racially polarized or bloc voting

Pattern of racial bloc voting which extends over period of time is more probative of a claim that use of multimember district impermissibly dilutes minority voting strength in violation of section 2 than are the results of a single election. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

[14] **Election Law** Racially polarized or bloc voting

In a district where elections are shown to usually be polarized along racial lines, fact that facially polarized voting is not present in one or few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting so that use of multimember district can be shown to impermissibly dilute minority voting strength in violation of section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

[15] **States** Evidence in general

Finding of political cohesiveness of black voters and existence of a white voting bloc, supporting claim that use of multimember districts impermissibly diluted black voting strength in violation of section 2, was supported by evidence of black support for black candidates in excess of 70% in both primary and general elections, that an average of 81.7% of white voters would not vote for any black candidate in the primary elections, and that two-thirds of the white voters would not vote for a black candidate even after he won the Democratic primary. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

38 Cases that cite this headnote

[16] **States** Judicial Review and Enforcement

District court's approach which tested election data from three years in each multimember district and revealed that blacks strongly supported black candidates while, to the usual detriment of black candidates, whites rarely did support black candidates satisfactorily addressed each facet of the proper legal standard for determining claim of vote dilution under section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

[17] **Election Law** Dilution of voting power in general

For purposes of section 2, the legal concept of "racially polarized voting" incorporates neither causation nor intent but, rather, simply means that the race of voters correlates with the selection of certain candidates; it refers to the situation where different races or minority language groups vote in blocs for different candidates. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

8 Cases that cite this headnote

[18] **Election Law** Vote Dilution

It is the difference between the choices made by blacks and whites, and not the reason for that difference, which results in blacks having less opportunity than whites to elect their preferred representatives when there is dilution of black vote in violation of section 2 through use of multimember districts. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

30 Cases that cite this headnote

[19] **Election Law** Vote Dilution

Fact that race of voter and race of candidate is often correlated is not directly pertinent to inquiry as to whether there has been impermissible dilution of minority vote through use of multimember districts in violation of section 2; it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

[20] **Election Law** Racially polarized or bloc voting

Concept of racially polarized voting as it refers to dilution of minority group voting strength through use of multimember districts in violation of section 2 does not refer only to white bloc voting which is caused by white voters' racial hostility toward the black candidate. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

39 Cases that cite this headnote

[21] **Election Law** Evidence

Minority voters claiming vote dilution in violation of section 2 through use of electoral devices such as multimember districts need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut a prima facie case with evidence of causation or intent. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

21 Cases that cite this headnote

[22] **Election Law** Dilution of voting power in general

Proof that some minority candidates have been elected does not foreclose a claim under section 2 for impermissible dilution of minority voting strength. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[23] **States** Judicial Review and Enforcement

District court could take account of circumstances surrounding recent black electoral success in determining its significance to claim of impermissible dilution of minority voting strength and could properly notice fact that electoral success increased after filing of lawsuit challenging multimember districts on the grounds of vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[24] **States** Political subdivisions; multi-member districts

Persistent proportional representation in particular multimember district over the last six elections showed that multimember district did not impermissibly dilute black voting strength in violation of section 2, in the absence of any explanation for success of black candidates in three of the six elections. (Per Justice Brennan with one Justice concurring and four Justices concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[25] **Federal Courts** Elections, voting, and political rights

Clearly erroneous test of Rule 52(a) is appropriate standard for appellate review of a finding of impermissible vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

14 Cases that cite this headnote

[26] **States** Evidence in general

Finding of impermissible dilution of black voting strength through use of multimember legislative districts was supported by evidence of racially polarized voting, legacy of official discrimination in voting matters, education, housing, employment, and health services, and persistence of campaign appeals to racial prejudice. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

****2755** ***30** *Syllabus*[*]

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, *inter alia,* that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the ****2756** disputed districts. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F.Supp. 345, affirmed in part and reversed in part.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, concluding that:

***31** 1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 2762–2772.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have ***32** succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 2779–2780.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based upon a practical evaluation of the past and ****2757** present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 2780–2782.

Justice BRENNAN, joined by Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS, concluded in Part III–C that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 2772–2779.

Justice BRENNAN, joined by Justice WHITE, concluded in Part IV–B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success

black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellees' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. Pp. 2780–2781.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may ***33** be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 2766–2767.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellees failed to establish a violation of § 2. Pp. 2766–2769.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, *post,* p. ——. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined, *post,* p. ——. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Lacy H. Thornburg, Attorney General of North Carolina, pro se, argued the cause for appellants. With him on the briefs were Jerris Leonard, Kathleen Heenan McGuan, James Wallace, Jr., Deputy Attorney General for Legal Affairs, and Tiare B. Smiley and Norma S. Harrell, Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Assistant Attorney General Reynolds and Deputy Assistant Attorney General Cooper.

Julius LeVonne Chambers argued the cause for appellees. With him on the briefs for appellees Gingles et al. were Eric Schnapper, C. Lani Guinier, and Leslie J. Winner. C. Allen Foster, Kenneth J. Gumbiner, Robert N. ***34** Hunter, Jr., and Arthur J. Donaldson filed briefs for appellees Eaglin et al.*

* Daniel J. Popeo and George C. Smith filed a brief for the Washington Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by Cynthia Hill, Maureen T. Thornton, Laughlin McDonald, and Neil Bradley; for Common Cause by William T. Lake; for the Lawyer's Committee for Civil Rights Under Law et al. by James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove, and Richard T. Foltin; for James G. Martin, Governor of North Carolina, by Victor S. Friedman; for Legal Services of North Carolina by David H. Harris, Jr., Susan M. Perry, Richard Taylor, and Julian Pierce; for the Republican National Committee by Roger Allan Moore and Michael A. Hess; and for Senator Dennis DeConcini et al. by Walter J. Rockler.

Opinion

****2758** Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, and an opinion with respect to Part III–C, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, and an opinion with respect to Part IV–B, in which Justice WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U.S.C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the

Eastern District of North Carolina pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate ***35** and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act.[3]

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before *Bolden, supra.* S.Rep. No. 97–417, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 205 (hereinafter S.Rep.).

***36** Section 2, as amended, 96 Stat. 134, reads as follows:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the ****2759** guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of ***37** the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate ***38** Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. *Gingles v. Edmisten,* 590 F.Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged ****2760** district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting[5] ***39** and designated seat plans[6] for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember ***40** districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged ****2761** voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and

in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F.Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

***41** With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, *post,* p. ——, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

***42** Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to ****2762** this Court, pursuant to 28 U.S.C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U.S. 1064, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

***43** A

SECTION 2 AND ITS LEGISLATIVE HISTORY

[1] Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of the circumstances" reveal that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." While explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in evaluating an alleged violation, § 2(b) cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[7] First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which ***44** required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority ****2763** voters.[8] See, *e.g.,* S.Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.,* at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9] *Id.,* at 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also *id.,* at 2, 27, 29, n. 118, 36.

[2] In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." *Id.,* at 27, U.S.Code Cong. & Admin.News 1982, p. 205. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political ***45** subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.,* at 28–29; see also *supra,* at ——. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.,* at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims,[10] other factors may also be relevant and may be considered. *Id.,* at 29–30. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 207. Rather, ****2764** the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), and on a "functional" view of the political process. *Id.,* at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208.

***46** **[3]** **[4]** **[5]** Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.,* at

16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.,* at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

***47** **[6]** The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' "[13] ****2765** ***48** *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966) (quoting *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965)). See also *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *White v. Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb v. Chavis,* 403 U.S. 124, 143, 91 S.Ct. 1858, 1869, 29 L.Ed.2d 363 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] See, *e.g.,* Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S.Rep., at 16. Cf. *Rogers v. Lodge, supra,* 458 U.S., at 617, 102 S.Ct., at 3275; *Regester, supra,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb, supra,* 403 U.S., at 142, 91 S.Ct., at 1868. Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. See, *e.g.,* S.Rep., at 16.

[7] **[8]** **[9]** **[10]** **[11]** While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly, ***49** a ****2766** bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden,* 446 U.S., at 105, n. 3, 100 S.Ct., at 1520, n. 3 (MARSHALL, J., dissenting) ("It is obvious ***50** that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[17] Cf. ***51** *Rogers,* 458 U.S., at 616, 102 S.Ct., at 3275. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, see, *infra,* at ——, and n. 26—usually ****2767** to defeat the minority's preferred candidate. See, *e.g.,* Blacksher & Menefee 51, 53, 56–57, 60. Cf. *Rogers, supra,* at 616–617, 102 S.Ct., at 3274–3275; *Whitcomb,* 403 U.S., at 158–159, 91 S.Ct., at 1877; *McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Davis v. Bandemer,* 478 U.S. 109, 131–133, 139–140, 106 S.Ct. 2797, ——, 92 L.Ed.2d 85 (1986) (opinion of WHITE, J.); *Bolden, supra,* 446 U.S., at 111, n. 7, 100 S.Ct., at 1523, n. 7 (MARSHALL, J., dissenting); *Whitcomb, supra,* 403 U.S., at 153, 91 S.Ct., at 1874. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

***52** III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting.[18] First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts.[19] Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological ***53** regression analysis[20] —in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between ****2768** the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated.[21] The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant.[22] Finally, adopting Dr. Grofman's terminology, see ***54** Tr. 195, the court found that in all but 2 of the 53 elections[23] the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F.Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." *Id.,* at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina maintains ***55** that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. *Id.,* at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is deemed to exist whenever " 'the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.' " ****2769** Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368). We read the District Court opinion differently.

2

The Standard for Legally Significant Racial Bloc Voting

The Senate Report states that the "extent to which voting in the elections of the state or political subdivision is racially polarized," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206, is relevant to a vote dilution claim. Further, courts and commentators agree that racial bloc voting is a key element of a vote dilution claim. See, *e.g., Escambia County, Fla.,* 748 F.2d, at 1043; *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen, 465, 469; Parker 107; Note, Geometry and Geography 199. Because, as we explain below, the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary ***56** from district to district. Nonetheless, it is possible to state some general principles and we proceed to do so.

[12] The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See *supra,* at ——. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. *Id.,* at 60. The amount of white bloc voting that can generally "minimize or cancel," S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 205; *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.[24] See, *e.g.,* Butler 874–876; Davidson 5; Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb.Aff.Q. 345 (1976); United States Commission ***57** on Civil Rights, The Voting Rights Act: Unfulfilled Goals 38–41 (1981).

[13] **[14]** Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb,* 403 U.S., at 153, 91 S.Ct., at 1874, a pattern of racial bloc voting that extends over a period of

time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.[25] Blacksher & Menefee 61; Note, Geometry and Geography **2770 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[26]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will *58 vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of " 'substantive significance" that the United States ascribes to it—" 'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,' " Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368)—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is *legally* significant through mechanical reliance on this standard.[27] While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

[15] The District Court's findings concerning black support for black candidates in the five multimember districts at issue *59 here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, *post,* p. ——, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

**2771 In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See *ibid.* The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.[28]

*60 While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see *infra,* at ——, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, *post,* p. ——. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived

from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,[29] as well as of the ***61** very different order of preference blacks and whites assigned black candidates,[30] in ****2772** reaching its conclusion that legally significant racial polarization exists in each district.

[16] We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a *correlation* between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income [,] incumbency, education, campaign expenditures," Brief for ***62** Appellants 42, "media use measured by cost, ... name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as *Amicus Curiae* 30, n. 57, can prove that race was the primary determinant of voter behavior.[31]

[17] Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.[32] Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate *infra,* appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S.Rep., at 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and the "searching practical evaluation of the 'past ***63** and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers ****2773** to voting patterns that are in some way *caused by race,* rather than to voting patterns that are merely *correlated with the race of the voter,* is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

[18] Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, *e.g.,* S.Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, *supra,* at ——, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently

as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws ***64** that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race,* but to voting patterns that are *determined primarily by the voter's race,* rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, *e.g.,* Butler 902 (Minority group "members' shared concerns, including political ones, are ... a function of group status, and as such are largely involuntary.... As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151–152 (1972) ("Socioeconomic status ... is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which ***65** holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes ****2774** and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S.Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. *Id.,* at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are *always* defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex–44. As is the case in Senate District 2, blacks in this ***66** hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S.Rep. 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and conduct a searching and practical evaluation of reality. *Id.,* at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical ***67** element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, *id.,* at 33, U.S.Code Cong. & Admin.News ****2775** 1982, p. 211, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 206. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

[19] First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to ... elect representatives *of their choice.*" ***68** Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect

were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, *supra,* the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, *e.g.,* Blacksher & Menefee 59–60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

***69** ****2776** Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S.Rep., at 5, 40; H.R.Rep. No. 97–227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, *e.g., White v. Regester,* 412 U.S., at 768–769, 93 S.Ct., at 2340–2341; *Kirksey v. Board of Supervisors of Hinds County, Miss.,* 554 F.2d 139, 145–146 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win ***70** election in a multimember district than in a single-member district. See, *e.g., Graves v. Barnes,* 343 F.Supp. 704, 720–721 (WD Tex.1972), aff'd in part and rev'd in part *sub nom. White v. Regester, supra.* Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122–123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, *Escambia County,* 748 F.2d, at 1043 (" '[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination' ") (quoting *United States v. Dallas County Comm'n,* 739 F.2d 1529, 1536 (CA11 1984)); *United States v. Marengo County Comm'n,* 731 F.2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

[20] Finally, we reject the suggestion that racially polarized voting refers only to ****2777** white bloc voting which is caused by ***71** white voters' *racial hostility* toward black candidates.[33] To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47

(1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden, supra,* that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.[34] Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L.J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee ... heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The Committee found the testimony of Dr. Arthur S. ***72** Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> " '[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.' " *Ibid.* (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. *Ibid.* The new intent test would be equally, if not more, burdensome. In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant ****2778** *causal factors,* such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

> ***73** "Many of the[se] independent variables ... would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L.J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. Amended § 2 asks instead "whether minorities have equal access to the process of electing their representatives." *Ibid.*

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, *supra,* requiring proof that racial considerations actually *caused* voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court ... make a separate ... finding of intent, after accepting the proof of the factors involved in the *White* [*v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314] analysis ... [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." *Id.,* at 37,

U.S.Code Cong. & Admin.News 1982, p. 215. We therefore decline to adopt such a requirement.

***74** 6

Summary

[21] In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

[22] North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.[35] They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly ****2779** proportional representation.[36] This electoral ***75** success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S.Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.,* at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207, quoting *Zimmer v. McKeithen,* 485 F.2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*). The Senate Committee decided, instead, to " 'require an independent consideration of the record.' " S.Rep., at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *Id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

[23] Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past ***76** and present reality,' " the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, *id.,* at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[37] 590 F.Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as ****2780** a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it

cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

***77** B

[24] The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,[38] but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute ***78** black citizens' votes is a mixed question of law and fact subject to *de novo* review on appeal. In support of their proposed standard of review, they rely primarily on *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as *Amicus Curiae* 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, *e.g., Rogers v. Lodge,* 458 U.S., at 622–627, 102 S.Ct., at 3278–3281; *City of Rome v. United States,* 446 U.S. 156, 183, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980); *White v. Regester,* 412 U.S., at 765–770, 93 S.Ct., at 2339–2341. Cf. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In *Regester, supra,* we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> ****2781** "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise." *Id.,* 412 U.S., at 769–770, 93 S.Ct., at 2341.

Quoting this passage from *Regester* with approval, we expressly held in *Rogers v. Lodge, supra,* that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s ***79** clearly-erroneous standard. 458 U.S., at 622–623, 102 S.Ct., at 3278–3279. Similarly, in *City of Rome v. United States,* we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U.S., at 183, 100 S.Ct., at 1565.

[25] We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past

and present reality,' " S.Rep., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " *Rogers, supra,* 458 U.S., at 621, 102 S.Ct., at 3277, quoting *Nevett v. Sides,* 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622, 102 S.Ct., at 3278. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in *Bose,* Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S., at 501, 104 S.Ct., at 1960, citing *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855, n. 15, 102 S.Ct. 2182, 2189, n. 15, 72 L.Ed.2d 606 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

[26] The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see *supra,* at ——, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 ****2782** to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

***80** B

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a

1982 (Polk)	32	83	33	94

House District 21

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		General	
	White	**Black**	**White**	**Black**
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

	Primary		General	
	White	**Black**	**White**	**Black**
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36

	Primary		General	
	White	**Black**	**White**	**Black**
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

House District 39

	Primary		General	
	White	**Black**	**White**	**Black**
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				

Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

590 F. Supp., at 369-371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District	**Prior to**						
(No. Seats)	**1972**	**1972**	**1974**	**1976**	**1978**	**1980**	**1982**
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0

See Brief for Appellees, table printed between pages 8 and 9; App. 93-94.

***82** ****2783** Justice WHITE, concurring.

I join Parts I, II, III–A, III–B, IV–A, and V of the Court's opinion and agree with Justice BRENNAN's opinion as to Part IV–B. I disagree with Part III–C of Justice BRENNAN's opinion.

***83** Justice BRENNAN states in Part III–C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis,* 403 U.S. 124, 149–160, 91 S.Ct. 1858, 1872–1878, 29 L.Ed.2d 363 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended

§ 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and to reject the "intent" test propounded in the plurality opinion in ***84** *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S.Rep.). Whereas *Bolden* required members of a racial minority who ****2784** alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 206. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.,* at 193–194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.,* at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the ***85** level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White.*

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The black ***86** voters in these districts would often be able to elect the representative of their choice in each of these two districts, ****2785** but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of

the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters ***87** backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see *ante,* at 2760, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White,* 412 U.S., at 765, 93 S.Ct., at 2339. See also *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely ***88** with reference to its ****2786** prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. *Ante,* at —— – ——. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 1012, 105 S.Ct. 416, 422, 83 L.Ed.2d 343 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted

30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% ***89** of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ante,* at 2766. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.[1] Second, "the minority group must ****2787** be able ***90** to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante,* at ——. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ...—usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a ***91** majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

****2788** To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the ***92** black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2.

Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Ante,* at 2770. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White* 's results test and which were highlighted in the Senate Report. S.Rep., at 28–29; see ***93** *Zimmer v. Mc* Keithen, 485 F.2d 1297 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) *(per curiam)*. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," *ante,* at ——, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," *ante,* at —— or "the exclusion of members of the minority group from candidate slating processes," *ante,* at —— or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," *ibid.,* or "the use of overt or subtle racial appeals in political campaigns," *ibid.,* or that "elected officials are unresponsive to the particularized needs of the members of the minority group." *Ibid.*. Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and ****2789** that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

***94** II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." *Gingles v. Edmisten,* 590 F.Supp. 345, 358–359 (EDNC1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this

case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable ***95** standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

What appellants *do* contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them* (*i.e.,* in proportion to their presence in the population)," standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F.Supp., at 372.[2] The District Court attached ****2790** great weight ***96** to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.,* at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors, as the Court's thorough summary of the District Court's findings indicates. See *ante,* at —— – ——.

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> "The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, ***97** and is not dispositive." S.Rep., at 194, U.S.Code Cong. & Admin.News 1982, p. 364 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it

follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport ****2791** to redefine or alter the ultimate showing of discriminatory effect required by *Whitcomb* and *White*. In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

***98** The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See *White,* 412 U.S., at 766, 93 S.Ct., at 2339–40. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," *id., at* 765–766, 93 S.Ct., at 2339–40, and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U.S., at 156, 91 S.Ct., at 1875. To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339–40. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis v. Bandemer,* 478 U.S. 109, 169–170, 106 S.Ct. 2797, ——, ——, 92 L.Ed.2d 85 (1986) (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden.* The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White.* The Court's test for vote dilution, combined with its standard for evaluating "voting potential," *White, supra,* 412 U.S., at 766, 93 S.Ct., at 2339–2340, means that any racial minority with distinctive interests must *usually* "be represented in legislative halls if ***99** it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." *Whitcomb,* 403 U.S., at 156, 91 S.Ct., at 1875. Nothing in *Whitcomb, White,* or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden.* Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Davis v. Bandemer, supra,* 478 U.S., at 132, 106 S.Ct., at ——. Of course, the relative lack of minority electoral success under a challenged plan, when compared ****2792** with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. *Davis v. Bandemer, supra,* at 169–170, 106 S.Ct., at —— (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent ***100** under the challenged plan before

it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White, supra,* 412 U.S., at 765, 93 S.Ct., at 2339.

III

Only three Justices of the Court join Part III–C of Justice BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the ***101** Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.,* at 33–34. Similarly, I agree with Justice WHITE that Justice BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case. *Ante,* at 2783 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in *aggregating* data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate ****2793** in the primary elections selected for study. *Ante,* at 2771, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. *White* calls for "an intensely local appraisal of the design and impact of the ... multimember district," 412 U.S., at 769–770, 93 S.Ct., at 2341, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtuallyproportional ***102** minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But Justice BRENNAN, joined by Justice WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Ante,* at 2780. I agree with Justice BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what

would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, *ante,* at ——, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each ***103** of these districts in three of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F.Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution ... is district-specific." *Ante,* at 2771, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," *ante,* at 2790, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black ****2794** candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F.Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend *some* support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and ... in each district it presently operates to ***104** minimize the voting strength of black voters." *Id.,* at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other *Zimmer* factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against *necessarily* foreclosing a vote dilution claim on the basis of isolated black successes, 485 F.2d, at 1307; see S.Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, *e.g., Turner v. McKeithen,* 490 F.2d 191 (CA5 1973) (no black candidates elected); *Wallace v. House,* 515 F.2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such ***105** weight was clearly erroneous, and the

District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with Justice BRENNAN that appellees failed to establish a violation of § 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred ****2795** candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White,* 412 U.S., at 765, 93 S.Ct., at 2339.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

***106** Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante,* at ——— – ———; ——— – ———, and n. 23; ——— – ———, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante,* at ——— – ——— is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.[2]

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not ***107** inconsistent with the District Court's ultimate finding concerning House District 23.[3] The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante,* at ———, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically ****2796** cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." *Ante,* at 2782.

To paraphrase the Court's conclusion about the other districts, *ibid.,* I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.[4] Accordingly,

I concurin ***108** the Court's opinion except Part IV–B and except insofar as it explains why it reverses the judgment respecting House District 23.

All Citations

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, 54 USLW 4877, 4 Fed.R.Serv.3d 1082

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

2 Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

3 Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, *Gingles v. Edmisten,* 590 F.Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

4 These factors were derived from the analytical framework of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*). S.Rep., at 28, n. 113.

5 Bullet (single-shot) voting has been described as follows:

" 'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' " *City of Rome v. United States,* 446 U.S. 156, 184, n. 19, 100 S.Ct. 1548, 1565, n. 19, 64 L.Ed.2d 119 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

6 Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, *e.g., City of Rome, supra,* at 185, n. 21, 100 S.Ct., at 1566, n. 21.

7 The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, *e.g., Garcia v. United States,* 469 U.S. 70, 76, and n. 3, 105 S.Ct. 479, 483, and n. 3, 83 L.Ed.2d 472 (1984); *Zuber v. Allen,* 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

8 The Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37

L.Ed.2d 314 (1973), and *Zimmer v. McKeithen,* 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S.Rep., at 16, U.S.Code Cong. & Admin.News 1982, p. 193.

9 The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.,* at 40, U.S.Code Cong. & Admin.News 1982, p. 218 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was " 'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.' " *Id.,* 5, U.S.Code Cong. & Admin.News 1982, p. 182 (quoting 111 Cong.Rec. 8295 (1965) (remarks of Sen. Javits)).

10 Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep., at 30.

11 Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis.Stud.Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

12 The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

13 Commentators are in widespread agreement with this conclusion. See, *e.g.,* Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla.St.U.L.Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden,* 34 Hastings L.J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga.L.Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La.L.Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo.Wash.L.Rev. 689 (1982); Jewell, The Consequences of Single-and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb.Aff.Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J.Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223 (1976); Parker 87–88.

14 Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers v. Lodge,* 458 U.S.,

at 623, 102 S.Ct., at 3279, leaving the minority effectively unrepresented. See, *e.g.,* Grofman, Should Representatives be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

15 Under a "functional" view of the political process mandated by § 2, S.Rep., at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.,* 28–29, U.S.Code Cong. & Admin.News 1982, p. 206. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to,* a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, *e.g., McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984); *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

16 In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

17 The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates.... [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55–56 (footnotes omitted; emphasis added).

18 The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

19 The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

20 The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F.Supp., at 367–368, n. 28, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb.Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr.1985) (hereinafter Grofman, Migalski, & Noviello).

21 The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." *Id.,* at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See, *infra,* at ——.

22 The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F.Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.

23 The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F.Supp., at 368, n. 31.

24 This list of factors is illustrative, not comprehensive.

25 The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

26 This list of special circumstances is illustrative, not exclusive.

27 The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

28 In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2–10, that the court relied on data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

29 For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent—who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did *not* vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed

that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

30 The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

31 Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

32 The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See *Lee County Branch of NAACP v. Opelika,* 748 F.2d 1473, 1482 (1984); *Jones v. Lubbock,* 730 F.2d 233, 234 (1984) (Higginbotham, J., concurring).

33 It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. *United Jewish Organizations v. Carey,* 430 U.S. 144, 166, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977); *Rogers v. Lodge,* 458 U.S., at 623, 102 S.Ct., at 3278. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

34 The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S.Rep., at 27–28, n. 109, U.S.Code Cong. & Admin.News 1982, p. 205.

35 The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

36 The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, *supra,* House District 21 elected a black to its six-member delegation in 1980, House District 39 elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

37 See also *Zimmer v. McKeithen,* 485 F.2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

38 We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

1 I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether it is imposed by § 2. I note, however, the artificiality

of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante,* at 2765–2765, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

2 At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, *e.g.,* 590 F.Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

1 See *ante,* at 2779 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered.' 42 U.S.C. § 1973(b).... However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," ' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' ... The Senate Committee decided, instead, to ' "require an independent consideration of the record" ' ") (internal citations omitted).

2 See *ante,* at 46 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

3 See *ante,* at ——— – ———, and n. 23, ———, n. 29, ——— – ———.

4 Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. *ante,* at 2780, n. 38 ("We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," *ante,* at 2782, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.

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494 F.Supp.2d 440
United States District Court,
S.D. Mississippi,
Eastern Division.

UNITED STATES of America, Plaintiff
v.
Ike BROWN, Noxubee County Democratic Executive Committee; Noxubee County Election Commission, Defendants.

Civil Action No. 4:05CV33TSL–LRA.
|
June 29, 2007.

Synopsis

Background: United States brought action against political party's county executive committee and its chairman, and the county election commission, alleging claims under Voting Rights Act.

[Holding:] The District Court, Tom S. Lee, J., held that political party's chairman, and its executive committee under his leadership, engaged in racially motivated manipulation of the electoral process in county to the detriment of white voters in violation of anti-dilution provision of Voting Rights Act.

Judgment for plaintiff.

West Headnotes (8)

[1] **Constitutional Law** Fifteenth Amendment

Fifteenth Amendment, which prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race, grants protection to all persons, not just members of a particular race. U.S.C.A. Const.Amend. 15.

[2] **Election Law** Dilution of voting power in general

Anti-dilution provision of Voting Rights Act was intended to protect the rights of all voters, regardless of race. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[3] **Election Law** Presumptions and burden of proof

In any Voting Rights Act anti-dilution case, burden is on the plaintiff to prove that the challenged situation constituted a qualification, prerequisite, standard, practice, or procedure within the meaning Act, and based on the totality of the circumstances, that the challenged practice has resulted in members of a protected class having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[4] **Election Law** Dilution of voting power in general

Senate report factors considered in determining whether challenged practice has resulted in vote dilution in violation of Voting Rights Act are: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) whether members of the minority group have been denied access to any candidate slating process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[5] **Election Law** Discriminatory practices proscribed in general

Claims of intentional discrimination under Voting Rights Act are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

[6] **Election Law** Dilution of voting power in general

Anti-dilution provision of Voting Rights Act prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[7] **Election Law** Election Officials' Actions

Election Law Voting procedures

Political party's chairman, and its executive committee under his leadership, engaged in racially motivated manipulation of the electoral process in Mississippi county to the detriment of white voters in violation of anti-dilution provision of Voting Rights Act; chairman not only recruited black candidates to run against whites with the aim of defeating white incumbents, but his plan involved the candidates' falsely representing their residency in order to qualify to run, chairman made a direct charge of race discrimination against white candidate which he knew was unfounded and did so to motivate black voters, chairman was involved in racially motivated abuses of the absentee ballot process in county that were designed to minimize white voter participation, provided unsolicited and otherwise improper "assistance" to black voters at a number of polling places, disparately enforced Mississippi's poll campaigning limitations on the basis of the race of the candidates, and intentionally kept the location of certain caucuses secret from all but a limited number of his supporters/followers, thus resulting in exclusive attendance by blacks. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

[8] **Election Law** Dilution of voting power in general

A "practice" within meaning of anti-dilution provision of Voting Rights Act will be found where there has been an intent to discriminate on account of race. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

The United States of America brought this action against the Noxubee County Democratic Executive Committee and its chairman, Ike Brown, and the Noxubee County Election Commission[1] alleging claims under Section 2 of the Voting Rights Act, and also asserting claims against Brown and the Noxubee Democratic Executive Committee under Section 11 of the Voting Rights Act. The case was tried to the court from January 16 to January 31, 2007, following which the parties submitted post-trial briefs presenting what they contend are the factual and legal issues pertinent to the court's decision. Having considered the evidence presented and the parties' memoranda, the court makes the following findings and conclusions.

The Parties:

The plaintiff is the United States Department of Justice (the Government) which brought this action pursuant to the authority granted by 42 U.S.C. § 1973j(d), which states,

> Whenever any person has engaged ... in any act or practice prohibited by Section [2 or 11] ..., the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction ... or other order.

The defendants are the Noxubee County Democratic Executive Committee, its chairman Ike Brown, and the Noxubee County Election Commission. Under state law, the Noxubee County Democratic Executive Committee (NDEC) is responsible for "performing all duties that relate to qualifications of candidates for (Democratic) primary elections" and for conducting Democratic primary elections in Noxubee County. *See* Miss.Code Ann. § 23–15–263. Ike Brown has been chairman of the NDEC since 2000, having been elected to the position at the county convention in 1999. The Noxubee County Election Commission is responsible for conducting general elections, as well as for maintaining the county's voter registration rolls. *See* Miss.Code Ann. § 23–15–213. The defendants, together with the registrar, who in Noxubee County is the circuit clerk, have control over every electoral activity "from voter registration, to voter roll maintenance, to voting itself, and to canvassing ***443** returns and certifying election results." Jeffrey Jackson and Mary Miller, *Mississippi Practice Series: Encyclopedia of Mississippi Law* § 6 (2003). Their authority is thus said to be "superior to that of any other players in the process." *Id.* ("the local parties' role in the conduct of the primaries is all encompassing").

The Government's Claims:

When the Voting Rights Act was passed in 1965, the population of Noxubee County was approximately 70% black and 30% white, but 100% of the elected officials in the county were white. Now, forty years later, the population of Noxubee County is still about 70% black and 30% white, but 93% of elected officials are black.[2] Four of five members of the Board of Supervisors are black; five of five members of the Election Commission are black; five of five members of the Board of Education are black; and with the exception of the county prosecuting attorney, all countywide elected officials are black, including the circuit clerk, chancery clerk, sheriff, tax assessor, superintendent of education, coroner, two justice court judges and two constables. Moreover, the Democratic party in Noxubee County, once dominated by whites, is now majority black; and Democratic party officials in Noxubee County, including NDEC Chairman Ike Brown and all but one of the 30 current members of the NDEC, are black. Thus, whereas whites were historically in power in this majority black county, the tables have turned, and, as the Government's expert Dr. Theodore Arrington has put it, "You now have a situation in which whites are the minority and blacks are in a position to discriminate against them very much in the same way as whites discriminated against blacks in the history further back." As the Government sees it, that is precisely what has occurred and is occurring in Noxubee County. Accordingly, in what is an unconventional, if not unprecedented use of the Voting Rights Act, the Government filed this suit claiming that Noxubee County Democratic party officials have engaged in conduct that has infringed the voting rights of white voters, the minority group, and has denied white voters equal access to the electoral process.

In broad terms, the Government charges that defendants have administered the Democratic primary in Noxubee County in such a way as to discriminate against white voters and white-preferred candidates; that the racially discriminatory way the elections are conducted is with the purpose of diluting the voting strength of white voters and reducing the opportunities for white voter-preferred candidates to be elected to local office; and that the result of this discriminatory administration of the Democratic primary is the dilution of white voting strength, thereby denying white voters the opportunity to elect candidates of their choice and ensuring

that the black candidates preferred by defendants will be elected. In short, the Government claims that defendants have intentionally practiced racial discrimination and that their actions have had the racially discriminatory result of reducing the electoral opportunities of white voters and white voter-preferred candidates.

Section 2:

Section 2 of the Voting Rights Act protects against discrimination in voting on account of race, and is the "major statutory prohibition of all voting rights discrimination." S.Rep. No. 97–417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207. ***444** Section 2 prohibits states from applying any "voting qualification or prerequisite to voting or standard, practice or procedures ... which results in a denial or abridgment of the right of any citizens of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of Section 2 is established where, "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of [a] class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

This is an atypical Section 2 case in a number of ways, principal among which is the fact that the case involves alleged discrimination against white voters. Yet Section 2 provides no less protection to white voters than any other class of voters.[3] Any doubt as to this conclusion is allayed by a review of the history of Section 2.

[1] As originally enacted, Section 2 was not considered controversial because it was viewed essentially as a restatement of the Fifteenth Amendment, which provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race," U.S. Const. amend. XV, § 1.[4] *See Mobile v. Bolden,* 446 U.S. 55, 61, 100 S.Ct. 1490, 1496–97, 64 L.Ed.2d 47 (1980) (plurality opinion). The Fifteenth Amendment had been enacted in the wake of the Civil War "to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom." *Rice v. Cayetano,* 528 U.S. 495, 512, 120 S.Ct. 1044, 1054, 145 L.Ed.2d 1007 (2000). Yet as the Supreme Court acknowledged in *Rice,* the amendment goes beyond this vital objective:

> Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. *The Amendment grants protection to all persons, not just members of a particular race.*
>
> The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, *the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race* ... The Court has acknowledged the Amendment's ***445** mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese,* 92 U.S. 214, 218, 23 L.Ed. 563 (1875).

Rice, 528 U.S. at 512, 120 S.Ct. at 1054 (emphasis added). Consistent with *Rice,* the court in *United Jewish Organizations of Williamsburgh, Inc. v. Wilson* concluded that white voters had standing to bring a vote dilution claim under the fifteenth amendment, reasoning,

> [T]here is no reason ... that a white voter may not have standing, just as a nonwhite voter, to allege a denial of equal protection as well as an abridgement of his right to vote on account of race or color, regardless of the fact that the fourteenth and fifteenth amendments were adopted for the purpose of ensuring equal protection to the black person. While we generally tend to think of white voters as being in the majority because in the country as a whole and in most states they are, it is plain enough that in a given state or political subdivision they may not be; to the extent that the fourteenth and fifteenth amendments can be construed as extending the rights of minority groups, in a given situation that group may of course be white.

510 F.2d 512, 520 (2d Cir.1975), *aff'd sub nom., United Jewish Org.'s of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). *See also Enlargement of Boundaries of Yazoo City v. City of Yazoo City,* 452 So.2d 837, 843 (Miss.1984) ("A person does not have to be a

> member of any particular race or group in order to have his right to vote respected. White persons have the same constitutional and legal immunity against the abridgment of, or dilution of, their right to vote on account of race and color as do black persons.").

[2] The Supreme Court has recognized that the coverage provided by Section 2, as originally enacted, "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment." *Chisom v. Roemer,* 501 U.S. 380, 391–92, 111 S.Ct. 2354, 2362, 115 L.Ed.2d 348 (1991); *see also Bolden,* 446 U.S. at 60–61, 100 S.Ct. at 1496 ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment and the sparse legislative history of § 2 makes it clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.").[5] It follows, then, that Section 2 was intended to protect the rights of *all* voters, regardless of race. *See White v. Alabama,* 74 F.3d 1058, 1073–74 (11th Cir.1996) (finding that right of class of "non-black voters" to be free from racial discrimination, as protected by Section 2, was violated by a settlement agreement which racially apportioned state judicial offices). While Section 2 was amended in 1982, the amendment was intended "to broaden the protection afforded by the Voting Rights Act," not constrict the Act's coverage. ***446** *Chisom,* 501 U.S. at 404, 111 S.Ct. at 2368. *See also Hayden v. Pataki,* 449 F.3d 305, 353 (2d Cir.2006) (stating that "from its inception and particularly through its amendment in 1982, Congress intended that § 2 ... be given the broadest possible reach"). From the foregoing, it is manifest that Section 2 broadly protects the voting rights of all voters, even those who are white.

This case also differs from the majority of more recent Section 2 cases in that the Government is not merely claiming that defendants have engaged in racially neutral activities that have *resulted* in discrimination; rather, it is claiming that defendants have engaged in intentional, purposeful racial discrimination against white voters.

In *Bolden,* the plurality opinion held that there was no violation of either the Fifteenth Amendment or Section 2 absent proof of intentional discrimination. 446 U.S. at 60–61, 100 S.Ct. at 1496. Responding to the Court's holding, Congress amended Section 2 in 1982 to eliminate any requirement of a purpose or intent to discriminate and to provide that proof of discriminatory results or discriminatory impact is sufficient. *Chisom,* 501 U.S. at 392–93, 111 S.Ct. at 2362–63. Following the 1982 amendment,

> "[P]laintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiffs must prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process."

McMillan v. Escambia County, Fla., 748 F.2d 1037, 1046–1047 (5th Cir.1984) (quoting S.Rep. No. 97–417, 205). *See also Garza v. County of Los Angeles,* 918 F.2d 763, 766 (9th Cir.1990) ("[T]he Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."); *Dillard v. Town of North Johns,* 717 F.Supp. 1471, 1476 (M.D.Ala.1989) ("[A] violation of § 2 of the Voting Rights Act is established if action was taken or maintained with a racially discriminatory 'intent' or the action has racially discriminatory 'results,' determined according to certain congressionally approved criteria").

[3] **[4]** Most Section 2 cases brought since the 1982 amendment have been "results" cases, rather than "intent" cases, so there are few cases addressing the specific proof requirements in intent cases in the wake of the 1982 amendment. In any Section 2 case, the burden is on the plaintiff to prove that the challenged situation constituted a qualification, prerequisite, standard, practice, or procedure within the meaning of Section 2, and based on the "totality of the circumstances," that the challenged practice has resulted in members of a protected class having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *United States v. Jones,* 57 F.3d 1020, 1023 (11th Cir.1995) (quoting Section 2, and citing *Thornburg v. Gingles,* 478 U.S. 30, 79–80, 106 S.Ct. 2752, 2781, 92 L.Ed.2d 25 (1986)). The inquiry into the "totality of circumstances" is guided by a number of factors set forth in the Senate Report accompanying the 1982 amendment, which in "results" cases, function as "signals of diminished opportunity for political participation of the minority group and election of the representatives of their choice." *See League of United Latin American Citizens, Council No. 4434 v.* ***447** *Clements,* 986 F.2d 728, 844–45 (5th Cir.1993). The Senate factors include:

> a. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

b. the extent to which voting in the elections of the state or political subdivision is racially polarized;

c. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

d. whether members of the minority group have been denied access to [any candidate slating] process;

e. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

f. whether political campaigns have been characterized by overt or subtle racial appeals;

g. the extent to which members of the minority group have been elected to public office in the jurisdiction;

h. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

i. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143, 1147 (5th Cir.1993) (quoting S.Rep. No. 97–417, at 206–07).[6] In a results case, these factors tend to show whether and to what extent a challenged practice has affected minority voters' participation in the political process.

[5] "Claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting," *United States v. Charleston Cty.,* 316 F.Supp.2d 268, 272 (D.S.C.2003) (citing *Garza,* 918 F.2d at 766), and while the Senate factors, or some of them, may still be relevant in such cases, they "serve a different purpose in litigation under section 2 from their purpose in constitutional litigation," *McMillan,* 748 F.2d at 1043 n. 11 (quoting *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1564–66 (11th Cir.1984)). "[I]f a section 2 plaintiff chooses to prove discriminatory intent, 'direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions' would be relevant evidence of intent." ***448** *McMillan,* 748 F.2d at 1046–47 (quoting S. Rep. 97–417, 205 n. 108). "Where direct evidence of discriminatory motive is proffered, a case is easily made, ... as it is where the circumstantial evidence of racially discriminatory motivation is so strikingly obvious that no alternative explanation is plausible." *Nevett v. Sides,* 571 F.2d 209, 221–222 (5th Cir.1978). Because such cases are rare, courts must usually look to other evidence. *Id.* In an intent case, the Senate factors may provide such "other evidence" of a discriminatory purpose. *McCarty v. Henson,* 749 F.2d 1134, 1136 (5th Cir.1984) ("The existence of the *Zimmer* factors might be indicative, though not conclusive, of discriminatory purpose"). *See also Rogers v. Lodge,* 458 U.S. 613, 620, 102 S.Ct. 3272, 3277, 73 L.Ed.2d 1012 (1982) (agreeing that "although the evidentiary factors outlined in *Zimmer* [are] important considerations in arriving at the ultimate conclusion of discriminatory intent, the plaintiff is not limited to those factors")

> For example, "[a] history of discrimination is important evidence of both discriminatory intent and discriminatory results," because "[a] history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination." Under the results test, the inquiry is more direct: past discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.

Marengo County Com'n, 731 F.2d at 1567 (citing *Zimmer,* 485 F.2d at 1306). Circumstantial evidence of discriminatory intent may also be found to exist in the form of starkly differential racial impact; the historical background of the practice, "particularly if it reveals a series of official actions taken for invidious purposes"; the "specific sequence of events leading up to the challenged decision"; procedural or substantive departures from normal decision-making; and statements, including legislative or administrative history, reflecting on the purpose of the decision. *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 267, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977) (cited in *Nevett,* 571 F.2d at 221–222).

[6] A final wrinkle here is that unlike most Section 2 cases, which have involved "entrenched electoral practices"

such as at-large elections or existing district voting plans, this case involves episodic, or "one of a kind" practices. Nevertheless, it is clear that Section 2 "prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members." S.Rep. No. 97–417, at 207. *See also Welch v. McKenzie,* 765 F.2d 1311, 1315 (5th Cir.1985) (Section 2 "covers episodic practices, as well as structural barriers, that result in discrimination in voting"); *Ortiz v. City of Philadelphia Office of City Com'rs Voter Registration Div.,* 824 F.Supp. 514, 521–522 (E.D.Pa.1993)(scope of Section 2 "includes all electoral practices that deny minority voters equal opportunity to participate in any phase of the political process and to elect candidates of their choice, even if the challenged practice is episodic rather than involving a permanent structural barrier infringing upon the right to vote"); ***449** *Goodloe v. Madison County Bd. of Election Com'rs,* 610 F.Supp. 240, 243 (S.D.Miss.1985) ("Section 2 on its face is broad enough to cover practices which are not permanent structures of the electoral system but nevertheless operate to dilute or diminish the vote of blacks").[7] However, the Senate Report notes that "[i]f the challenged practice relates to ... a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers." S.Rep. No. 97–417, at 207. Taking their cue from this comment, most of the relatively few courts that have addressed alleged episodic violations of Section 2 generally have not applied the Senate factors. *United States v. Jones,* 846 F.Supp. 955, 964 (S.D.Ala.1994) (citing *Welch,* 765 F.2d 1311, and *Brown v. Dean,* 555 F.Supp. 502 (D.R.I.1982)). "Whether these factors are considered or not, however, 'the ultimate test would be ... whether, in the particular situation, the (episodic) practice operated to deny the minority (plaintiff) an equal opportunity to participate and to elect candidates of their (sic) choice.' " *Id.* (quoting S.Rep. No. 97–417, at 30); *Welch,* 765 F.2d at 1315 (5th Cir.1985).

[7] The court is convinced that Ike Brown, and the NDEC under his leadership, have engaged in racially motivated manipulation of the electoral process in Noxubee County to the detriment of white voters.

A Racial Agenda:

The court has not had to look far to find ample direct and circumstantial evidence of an intent to discriminate against white voters which has manifested itself through practices designed to deny and/or dilute the voting rights of white voters in Noxubee County. The court is hesitant to find that Ike Brown, or any member of the NDEC, has a specific racial animus against whites. Brown, in fact, claims a number of whites as friends. However, there is no doubt from the evidence presented at trial that Brown, in particular, is firmly of the view that blacks, being the majority race in Noxubee County, should hold all elected offices, to the exclusion of whites; and this view is apparently shared by his "allies" and "associates" on the NDEC, who, along with Brown, effectively control the election process in Noxubee County. This is a view that Brown has expressed publicly and privately over the years, and one that has been the primary driving force in his approach to all matters political since his first involvement in Noxubee County politics in the 1970s.

A Brief History:

At the time the Voting Rights Act was passed in 1964, there were no black elected officials in Noxubee County and only a small number of the county's black population were registered to vote. This began to change when federal registrars came to Macon, the county seat, in 1968 to register voters. The year 1971 saw the county's first black candidates on the ballot, and the first black elected official, Joseph Wayne, who won a seat on the Board of Supervisors.

Ike Brown first became involved in Noxubee County politics in 1977 when he worked in the campaign of William Dantzler, a black candidate for supervisor. At ***450** the time of the Dantzler campaign, Brown was living in Madison County but he eventually moved to Noxubee County in 1979 to help black candidate Reecy Dickson in her bid for election as superintendent of education. Dickson's election to this countywide office, as defendants put it, was "the first major crack in the wall of white dominance in county elective offices."

The 1980s brought a sea change in the political landscape of Noxubee County. More and more blacks were running for office and blacks began going to the polls in increasing numbers. Brown was active throughout these years in support of black candidates and the cause of blacks taking control, and as blacks steadily gained power, so did Brown gain influence in the black community. By the mid–1990s, blacks held the majority of elected positions in the county.

Defendants readily admit that Brown has been the most vocal, opinionated and controversial political figure in Noxubee County, and they do not deny that he has promoted a racial

agenda. For example, in a 1995 letter authored by Brown while in federal prison on a conviction for income tax fraud, Brown addressed the county's black voters:

TO THE BLACK VOTERS OF NOXUBEE COUNTY

Lest We Forget

> We are not free yet. As I am imprisoned, so could you, but in a different manner. They thought by getting rid of me they could fool you. Don't let them carry you back to the old days, when blacks were found dead in the jail, you couldn't even go in the courthouse, you weren't even respected, I help bring change to Noxubee County, and I will be back soon. You must win this one yourself. I am asking you to remember me by supporting these candidates who have pledge to keep the dream alive....
> After then presenting a slate of all black candidates, Brown concluded:
>
> > Please support these candidates. As Jessie Jackson said, "Keep Hope Alive Vote Black in '95'."[8]

Similar racially-based encouragement had been offered by Brown to black voters at one polling place in 1994. As related by Judith Ann Ewing, a white bailiff at the Democratic table at the Title 1 polling place, Brown entered the polling place and, speaking loudly, announced (to the blacks) in the room, "You've got to put blacks in office, our candidates, because we don't want white people over us anymore."

At the same time he was publicly appealing to black voters to "vote black" and put "our candidates" in office, Brown was privately recruiting and counseling black candidates about the importance of defeating white candidates and of black officials governing the county. David Boswell, who is black, testified that in 1995, Brown asked him to a meeting to discuss Boswell's candidacy for District 5 supervisor. According to Boswell, at the meeting, attended only by blacks, Brown told him he was looking for a "good black candidate," expressed concern that a white candidate might win the position, and told him that since the county was predominately black, all county officials should be black. Brown told Boswell, "We want to keep this thing as black as possible." Similar testimony was presented from Larry Tate, the current member of the Board of Supervisors for District 1, who is also black. Tate reported that when he ran for chancery clerk in 1991 and again in 1995, Brown told ***451** him he wanted a black to be elected to the position since the county was predominately black.

Brown was also openly critical of blacks he saw as supporting white candidates and/or working with whites. In the early 1990s, for example, during a particularly divisive debate in the county over the efforts of Federated Technologies, Inc. (FTI), Brown, who supported FTI, criticized John Gibson, another black man, for making an "alliance" with the whites (the majority of whom opposed FTI). And in a 1998 meeting of the Board of Supervisors in which black supervisor William "Boo" Oliver voted, along with Eddie Coleman, a white supervisor, to fire two black justice court clerks who were accused of stealing, Brown accused Oliver of being "a white man's nigger" and "selling out to the white folks."[9] Brown made this accusation, notwithstanding that the motion to terminate the employees had been made by another black supervisor, Robert Henley, and two of the three members of the Board voting for the terminations were black.

In 1999, another letter from Brown, in which he identified himself as "Chairman, Noxubee County Voters League," was published in the *Macon Beacon,* directed to "the voters of Noxubee County," but the substance of which was directed to black voters, in which Brown wrote:

> Three years ago, Marzine Robinson (Soul) was sentenced to 35 years in prison for selling a rock of cocaine less than one ounce. Two years later, a whole field of dope was found on the property of two white public officials, Judge Sherlene Boykin and Supervisor Eddie Coleman. Nothing was done, but you can do something—vote both of them out of office.
>
> Saturday, July 10th, a representative for Forrest Allgood, District Attorney, was at a political rally in Macon. When questioned as to why no blacks had ever been hired to work for Forrest, he replied, "None are good enough." Remember, if none are good enough for him, then he is not good enough for our vote.

Brown identified black candidates for each of the positions of justice court judge, supervisor District 4 and district attorney, and concluded,

> [R]emember, I will be at the polls in Shuqualak all day, so stand with me and I will stand with you, and may God bless you.

When Brown wrote this letter, Boykin, Coleman and Allgood were among the few remaining white elected officials in Noxubee County and the few whites running for election.

Brown wanted them out of office and used racial appeals to "get the job done."[10] In fact, a representative of Forrest Allgood had not said that blacks were not "good enough" to work in the district attorney's office; this was instead Brown's spin on the representative's statement, conveyed in a manner which was calculated to inflame black voters. And while there were rumors that marijuana had been found on property owned by Boykin and Coleman, there was nothing to suggest ***452** that either official was aware of or had any involvement in this alleged discovery, but more pertinently, there was no reason for Brown to have identified Boykin and Coleman in the letter as "white" public officials other than to raise the ire of black voters and galvanize black opposition to these "white" officials.[11]

All of these remarks and incidents—Brown's letters and declarations to black voters, his statements to Tate and Boswell, his chastisement of Gibson and racial slurs against Oliver-occurred prior to Brown's ascent to the chairmanship of the NDEC and have not been suggested by the Government to have violated Section 2. Indeed, as an individual, Brown was free to promote his racial views and agenda among the electorate with impunity. *See Welch,* 765 F.2d at 1316 ("Section 2 only affords redress for voting practices 'imposed or applied by any State or political subdivision' ").[12] However, Brown's comments and actions predating his tenure as NDEC chairman present a clear picture of Brown's racial agenda and, to the extent it might otherwise be unclear, give context and meaning to his actions as NDEC chairman. This agenda did not change when he assumed his duties as chairman of the NDEC in 2000 following his election to the position at the 1999 county convention.[13] What did change was Brown's ability to affect the electoral process in a much more direct fashion.

Recruitment of Black Candidates:

The credible evidence plainly establishes that, among other actions Brown took once he became NDEC chairman in an effort to further his racial agenda, Brown attempted to recruit black candidates to run for offices for which he knew they were not qualified according to state residency requirements. Although he denies having done so, the court finds that prior to the 2003 Democratic primary, Brown encouraged a black attorney, Winston Thompson, whom he knew to be a nonresident of Noxubee County, to run against the white incumbent, Ricky Walker, for the office of county prosecuting attorney, the only countywide elected office held by a white.[14] ***453** In so doing, race was Brown's sole motivation: He wanted to find a black candidate who could unseat the white incumbent.[15] After learning of Thompson's candidacy, Walker began inquiring about him and determined that Thompson was not a resident. He learned, for example, among other things, that while Thompson had rented an apartment (which he did with Brown's assistance), the apartment had no utilities, appliances or furniture, and the phone number on Thompson's qualifying forms was a Madison County number. Walker first tried unsuccessfully to have Thompson declared disqualified by Brown and the NDEC, and was eventually forced to file suit in chancery court where he was successful in getting Thompson disqualified. *See Walker v. Noxubee County Democratic Executive Committee,* Civil Action NO.2003–028 (Nox.Cty.Cir.Ct. May 13, 2003) (finding Thompson had not shown an actual residence in Noxubee County with a bona fide intention to remain and that not being a resident of Noxubee County, was not qualified for the Office of County Attorney).

The court also finds that in 2005, Brown tried to convince Kendrick Slaughter, a black resident of Ward 4 for the City of Macon, to use his sister's address and run against the white incumbent, James Watkins, in Ward 2, telling Slaughter that if he ran in Ward 4, where Slaughter in fact lived, he and another black candidate, Willie "Man" Dixon, would "split the black votes between [them] and let the white one (Barbara Hutchinson) win."[16] Despite Brown's appeal to him, Slaughter refused because he was not, in fact, a resident of Ward 2 but a resident of Ward 4;[17] Slaughter lost his bid for the position.

Both of these instances occurred at a time when Brown was chairman of the NDEC, and in both instances, Brown not only recruited black candidates to run against whites with the aim of defeating white incumbents, but his plan involved the candidates' falsely representing their residency in order to qualify to run. Although Brown was ultimately unsuccessful in his efforts to get Thompson on the ballot and to get Slaughter on the ballot for the ward in which Brown wanted him ***454** to run, the fact that he made these attempts speaks volumes on the issue of his racial intent and his willingness to violate the law to achieve his goal of all-black leadership for Noxubee County.[18]

Walker's Petition:

Brown's blatantly obstructionist conduct with respect to Walker's petition challenging Thompson's candidacy is consistent with complicity on Brown's part in recruiting Thompson and is evidence of his racial intent. Brown purported to schedule a hearing on Walker's petition, to be held at Brown's personal residence, of all places, but he gave Walker short notice of the meeting and specifically refused Walker's request for a current list of NDEC members and a copy of the State Party Constitution. Brown did not give notice of the hearing to all members of the NDEC, and when Walker appeared for the hearing, Brown refused to allow him to present his petition and accompanying evidence to the members present, claiming the petition was inadequate because it did not set forth the specific basis for Walker's challenge, even though Brown was well aware of the basis and Walker was armed with evidence substantiating his position.[19] Without taking a vote or consulting any members of the NDEC, Brown refused to allow Walker to proceed. Moreover, Brown banned two white NDEC members from even attending the meeting/hearing. When Wallace Gray and Robert Cunningham arrived, Brown met them in the garage, told them they had been put off the committee and were no longer members and that he might have to get the law. Brown allowed them into his house, but told them they would have to stay in the kitchen. In fact, in keeping with the party's constitution, Gray and Cunningham could only have been removed from the NDEC after proper written notice and an opportunity for a hearing, which never occurred.[20] That ***455** Brown was willing to ignore those rules altogether and exclude Gray and Cunningham from the meeting with no proper cause[21] and yet was totally inflexible in denying Walker's reasonable request to present his petition to the NDEC supports the court's finding that Brown's handling of the entire Walker/Thompson situation was motivated by discriminatory intent.

Racial Appeals:

Similar to his racial appeal to black voters to vote Eddie Coleman out of office in 1999,[22] in May 2003, Brown made a direct charge of race discrimination against Coleman which he knew was unfounded and did so to motivate black voters. In a letter published in the *Macon Beacon* in May 2003 from Brown, as "Democratic Chairman" and "Chairman East Mississippi Voters League" to the "Concerned Citizens of Noxubee County," Brown wrote:

> This is an open letter to all Democratic voters. In 2003, 138 years after the end of slavery and 38 years after the passage of the Voting Rights Act, we still have the vestiges of discrimination and slavery in Noxubee County. There is discrimination in the location of paved roads and slavery to the Board of Supervisors in Noxubee County.
>
> *Discrimination* is evident because roads that are paved are primarily where the whites live, blacks live on gravel roads. In District 4 Mashulaville Supervisor Eddie Coleman paved a road to the last white resident's house and stopped. He then paved a road in an all-white area where his cousin and Foreman, Gerald Butler, lived. This is not fair and must end. *Slavery* is evident because the Supervisors do not want you to have paved roads; they want you to have to beg them for gravel and to fix your road. This is not fair and must end.

Brown had previously written a letter to the newspaper criticizing each of the four incumbent members of the Board of Supervisors who were running for reelection, including three black board members. However, in the May 8 letter, he singled out Eddie Coleman, making what he knew were unfounded charges of race discrimination by Coleman. Brown admitted at trial that he believed that Coleman had done the best job of all the supervisors with respect to the paving of roads. He also clearly knew the allegation that Coleman had paved roads only where white residents lived, or that he had paved one particular road only to the point where the last white person lived and stopped, falsely portrayed Coleman's actions. Yet Brown again used race "to get the job done."

Absentee Ballot Program:

The most serious charge by the Government in this case relates to Brown and the NDEC's alleged involvement in racially ***456** motivated abuses of the absentee ballot process in Noxubee County. To fully appreciate the Government's position, it is first necessary to understand the basic rules governing absentee voting in Mississippi.

Under Mississippi law, a voter may not simply choose to vote absentee; rather, the election statutes provide that only certain registered voters are eligible to vote by absentee ballot. *See* Miss.Code Ann. § 23–15–713.[23] Under the applicable statutes, a voter can obtain an absentee ballot in only two ways: appearing in person at the county registrar's office (here, the circuit clerk's office) and voting early, or requesting a ballot by mail and mailing it back. *See* Miss.Code Ann. § 23–15–715. However, only certain voters may qualify to vote

by mail, namely persons 65 and over, disabled, temporarily residing outside the county or who have a spouse, parent or child hospitalized more than fifty miles away and who will be with the spouse, parent or child on election day. Miss.Code Ann. § 23–15–721. Whether voting in person or by mail, the voter must first request an application for an absentee ballot; this request may be made orally or in writing by the voter or a third party acting on his behalf. Miss.Code Ann. § 23–15–715.

Once the voter has completed the application for an absentee ballot, which must be signed and sworn by the elector, the voter is to be provided a ballot and an envelope to be sealed and be imprinted with a voter's affidavit and a certificate of an attesting witness. Miss.Code Ann. § 23–15–719. If the voter requests to vote by mail, the circuit clerk's office will mail the application and the absentee ballot and ballot envelope to the address provided by the voter. Miss.Code. Ann. § 23–15–715. By law, the voter must appear before an official authorized to administer oaths and mark the ballot in secret but in the presence of such an official. Miss.Code Ann. § 23–15–719. The voter is to then seal the ballot in the envelope, sign his name across the flap of the envelope, sign the affidavit, have his affidavit notarized, and have the attesting witness sign. *Id.* For those voting by mail, the envelope containing the ballot must be mailed to the registrar so that it is received prior to 5:00 p.m. of the day preceding the day of the election. Miss.Code Ann. § 23–15–731. The provisions requiring that a voter request an absentee ballot, that he actually vote his own ballot, and that he place and seal the ballot in the provided envelope "are intended to ensure the integrity of absentee ballots." *Lewis v. Griffith,* 664 So.2d 177, 185 (Miss.1995).

Turning to the Government's allegations, with respect to the August 2003 primary and runoff in particular, the Government has proposed that Brown and the NDEC engaged in a pattern of absentee ballot abuses that was designed, from start to finish, to minimize white voter participation. According to the Government's theory, the first phase of this absentee ballot scheme involved Brown's hiring notaries ***457** and sending them into the black community to collect ballots from voters who were encouraged to vote for his candidate of choice or for whom his notary actually completed the ballot (sometimes with, but sometimes without the knowledge and consent of the voter). Then, to ensure these ballots would be counted, Brown and the NDEC put in place a nearly all black force of poll workers and managers, over whom they had effective influence and control, and who, under Brown's direction, ignored or rejected proper challenges to the ballots of black voters. While the Government's theory in this regard, that Brown and his "associates" and "allies" orchestrated such a scheme, may seem improbable, having thoroughly reviewed and considered the evidence, the court has come to the firm and definite conclusion that there is substance to the Government's position.

What is most striking about absentee voting in Noxubee County is the sheer volume of absentee ballots cast in relation to the number of qualified electors. The Government's expert testified without contradiction that in other jurisdictions, including other jurisdictions in Mississippi, the normal rate of voting by absentee ballot in a given election ranges from around three to six percent. In Noxubee County, however, the rate is around twenty to twenty-three percent. This rate is astounding given that Mississippi is not an "early voting" state and that voters must meet one of the eligibility requirements to vote absentee. It is highly unlikely that twenty percent or more of those on the voter rolls of Noxubee County are eligible to vote by absentee ballot. The Government's expert maintains, and the court would agree, that even taking into account that there could have been an exceptionally efficient "get out the vote" campaign at work here, this level of absentee voting "cannot happen except when you're generating absentee ballots on a fraudulent basis," for there is no "reasonable legal rationale that would account for this degree of difference."[24] The question becomes whether this situation is traceable to defendants. The Government insists it is.

As all absentee voters, with the exception of those who are temporarily disabled, are required to have their absentee ballot application and certificate notarized, to conduct an effective, widespread absentee ballot operation, access to notaries is critically important;[25] and the simplest way to ensure voters have easy access is to have a notary going to people's homes to notarize and collect their ballots for mailing.[26] This was undeniably done on a large scale in Noxubee County. Nearly every local candidate running for office had one or more notaries doing absentee ballot work for them, traveling around and collecting ballots from persons they considered supporters. As the court understands the process, if the candidate found that a supporter wanted to vote absentee, the candidate would help the voter by letting him know how to get an application to vote absentee;[27] and once the candidate determined ***458** from records in the circuit clerk's office that an application and ballot had been mailed

to that voter, he would give the voter's name and address to a notary (this would usually involve a list of names), who would then go to the voter's house to notarize and collect the ballot for mailing once the voter had voted. Some notaries did this work as a public service or because they supported and wanted to help a particular candidate. However, it seems that most were hired and paid in one form or another for their services. The witnesses who addressed this subject, including Dr. Arrington, agreed there was nothing impermissible about paying notaries for their services, so long as they were not paid based on the number of ballots collected, as it is illegal under Mississippi law to pay a notary per absentee ballot collected.[28] *See Welch v. McKenzie,* 592 F.Supp. 1549, 1553 (S.D.Miss.1984) ("It is not ... improper for a candidate to urge his supporters to utilize the absentee voting procedures where they are applicable, nor is it improper for a candidate to instruct his supporters as to how they may obtain and vote such ballots.").

Although not a candidate, Ike Brown was plainly heavily involved in an absentee ballot program. The uncontroverted evidence showed that from 1999 to 2004, but principally in late 2002 and 2003, a corporation owned by Brown, RMB Enterprises, paid the notary application fees of more than fifty persons, nearly all of them residents of Noxubee County. For at least some of these applicants (three of which Brown actually admitted but likely more), Brown's corporation also paid for their surety bonds, which they required in order to do notary work. Brown's acknowledged purpose in paying these fees was so these notaries could become involved in the absentee ballot process. That, in itself, would not be improper, for facilitation of lawful and proper absentee voting would be a legitimate facet of any effort to turn out votes,[29] which Brown claims is all he was doing. But the Government claims Brown's efforts were anything but legitimate.

Brown testified that his work in establishing notaries in Noxubee County was part of an effort by him to turn out as many Democratic votes as possible in the 2002 congressional race between Chip Pickering and Ronnie Shows, and he insists that he was highly successful in this regard, as Noxubee County had one of the highest turnouts on election day 2002. The evidence does support his position in ***459** this regard. For example, in 2002, prior to the Pickering/Shows race, Brown requested that the state Democratic party pay substantial sums to fund the application and certification fees for notaries;[30] and the fact that most of the notary applications for which RMB paid were made in 2002 is consistent with Brown's testimony concerning his "get out the vote" efforts in the 2002 race. However, there is also credible direct evidence, as well as circumstantial evidence, which links Brown to improper absentee ballot activity during the 2003 election in Noxubee County.

Gwendolyn Spann, called as a witness by the Government, testified that Brown approached her in 2003 about doing notary work; at Brown's direction, she got an application from Circuit Clerk Carl Mickens' office, which she completed and gave to deputy clerk Freda Phillips to mail. After Spann received her kit in the mail, Brown hired her to do absentee ballot work in the 2003 Democratic primary. Spann explained that she was told to get a list from Phillips of the voters she needed to contact and she did so; all of the voters on the list were black so all of the voters from whom she collected ballots were black. Spann periodically reported the number of ballots she had collected to Brown, who paid her in cash, not "per ballot," she maintained, but based on "the amount of work"; in other words, she said, the more ballots she collected, the more she was paid.[31] In the end, she said, Brown was satisfied with her work, but felt she could have collected more ballots.

Although Spann testified that she never assisted anyone in marking a ballot unless they asked for help (which she claims happened only about three times), and stated that Brown never gave her instructions to do anything she thought was wrong, the fact remains, he paid her (by volume) to collect absentee ballots from black voters and black voters only.[32]

Testimony from Mable Jamison provided further evidence of Brown's involvement in an absent ballot program. Jamison, a notary public who lives in Noxubee County, did some notary work during the 2003 primary, not for any particular candidate but as a public service, to help people who needed a notary. Jamison testified that Brown called her on the phone and was upset that she was picking up his ballots. Brown, she reported, did not appreciate what she was doing: "He pretty much said that his people had did the initial leg work and I shouldn't be picking up his ballots." Brown clearly indicated there were specific people collecting absentee ballots under his direction, and he wanted control over who was collecting those ballots.

The Government also presented direct evidence of fraud in the collection of absentee ballots by one notary in particular, Carrie Kate Windham, who became a member of the NDEC during Brown's chairmanship and whose notary application fee and surety bond were paid by Ike Brown. Susan Wood, who is black, testified that after she voted absentee at

the courthouse one time in 1999, she inexplicably began receiving absentee ballots by ***460** mail notwithstanding that she is neither illiterate nor disabled nor incapable of going to the poll to vote. Windham started coming over to Wood's house to assist her in voting, and Wood now votes absentee in every election and each time is assisted in voting by Windham. According to Wood, Windham actually marks Wood's ballot for her and selects candidates when Wood does not know whom she wants to vote for because, as Wood put it, Windham "knows folks" better than Wood does.[33] Wood testified that her daughter lives with her, and although her daughter is not disabled or illiterate and was not going to be out of the county on election day, she was recruited to vote absentee by Windham. The same was true of Otis Shanklin, who also lives in Wood's home. Shanklin is not disabled, can read, and is able to go to the poll on election day, yet he casts his vote by absentee ballot in every election and is assisted in every election by Windham; and if he does not know whom to vote for, he has Windham vote for him.

Another black voter, Nikki Nicole Halbert, testified at trial that Windham came to her home and recruited her and her mother to vote absentee, telling them all they had to do in order to vote absentee was to let Windham know. Although Halbert never requested an absent ballot application, a ballot came in the mail. Not long after, Windham came by Halbert's house to pick up the ballots. Halbert had already voted her ballot. Halbert handed Windham the envelope and ballot and Windham left without signing or sealing it. When shown the application form and envelope at trial, Halbert maintained that the signatures on the application and ballot envelope were not hers, and that whoever had filled out the application had checked the box indicating Halbert was voting absentee because she had a temporary or permanent disability, which was untrue. To refute Halbert's testimony, the defense offered testimony from Catherine Johnson, who claimed to have accompanied Windham to Halbert's home and to have observed Halbert sign the application and ballot envelopes; the court fully credits Halbert's testimony in this regard.[34]

It is hardly likely that these incidents represent the extent of Windham's fraudulent absent ballot activities in the 2003 election conducted under Brown's leadership; on the contrary, the court considers it quite likely these are merely examples of ***461** Windman's activities.[35] Moreover, while the only direct evidence linking Brown to Windham's notary activities is the fact that he paid for her notary application fee and bond, based on the totality of the evidence, the court has little doubt that Windham was one of Brown's "people." Furthermore, while Brown may not have specifically directed Windham's activities, the court is convinced the two were working together and that he encouraged her actions, or at the very least was aware of and condoned Windham's tactics, which furthered his agenda.

The evidence at trial showed that Brown closely monitored the activity surrounding the circuit clerk's receipt of absentee ballot requests and the mailing and return of voted absentee ballots during the August 2003 Democratic primary. The circuit clerk's office is required by law to maintain a record of all absentee ballot activity, which includes a list of every person who has made request for an absentee ballot, the date on which the application and ballot were mailed to the voter and the date on which the application and ballot were returned. Brown checked the absentee ballot record book in the clerk's office at least once and usually twice or more each day to see who had requested absentee ballots, what precinct the ballots were mailed to, whether the ballots were mailed, and whether the ballots had yet been returned by the voters.[36] Notably, too, there was evidence that for the runoff election between Johnny Kemp and Bruce Brooks, Brown copied the pages of the absentee ballot book and tallied the number of white and black ballots returned for each precinct. His interest, in the court's opinion, was more than casual.

An absentee ballot can only be effective if it is counted; and according to the Government, toward ensuring that the ballots collected by "his people" would be counted, Brown and the NDEC, working together, put in place a force of poll workers and managers that was more than 90% black and that was comprised largely of persons over whom they had influence, and then took steps to push them through the counting process by preventing, ignoring or rejecting challenges. There is ample credible proof of the extent of Brown and the NDEC's control over the process of counting ballots and that the process was conducted in many instances in blatant disregard of applicable law.

***462** The Government does not claim that Brown or the NDEC rejected any white person's request to be a poll worker for the Democratic primary. Rather, it claims that, notwithstanding that there was no shortage of white persons available and willing to work the polls, Brown made no effort to include any whites as poll workers. Rickey Cole, Chairman of the State Democratic Executive Committee, testified the Democratic party has a rule of thumb, honored by most local chairs, that encourages the hiring of poll workers in

each precinct to be representative racially of the Democratic electorate in that precinct. According to Cole, the general consensus among most chairs was that it was desirable that there be a racial composition reflective of the Democratic electorate.[37] He recalled that Brown, in contrast, was very adamant in saying, "In Noxubee County we hire who we want to." And that is precisely what he and the NDEC did. For the August 5, 2003 primary, 103 of 110 workers were black, so that the workforce on the Democratic side was only 6.3% white; and in most of the thirteen precincts, all of the poll managers, whose job it was to review and count absentee ballots, were black. For the August 26 runoff, 74 of 78 poll workers were black, or only 2.6% white.

At trial, Brown insisted that he had no control over the selection of poll workers and that this was solely the prerogative of the NDEC; his only input was as to his own district, District 2. Although it may be true that the chairman is not ultimately responsible for choosing poll workers and that this is a function of the NDEC, the court is convinced that Brown had vastly more influence over these decisions than he would have the court believe. In any event, the NDEC is also a defendant. Brown also claimed that he told the NDEC that the number of white poll workers needed to be increased; his testimony on this point is not credible. Brown finally attempted to justify the dearth of white Democratic poll workers by reference to the all-white force of Republican poll workers; yet in Noxubee County, the Republican party, unlike the Democratic party, is all white, and contrary to what Brown may believe, the Democratic party is not all black.

Courts have found that a low number of minority poll workers can impair minority access to the electoral process by making the polls feel less open to minority voters and can undermine the confidence minorities have in the openness of the system. *See Harris v. Graddick,* 593 F.Supp. 128, 130–31 (M.D.Ala.1984).[38] White voters in ***463** Noxubee County, not being encumbered by the memories and lingering effects a long history of official discrimination, are not likely to feel intimidated by the voting process; but white voters, like black voters, are no less likely to be skeptical of a process which they do not perceive as open. This, however, is not the court's greatest concern here. Rather, the court finds that Brown and members of the NDEC intentionally selected a nearly all-black work force primarily as a means of facilitating a scheme to disenfranchise and dilute white voting strength by pushing through absentee ballots that had been collected by Brown's people.

Mississippi law prescribes in detail the procedure for handling and counting absentee ballots, which is the responsibility of the poll managers. When the polls have closed, the poll managers "shall then publicly open the box and immediately proceed to count the ballots," Miss.Code. Ann. § 23–15–581, including absentee ballots. By law,

> Each candidate shall have the right, either in person or by a representative to be named by him, to be present at the polling place, and the managers shall provide him and his representative with a suitable position from which he or his representative may be able to carefully inspect the manner in which the election is held. He or his representative shall be allowed to challenge the qualifications of any person offering to vote, and his challenge shall be considered and acted upon by the managers.

Miss.Code Ann. § 23–15–577. Further, "[c]andidates or their duly authorized representatives shall have the right to reasonably view and inspect the ballots as and when they are taken from the box and counted." *Id.*

Before the absentee ballots are removed from the sealed envelopes, poll managers must "first take the envelopes containing the absentee ballots of such electors from the box, and the name, address and precinct inscribed on each envelope shall be announced by the election managers." Miss.Code. Ann. § 23–15–639(1)(a). The "signature on the application shall then be compared with the signature on the application and the signature on the back of the envelope." Miss.Code Ann. § 23–15–639(1)(b). If the signatures correspond, and the election managers find that the applicant is a registered and qualified voter, and that the voter has not appeared in person and voted at the election, then the poll managers are to open the envelope and remove the ballot from the envelope, without unfolding or examining it, and deposit it in the ballot box with the other ballots. Conversely, if it is found that the signatures on the application and ballot envelope "do not correspond," that the affidavit or certificate is insufficient, that the applicant is not a duly qualified elector, that the voter is not qualified to vote absentee, ***464** that the voter has voted in person, or that the ballot envelope is open or has been opened and resealed, the ballot "shall not be allowed." Miss.Code Ann. § 23–15–641. The poll managers must take the unopened envelope, mark across its face "REJECTED", with the reason for rejection.

When a vote is challenged at the polls, "whether the question be raised by a manager or by another authorized challenger," if it clearly appears in the unanimous opinion of the managers that the challenge is well taken, the vote is to

be rejected entirely and marked "REJECTED." Otherwise, it will be counted, but the challenged ballot must be marked "CHALLENGED", and counted only after all unchallenged ballots have been counted and tallied.

The Government has presented substantial, credible evidence in this case that during the 2003 Democratic primary election, these requirements were often disregarded. During the August 5th primary, Peggy Brown, a poll watcher for Samuel Heard, Jr., the white candidate for sheriff running against the black incumbent Albert Walker, was present at the West Macon polling place. Ms. Brown testified that when she started to challenge a ballot, poll manager Octavia Stowers called Ike Brown on her cell phone, and told him, "Ike, they're trying to challenge these ballots." After speaking with Mr. Brown, Stowers reported, "Ike instructed me to count all the ballots." Stowers then said ballots could not be challenged, and she and the other managers continued opening ballots. According to Ms. Brown, when she later tried to challenge another ballot because the signatures did not match, Stowers told her, "No. Ain't no ballots being challenged. I was instructed by Ike not to—can't no ballots be challenged."

Samuel Heard, Jr. was present during the counting of absentee ballots at the East Macon precinct during the primary election, and testified that poll managers tore open the absentee ballot envelopes, and stacked the envelopes on one end of the table and the ballots face down on the other end. They did not call out the names of the voters, check the register to see if the person had voted at the polls or take the time to check the envelope and application to ensure the statutory requirements were met. Moreover, all this was being done at such a pace and in such a fashion that poll watchers "didn't even have time to think about looking at the envelope versus the application to check signatures." When Heard tried to get them to stop this process, a deputy sheriff who was present, John Clanton, told the manager, Annie Pearl Rice and Clanton's niece, Patricia Clanton, "Don't listen to him. He can't tell you how to do your job. You know what you're supposed to do. You know what you've been told to do. You open those envelopes now and get those ballots down to the end."[39]

At some point, controversy arose when it was noticed that the absentee ballot of a ***465** person who had voted at the polling place had been separated from its envelope and mixed in with all the other absentee ballots. Heard testified that Ike Brown, who had been in the sheriff's office across the hall, came charging over, waving his arms and telling the workers, "Count every vote, count them every one right now. Pick up those absentee ballots that are on that table and bring them over here and put them in that machine right now." When it was all over, Heard turned to Annie Pearl Rice and asked why they had done it this way; she responded that Mr. Brown had told her to. Kevin Jones, the (black) incumbent superintendent of education who was running for reelection, testified that he came in the middle of the controversy, and though he testified he did not know the totality of the situation, he confirmed that Brown did come in and tell the poll managers, "Count them."

Len Coleman, a poll watcher for his cousin Eddie Coleman at Table 1 in the Shuqualak precinct during the counting of absentee ballots, described the process as speedy and disorganized, which made it difficult for him to see if the absentee ballots had been voted in compliance with Mississippi law. Len Coleman said there were ballots he wanted to challenge, but that this was difficult to do, given how quickly poll workers were moving. He complained, but they continued in the same manner at the direction of Gary Naylor, who was not a manager but a member of the NDEC. Poll watchers were able to make some challenges to obvious deficiencies, and some of their challenges were sustained. However, at some point during the process, Brown arrived, and told poll workers, "No, we are not going to do that. We're going to count them all." Poll managers began counting all the absentee ballots, including those that had already been successfully challenged and rejected, despite the fact that they should not have been counted. When Len Coleman objected that poll managers were counting even the ballots that had already been rejected, Brown ignored him.

Eddie Coleman was also at the Shuqualak precinct and testified that as poll workers were going through the ballots and checking them, they were "going a little too fast" and were not giving poll watchers very much time to challenge them. Some had been laid out that they were not going to count, but then Ike Brown arrived. As related by Eddie Coleman, when Brown saw the ballots sitting out on the table, he said, "No, we are not going to do that. We're going to count them all," and told the workers to take them and put them in the machine.

As reported by Richard Heard, poll watcher for his father Samuel Heard, Jr., the poll managers at the Title 1 precinct (two black and one white) moved through the absentee ballot process very quickly, and were obviously not checking the applications and envelopes for deficiencies; and because of how fast they were going, he was also unable to view the ballots and check them for irregularities. Although

Heard asked the managers to slow down so he could check the ballots, they ignored him. He did notice one ballot and application (which had been notarized by Carrie Kate Windham) on which the signatures obviously did not match; but when he tried to challenge the ballot, the "head" manager, Dorothy Clanton McCoy, secretary of the NDEC, joined by her sister and fellow NDEC member Carrie Kate Windham, argued that the signatures did match and his challenge was rejected.[40]

***466** Samuel Heard's daughter, Libby Abrams, a poll watcher for her father, testified that the process at the Brooksville polling place was similar: the poll managers did not compare the signatures on the applications and envelopes; at the table where Abrams was located, the ballots were being processed so quickly it was nearly impossible for her to observe the applications and ballots so she could decide whether to make a challenge. There were a few ballots as to which she tried to make challenges, but was told by poll manager David Harrison, who is black, "We are taking them anyway." No vote was taken by the poll managers on her challenges.

There was also undisputed evidence that Brown went through the absentee ballots for Brooksville the night before the August 26 runoff and put post-it notes on a number of the ballots identifying reasons for rejecting the ballots. Johnny Kemp, a white candidate for supervisor running against Bruce Brooks in District 3, testified that Brown came in as they were getting ready to go through the absentee ballots and told the poll managers, "I've already went through these absentee ballots and I put y'all's stick-on stickers on the ballots that I want rejected and the rest of them is all right to count." He told them the reasons for rejection were on the yellow stickers. According to Kemp, the managers did as Brown said, and rejected all those ballots and "pretty well counted all the rest of them." Unlike at some of the other polling places, the managers did take the time to call out the names of the voters (though not their address or precinct) and checked the poll books to see if the voter voted at the polls. Kemp stated that if they determined that the voter had not voted in person, the managers tore open the ballot and counted it, without checking anything, and without affording candidates or poll watchers the opportunity to observe the ballots so as to be able to challenge them. Kemp complained to poll manager David Harrison that they needed to slow down so that everyone could look at the ballots and envelopes and compare them and have a valid opportunity to challenge them; Harrison responded, "We can't look at every ballot and every application. We'll be here all night. We are going to count them."

The Government submits that by processing and/or directing the processing of the absentee ballots in a fashion directly contrary to Mississippi law, Brown and NDEC members denied white candidates and their poll watchers an opportunity to challenge absentee ballots and have those challenges voted upon in the manner prescribed by the Mississippi Election Code. It submits these actions were taken because Brown and the NDEC were aware of the following: (1) large numbers of absentee ballots had been voted at Brown's encouragement; (2) many of these absentee ballots had been notarized by Brown-funded notaries; (3) some of those ballots contained material defects that were challengeable; (4) many of those absentee ballots were marked for black candidates favored by Brown; and (5) Brown's desire to defeat all of the white candidates for local office would be furthered by the poll managers complying with Brown and the NDEC's orders to count all of these absentee ballots.[41]

***467** For their part, Brown and the NDEC deny that the process followed by poll managers in counting absentee ballots during the 2003 primary was improper in any respect or that Brown or any NDEC member gave any instructions to poll managers as to how or whether to count any ballots; and they point out that black and white candidates and their poll watchers were give the same opportunity to view and make challenges. Finally, defendants submit that the Government's position on this issue is in any event grounded on the misconception that poll watchers have a right under the law to challenge the sufficiency of the application, or technical compliance with the requirements established by law for absentee ballots.

In response to the claims of Government witnesses, the defense offered testimony of a number of witnesses who were poll workers during the 2003 primary and/or runoff, including Robin Bankhead Mason (Title 1, Box 1); Virginia Dooley (Brooksville, Sub 2); Annie Earl Johnson (Brooksville); Octavia Stowers (West Macon); Sam Gilkey (West Macon); James Bridges (Brooksville); Doris Wilborn (High School, Box 1); Laura Diane Sparks (Shuqualak, Table 2); Velma Jenkins (Shuqualak, Table 2); and Chester Turner (High School, Box 2).[42] Each of these witnesses testified consistently that whether challenged ballots are accepted or rejected is a decision that is made solely by the poll managers, who cannot be told by any member of the NDEC or the

chairman how to treat or rule on any ballot; that neither Brown nor anyone else told poll managers what to do or how to rule on a challenge and that even had they done so, the poll managers would have followed their training; that poll managers did not go through the ballots too quickly or omit any step of the process, including calling out each voter's name, making sure the voter had not voted in person, and taking adequate time to check the ballot and application to make sure everything was correct; that poll watchers were given adequate opportunity to make challenges, and that there were either no challenges, or that challenges made were duly considered by the managers as required by law; that there were no complaints by poll watchers that they were not able to make challenges or no such complaints any witness could recall; and that all the candidates or their poll watchers, black and white alike, had the same adequate opportunity to challenge ballots. The testimony of these witnesses was predictable, as it would have been surprising had those closely involved in the process admitted to having done other than what the law required of them. The court finds it far more likely that the more accurate accounts of the way the process was conducted ***468** at the various polling places addressed were those provided by the Government's witnesses.[43]

As for defendants' argument that the Government is mistaken as to the claimed right of candidates and their poll watchers to challenge the sufficiency of applications and ballots, the court would point out that regardless of whether such a right exists as a matter of law, the evidence in the case establishes without dispute that poll workers in Noxubee County were specifically trained by the NDEC that candidates and poll watchers had this very right.[44] For example, Virginia Dooley and Sam Gilkey both testified that they received poll worker training prior to the election and understood from this training that although the final decision with respect to challenges is up to the poll managers, candidates or their poll watchers are entitled to make challenges to ballots. Gilkey said, for example, that it was his understanding that poll watchers are allowed to point out that signatures do not match. Moreover, Sue Sautermeister testified that for eleven years, she has been an instructor for the Election Commissioners Association of Mississippi (ECAM) and the Secretary of State's office, which provide the training for local executive committees (including NDEC) as to proper election procedures. ***469** She explained that it has always been part of the instruction that candidates have the right to challenge absentee ballots for sufficiency, which means they have the right to let the managers know when a signature does not correspond or the information is insufficient in some way.

Given that the NDEC receives training from the State that candidates have the right to make these challenges, and that poll workers are, in turn, so trained, it is disingenuous for defendants to now claim that no such right exists. Whether it does or not,[45] it is clear that this argument is offered by defendants as nothing more than an after-the-fact justification for their actions. The court has no doubt that at the time of the August 2003 election, Brown and the members of the NDEC and the poll workers trained at their instance, knew or at least believed such a right existed, and yet proceeded in complete disregard of that right.

Finally, the purpose of absentee ballot work done by Brown and his people on the front end was to stack the deck in favor of the candidates supported by Brown (all black) so when the time came to count the ballots, Brown and members of the NDEC would have considered it to the likely benefit of the Brown-preferred candidates that all the ballots be counted.[46] The court therefore does not consider the fact that white and black candidates were equally prevented from challenging ballots to be probative.[47]

In addition to evidence as to the manner in which the process was run, the Government offered evidence that in a number of instances in the August 26 runoff, absentee ballots of white voters were rejected when absentee ballots of black voters with the same deficiencies were accepted and counted. Some of the rejected white voters' ballots were ballots on which Brown had himself placed yellow post-it notes identifying a reason for rejection. The number of ballots with these yellow stickies was not established (the highest estimate was twenty), but witnesses who saw the yellow stickies (other than Brown) maintained that every stickie seen was on the ballot of a white voter. The Government submits that a racial purpose is the only reasonable conclusion to be drawn ***470** from the evidence of such disparate treatment.

Regarding the yellow stickies placed on ballots by Brown during the August 26 runoff between Johnny Kemp and Bruce Brooks, though Dr. Arrington maintained this was impermissible, the court is aware of nothing in the law that would specifically have prohibited Brown's placing yellow stickies on ballots that he perceived to have defects. However, the law does give poll managers the responsibility for determining whether or not a ballot is to be counted and Brown had no legitimate role in the process. Moreover, given Brown's position that his only purpose was to point out obvious defects to the poll workers, one must question

why he would have bothered. Presumably the poll managers themselves would have been qualified by their training to identify obvious defects. Further, while Brown insists he was merely making suggestions to the poll managers and that he made clear to them that the decision was theirs to make, it is manifest that, in yet another example of Brown's exerting his influence and control over the process, Brown's "suggestions" were both intended by him and perceived by the poll managers as directions, and the ballots with the yellow stickies were rejected. Finally, while Brown claims that he put stickies on the ballots without regard to race, i.e., they were on both black and white voters' ballots, he was unable to identify a single black voter's ballot that had been marked by him for rejection. The evidence did establish that ballots of black voters with defects similar to those of white voters with yellow stickies were not marked by Brown for rejection and were counted. For example, the ballot of white voter Charles Bryant Cooper had a yellow stickie on it indicating it should be rejected because he did not sign entirely on the line for "signature of voter"; yet Johnny Will Thomas, Larry Williams and Alberta Harper, all black voters, signed their ballots the very same way and their ballots were counted.[48]

Improper Assistance to Black Voters:

In addition to the substantial proof relating to absentee ballot improprieties, the Government presented testimony from several witnesses who related instances of unsolicited and otherwise improper "assistance" being given by black poll workers and other unidentified black individuals to black voters at a number of polling places. Mississippi law requires that before any voter may be given assistance, the voter must first request such assistance. *See* Miss.Code Ann. § 23–15–549 (providing that "[a]ny voter who declares to the managers of the election that he requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice other than the voter's employer, or agent of that employer, or officer or agent of the voter's union."); *O'Neal v. Simpson,* 350 So.2d 998, 1009 (1977) (before receiving assistance in marking ballot, voter must first make a request for assistance to the managers of the election, and if the managers are satisfied that the voter is either blind, physically disabled, or illiterate and needs assistance, voter may be ***471** given assistance). Annette Hadaway testified that throughout the day of the primary election at the East Macon polling place, she witnessed a number of black individuals approaching black voters, offering them assistance and in some cases actually marking the voters' ballots. Len Coleman related that black poll workers at the Shuqualak precinct similarly offered assistance to black voters, who usually accepted their assistance. And Libby Abrams testified that at the Brooksville precinct, she saw black poll workers approaching black voters and offering them unsolicited assistance, which "assistance" consisted of the poll workers taking the ballots and marking them without consulting the voters. Abrams recalled that such assistance was not offered to white voters, and that in fact, when an elderly white voter had difficulty marking her ballot, the poll official offered her no help and instead ran the voter's blank ballot through the machine and thereby denied her the opportunity to cast a ballot.

All but one of the poll workers offered as witnesses by the defense explicitly denied knowledge of any improper assistance having been offered to any voters, and maintained that assistance was given to black and white voters only when requested. Octavia Stowers testified that the only person she was aware of having given unsolicited assistance was Peggy Brown, a poll watcher for Samuel Heard, Jr.

The testimony of the Government's witnesses, which the court found believable, suggests a concerted effort to illegally "assist" black voters, which could not have occurred without complicity on the part of Brown and the NDEC and the poll workers they selected and placed in these polling locations.[49] By law, poll workers have the authority and responsibility to stop such patently unlawful activity, and yet that did not occur.[50]

Disparate Treatment of White Candidates at the Polls

The Government claims that Brown and the NDEC disparately enforced Mississippi's poll campaigning limitations on the basis of the race of the candidates, and cites this as further evidence that white voters and the candidates they supported were denied equal access to the local political process. Under Mississippi law, candidates and their representatives are prohibited from posting or distributing cards, posters or other campaign literature within one hundred fifty feet of any entrance of the building wherein any election is being held. *See* Miss.Code Ann. § 23–15–895. ***472** Annette Hadaway, the Republican manager at the East Macon precinct for the 2003 primary, testified that some young black people who had been outside of the polling place passing out campaign literature for Sheriff Albert Walker had moved to the back landing of the building. Hadaway instructed one of the women to move their campaign papers away from the

building or they would be thrown away. Chief Deputy Terry Grassaree, who was an NDEC member at the time, was sitting on the back steps, and immediately jumped up and confronted Hadaway. He told her not to touch the papers, told her "he [was] the law," and added, "[T]his young lady is not the problem; you're the problem. You have no business touching her sign or trying to make her move." About that time, Samuel Heard, Jr. was approaching the building and witnessed the exchange. When Heard spoke up in defense of Hadaway, Grasseree threatened Heard, stating, "I'll put your ass in jail." On the same day, however, Grasseree ordered three people who were passing out campaign literature on the courthouse lawn for Heard to leave the courthouse lawn because they were in violation of the 150–foot anti-campaigning rule.

Grasseree's conduct toward Hadaway and Heard was an egregious abuse of his authority as a law enforcement officer and as a member of the NDEC, and is troublesome, to say the least. His motivation for such disparate treatment of these two candidates was doubtless in part the preservation of his job as an employee of the incumbent Sheriff Walker, a job that would rightly have been at risk under another sheriff, though it is not unlikely that race was a factor too.

In another incident cited by the Government as evidence of disparate treatment of white candidates, on the day of the 2003 primary, as Eddie Coleman was approaching the Shuqualak poll to vote, Brown confronted him and in a loud voice, ordered him to get away from the entrance to the building. When Coleman refused, Brown summoned law enforcement, and Terry Grasseree appeared. Ultimately, Coleman was allowed to enter the building. Under Mississippi law, the only persons allowed within thirty feet of the polling place are voters, poll workers and no more than two poll watchers for each candidate. *See* Miss.Code Ann. § 23–15–245. Given that Coleman had the absolute right to enter the building to cast his vote, he was not in violation of either the thirty-foot or 150–foot prohibition. Brown has claimed that at the time of this incident, he did not know whether Coleman had voted and he thus could have mistakenly believed Coleman was in violation of the thirty-foot rule. Any fair-minded person, however, would have inquired before ordering him to leave, and certainly before calling for law enforcement.[51]

Party Loyalty Issues:

Throughout his political life, Brown has been a Democrat, though prior to becoming NDEC chairman, he considered it his personal prerogative as a voter to support any candidate he wanted, without regard to party affiliation. He admitted that he had occasionally supported and voted for ***473** Republicans. However, since becoming NDEC chairman, Brown has become more of a "dyed in the wool" Democrat, supporting and voting the tickets of the local, state and national Democratic party. He testified that one factor contributing to his heightened sense of party loyalty was the fact that he had become a party leader, which he believed naturally imposed on him a higher standard. However, as told by Brown, what most galvanized him as a true Democrat was the 2000 presidential election in which he contends the Republicans "stole" the presidency from the Democrats.

Subsequently, after former Democrat Lieutenant Governor Amy Tuck switched to the Republican party mid-term in December 2002, Brown began to vigorously advocate establishing a standard of party loyalty, and maintained that he should and could insist on requiring declarations of party loyalty on the part of candidates who would seek to run as Democrats in Noxubee County. State Democratic Party Chair Rickey Cole confirmed that while Brown was not alone in demanding implementation of a party loyalty standard, he was perhaps the most adamant and outspoken on the issue. It was well known that Brown was outraged by Tuck's actions and believed that party rules regarding party loyalty should be enforced.

Brown first addressed the issue publicly in a letter published in the January 2, 2003 edition of the *Macon Beacon,* in which he wrote:

> An open letter to the Democratic voters from Ike Brown, the chairman of the Noxubee County Democratic Executive Committee.
>
> As a result of the recent switch by Amy Tuck to the Republican part after years of masquerading as a Democrat. And also due to a recent Supreme Court ruling, we will root out disloyal Democratic elected officials and voters. To paraphrase a cousin of mine, you won't be able to run with the hares and back with the hounds. The following actions are going to be taken this year.
>
> 1—Republican-supporting officials will not be certified to run as Democrats. This includes two members of the board of supervisors and some countywide officials. They may wish to run as a Republican or Independent but will not be allowed as Democrats.

> 2—Those voters who are Republicans will be challenged if they attempt to vote in the Democratic primary. (We have found out who they are).

A week later, the *Beacon* carried a story headlined "Dem Chairman Says Some Candidates Won't Qualify," in which Brown was quoted at a meeting of the Board of Supervisors saying that his committee would not certify candidates who had not been faithful Democrats, and that among the unfaithful were two members of the Board of Supervisors and one countywide official. Brown was quoted as saying, "We encourage any candidate who thinks they might be in trouble to qualify as an Independent or a Republican and take their chances in the General Election."

It is uncontroverted that in December 2002 and continuing into 2003, Tuck's defection and the issue of party loyalty was very much on the minds of Democratic party officials; it was also an issue high on Ike Brown's agenda, as evidenced by his letter to the *Macon Beacon* and comments to the Board of Supervisors. In the midst of this discussion and debate within the party, Samuel Heard, Jr. filed papers to qualify to run on the Democratic ticket for sheriff of Noxubee County. In January or February 2003, as Heard was leaving the circuit clerk's office, Ike Brown followed him into the foyer, and in a loud voice, told ***474** Heard, "You know I'm not going to let you run as a Democrat because you know what you are." Heard took this to mean that he was "a white Republican." Brown did not follow through on this threat; nothing further was said and Heard ran as a Democrat.

In June of 2003, as the election drew closer, Brown sent a press release to the *Beacon* with the list of the names of 174 voters, of whom Brown was quoted as saying:

> "They have either removed themselves from their precinct or are in violation of Section 23–15–575.
>
> That Code Section says voters who participate in primary elections must support the party nominees in the general election."

Brown was reported as saying those voters might be challenged under the authority of Miss.Code Ann. § 23–15–575 if they attempted to vote in the Democratic primary.[52] The majority of the 174 voters listed were from District 4, the home of Supervisor Eddie Coleman, and the rest were from District 1, Larry Tate's home district.

In the end, Brown did not challenge any voter. Once his press release was published, controversy immediately erupted which prompted State Party Chairman Rickey Cole to seek an opinion from the Mississippi Attorney General as to the enforceability of § 23–15–575 by way of challenges to voters.[53]

The Attorney General responded with an opinion, strongly cautioning against ***475** challenging voters under Mississippi Code Annotated § 23–15–575. Nevertheless, there was testimony that as a result of the publication of this letter, several persons telephoned the circuit clerk's office expressing concern they would be challenged; one voter felt intimidated and took her husband with her to the poll; and another testified that she did not go to vote because she feared she would be challenged.

The Government contends that Brown's putative insistence on party loyalty was nothing more than pretext for race discrimination, and that his actions were a racially discriminatory attempt to disqualify voters and candidates from participating in the Democratic primary. Brown, on the other hand, claims that this had nothing to do with race and everything to do with partisanship.

In the court's opinion, Brown's remarks to Heard must be viewed in the context of the larger debate that was ongoing within the party concerning a party loyalty standard. Although Heard has maintained that he is and has always been a Democrat and the court has no reason to conclude otherwise, it is undisputed that Heard's father had been heavily involved in the Republican party for decades, and Heard's brother, Keith Heard, had run for Congress on the Republican ticket against Chip Pickering. Thus, while Brown's conclusion that Heard was not a true Democrat may have been wrong, the court is nevertheless persuaded that Brown did perceive Heard as a Republican masquerading as a Democrat and that his comment to Heard was not about race but rather about party.

The text of Brown's letter tends to confirm this. Brown vowed to "root out disloyal Democratic elected officials and voters," including, among others, "two members of the board of supervisors." It is reasonably clear from the evidence the one of the two members of the Board of Supervisors to whom Brown was referring was black board member Larry Tate, who was known to have angered Brown by supporting Chip Pickering and Thad Cochran.

It is not as clear to the court that partisanship was Brown's motivation, or at least his sole motivation, for publishing the

names of the 174 persons who might be challenged if they attempted to vote in the Democratic primary.[54] Each of the 174 voters he identified is white; but since virtually everyone in Noxubee County who might be considered Republican is white (perhaps with the exception of Larry Tate, at least as Brown saw it), any list of Republicans would necessarily be a list of whites. All the witnesses agreed, if you are challenging Republican voters in Noxubee County, you are by definition challenging white voters in Noxubee County. However, while all Republicans in Noxubee County are white, all whites are not Republicans.

In Noxubee County, there are few Republican candidates and few voters who vote in the Republican primary; and those who do vote Republican are white. Approximately twenty percent of voters in the Democratic primary are white, yet it is widely known that many of those who vote in the Democratic primary (presumably ***476** white) vote the Republican ticket in the November general election. That is why the Democratic primary, in local elections at least, is for all practical purposes the real election in this county. Thus, although there is no "party-raiding" occurring in Noxubee County since there are so few Republican candidates, the court acknowledges the legitimacy of party concerns over non-Democrats voting in the Democratic primary and thereby subverting the will of the true Democrats, i.e., those who support the policies and principles of the Democratic party. *See* Democratic Const. Art. III, §§ 1, 3 (providing that membership in the Democratic Party is open to "all qualified Mississippi electors who profess to support the principles of the Democratic Party").[55] The question is whether Brown's action with respect to this list of 174 voters was actuated by these party loyalty concerns or whether this was pretext for a true purpose to discourage white voters from coming to the polls, or some combination of the two. The court has carefully weighed the evidence and finds that while party concerns were a factor in Brown's actions, race played a role as well.

If concerns over party loyalty had been the sole impetus for Brown's actions, Brown should have been able to articulate a basis for his decision to include each voter whose name was included on the list on account of such alleged concerns; yet Brown was only able to identify a few specific persons for whom he had any concrete basis for suspecting they were not true Democrats. Those included the current and past chairwomen of the Noxubee County Republican Party; and he vaguely suggested that some he recognized as having voted in Republican primaries in the past or having contributed to Republican candidates. For most, however, no explanation for their inclusion was provided, and he was not able to identify any investigation that was undertaken prior to publishing these names. Moreover, although the article recited that the majority of the voters on his list "[f]ell into the party ***477** loyalty category," others were supposedly included because they had "removed themselves from their precinct." Brown claimed to have believed that the voter rolls in Noxubee County included some nearly 2,000 voters who had either moved or died, and thus, some of those 174 were thought to be among those voters. Yet is not credible in the least that Brown was only aware of whites who had moved and were consequently no longer eligible to vote. Finally, it was not disputed that the majority of voters included in the list were from supervisor District 4, that of the lone white incumbent.

In sum, the court is of the opinion that Brown had the names of these white voters published in part because of party loyalty concerns, but also as an attempt to discourage white voters from voting in the 2003 Democratic primary.[56]

The Precinct Caucuses:

Brown's handling of the 2004 precinct caucuses represents in the court's view one of the most blatant abuses of Brown's position as chairman. The evidence established that at Brown's direction, five of the Democratic Party's precinct caucuses for Noxubee County in the spring of 2004 were held in private homes or businesses;[57] and Brown intentionally kept the location of these caucuses secret from all but a limited number of his supporters/followers, all black, and, as a result of the clandestine nature of these "private" caucuses, a number of whites who tried to attend and participate in the caucuses were thwarted in their efforts.[58] These private caucuses were attended exclusively by blacks, and the delegates elected at these caucuses, many of whom were not even present for the caucuses and were not even aware they had been elected, were black.[59]

It is abundantly clear that there was no arguably legitimate reason for these caucuses to be held at any location other than the usual polling places. That is where all ***478** caucuses had always been held. It was also the explicit intent and directive of the State Democratic Party that caucuses be held at the "usual polling places whenever possible," and there was no reason the caucuses could not have been held at the usual polling places.[60] What prompted Brown to hold these private caucuses is clear: His position as NDEC chairman was threatened and he wanted to maintain that position.

The evidence at trial showed that in the wake of the 2003 primaries, a movement was begun by a group of Democrats in Noxubee County, primarily black, to oust Brown from the chairmanship of the NDEC. This anti-Brown faction was led by John Gibson and Larry Tate, both black. Gibson and Tate had asked persons, both black and white, whom they believed would support them to attend the caucuses so they could elect delegates to the county convention who would vote to unseat Brown.

Samuel Heard testified that his experiences during the 2003 primary showed him how important it was to try to make a change in Democratic party leadership. He was aware there was a group that was interested in a change of chairmanship of the NDEC and he wanted to go to the caucus so that he could vote to elect delegates who would attempt to defeat Brown in any bid for reelection to be chairman. Heard stated he was unable to attend the caucus because when he arrived at the Lottie Smith Center on the day of the caucus, the doors were locked and no one was there. He complained he was unable to attend the caucus because he did not know where it was being held.

Johnny Kemp, who had run unsuccessfully for the Board of Supervisors in the 2003 primary, also tried to attend the caucus for the Brooksville precinct because he wanted to "try to get us some good delegates elected and get us some good people that we felt would run fair elections in Noxubee County." But when he went to the Lottie Smith Center, he, too, found it locked and no one present. He testified, however, that the person he had wanted to try to get elected did find out where the caucus was and went to the caucus and got elected as a delegate.

Phillip McGuire, chairman of the Macon Democratic Executive Committee, testified that there had been talk in the county about a movement, which he assumed to be among some of the black Democrats, to get new leadership on the county level. McGuire supported this movement and wanted to be more involved, and to be elected as a delegate and to attend the county convention; but he was not able to get elected, he stated, because he never got an opportunity to caucus. When he went to the B.F. Liddell Middle School, the polling place for the High School precinct, the doors were open but no one was there and no member of the NDEC showed up to conduct a caucus. The High School precinct caucus was held at Ike ***479** Brown's home, and was attended only by blacks.

In three of the five precincts in which Brown and his followers held private caucuses, the Gibson faction held duplicate caucuses, and elected delegates to the county convention.[61] At the March 13, 2004 county convention which followed, chaos prevailed. After Brown appointed himself temporary chair of the convention, a vote was held for a permanent chair; Brown received 22 votes and Betty Robinson was elected temporary chair with 39 votes. Brown then attempted to adjourn the convention, claiming this was his prerogative as NDEC chairman, and he left. Those who remained elected delegates to the state convention, but failed to elect members of an executive committee. The controversy over who was the legitimate representative of the Democratic Party in Noxubee County was brought before the State Democratic Party for resolution;[62] and although the State Party began looking into the matter, it has never taken any action to finally resolve the issue, apparently because Brown represented (or misrepresented) to State Democratic Party Chairman Rickey Cole that his group and the Gibson faction had worked out a power-sharing arrangement of sorts.[63] Throughout this time, Brown has maintained that he remains the rightful chairman of the NDEC.

It is apparent to the court that Brown's singular purpose in all of these events was to retain his position and power as chairman of the NDEC, and to do so by whatever means were necessary, namely, connivance, manipulation and prevarication.[64] His actions are properly to be condemned, and in the court's view, the State Democratic Party was remiss in failing to take action to rectify his abuses. However, while Brown's actions impeded the efforts of at least a few white persons to attend the caucuses, his intent, in the court's opinion, was to thwart the Gibson faction's move to take control of the party from him. His intent was not to exclude whites, but to exclude Gibson's supporters, both black and white. *Cf. Welch,* 592 F.Supp. 1549 (finding that irregularities, errors and fraud in distribution and counting of absentee ballots did not violate Section 2 where there was no evidence that such infractions were motivated by racially discriminatory ***480** intent or that blacks, as opposed to supporters of the black candidate, suffered dilution of their votes).

Conclusions of Law:

Defendants view the Government's use of the Voting Rights Act in this case as a perversion of the Act's historical and salutary purpose to "eradicate inequalities in political

opportunities that exist due to the vestigial effects of past purposeful discrimination" against blacks. *Gingles,* 478 U.S. at 44, 106 S.Ct. at 2763 (citations omitted). As a matter of principle, defendants proclaim it "preposterous" that the Justice Department—a Justice Department they maintain has for decades been wholly unresponsive to complaints of voting discrimination by black citizens—would have the temerity to come into this court claiming that blacks in Noxubee County, who were oppressed by the white establishment for 135 years and who finally gained the reins of power a mere 12 years ago, have discriminated against whites in that county. As defendants see it, this is a case of the Government "persecuting the victim for fighting back when a crime has been committed against him" after the Government refused to protect the victim.[65] They declare:

> The Government sues for a group of Noxubee County whites who (1) have endured no history of official discrimination, but have enjoyed privileged status, (2) have not been under-represented or unable to elect candidates of their choice, (3) have not had to bear the effects of discrimination in education, employment and health, (4) have not been subject to an unresponsive government, and (5) have not been subject to any practice that enhances the opportunity for discrimination against them.
>
> Section 2, they argue, "is being launched as a missile without an enemy." There is no "practice" that has denied whites equality in participation in the political process, they contend, and so, with no practice to attack, the Government has resorted to attacking Democratic Party leadership, an attack they insist cannot be maintained under the authority of Section 2. Beyond that, defendants deny there has been any kind of fraudulent or wrongful conduct, or any showing of any violation of state election laws, but rather the kind of run-of-the-mill mistakes that occur in any election.

For Section 2 to apply, the challenged situation must constitute a qualification, prerequisite, standard, practice or procedure within the meaning of Section 2. *See United States v. Jones,* 57 F.3d at 1023. In *Welch v. McKenzie,* 592 F.Supp. 1549 (S.D.Miss.1984), relied on by defendants, the losing black candidate in a race for supervisor of Copiah County sued under Section 2, claiming that illegal absentee ballots had been improperly counted. The district court reviewed the evidence and found that "[w]hile irregularities [were] apparent, these [did] not constitute 'episodic' events in the sense that they [were] part of an over-all scheme or pattern. ***481** Rather, these were isolated and singular incidences of misconduct and improper administration." *Welch,* 592 F.Supp. at 1558. According to defendants, the same holds true here. Contrary to defendants' urging, *Welch* does not provide the "most appropriate guidance" for this court's resolution of this case.

In *Welch*, while there were infractions, the district court found there was no evidence that racially discriminatory intent motivated those infractions or that there was otherwise any racial element involved. The court found that while the procedures used by the registrar's office in the handling of absentee ballots were contrary to Mississippi law, the problems arose because the registrar and her office were unknowledgeable as to the proper procedures; they had not been "intentionally active in seeking to defraud the black voters of Copiah County and the (black) candidate Welch." *Id.* at 1557. Moreover, the notary public involved for the challenged ballots had done nothing other than attempt "to render a service to those voters who wished to vote by absentee ballot" and had sought advice from the registrar's office as to the proper manner for handling absentee ballots. *Id.* The poll managers made mistakes with respect to the ballots simply because "[t]hey had not been adequately trained as poll workers and did not know what the provisions of law were regarding the challenges to absentee ballots." *Id.* Finally, the Democratic Executive Committee, comprised of black and white members, failed to grant relief to the black candidate based on questionable advice from the Attorney General's office, and did nothing to "intentionally and purposely violate[ ] any of the rights" of the black candidate. *Id.* There was evidence of absentee ballot fraud by the white candidate, but as he was not a state actor, Section 2 did not extend to his misdeeds. *Id.* at 1558.

On appeal, the Fifth Circuit found the absence of evidence of any racial component significant. The court affirmed the lower court's factual findings, and concluded there was no Section 2 violation, stating, "Without racial motivation or state-created impairment of black votes, there was no violation of Section 2 of the Voting Rights Act." *Welch,* 765 F.2d at 1316. The court stressed the importance of the lack of proof of a racial element, stating, "If the registrar in this case had supplied absentee ballots only for white voters, or if the Democratic Executive Committee had been an all-white body voting to certify Hood as the winner despite the number of obviously invalid votes cast for him, the district court's finding of no Section 2 violation might have been sorely taxed." *Id.* (citing *Goodloe v. Madison County Bd. of Election Com'rs,* 610 F.Supp. 240, 243 (S.D.Miss.1985)).

In *Goodloe,* although there was no proof of intent to discriminate, the court found a Section 2 violation where the Board of Election Commissioners threw out 250 ballots notarized by Mildred Branch, virtually all of which had been cast by black voters, where it was presented with proof only that four ballots notarized by Branch had been marked when the notary was not present, in violation of state election laws. 610 F.Supp. at 242. Faced with an administrative dilemma, the commissioners chose not to undertake an individualized evaluation of each ballot but rather to invalidate all of the ballots notarized by Branch. *Id.* The court found there was "no indication that intentional discrimination played any role whatsoever in the decision made by the Board of Election Commissioners," yet because their decision resulted in the effective disenfranchisement of the black voters without any clear indication of whether those votes were cast in accordance with state absentee balloting procedures, ***482** the court found the "series of events leading up to and including the invalidation of the Branch ballots was a practice within the meaning of Section 2" which "operated to deny the black voters who cast these absentee ballots an equal opportunity to participate and elect candidates of their choice." *Id.*

Goodloe involved a one-time response to a specific situation, and yet was a "practice" because the decision resulted in the disenfranchisement of minority voters. A number of cases have found Section 2 violations in analogous circumstances. *See Toney v. White,* 488 F.2d 310 (5th Cir.1973) (*en banc*) (finding Section 2 violation where voting registrar purged black voters for nonvoting but did not drop similarly situated white voters; although there was no discriminatory purpose, net result was discriminatory); *Brown v. Post,* 279 F.Supp. 60 (W.D.La.1968) (finding violation of Section 2 where voting registrar, though acting in good faith, made absentee ballots available to white voters without taking equal steps to aid black voters); *cf. United States v. Jones,* 57 F.3d 1020, 1024 (11th Cir.1995) (finding that an inadvertent error which resulted in officials' unwitting allowance of out-of-district white voting did not violate Section 2).

[8] As intimated by the court in *Welch,* a "practice" will also be found where there has been an intent to discriminate on account of race. Thus, in *Dillard v. Town of North Johns,* 717 F.Supp. 1471, 1476 (M.D.Ala.1989), the court found Section 2 was violated where the mayor intentionally withheld candidacy requirement information and forms from black candidates because of their race. *Cf. Operation King's Dream v. Connerly,* No. 06–12773, 2006 WL 2514115, *17 (E.D.Mich. Aug. 29, 2006) (although Section 2 applied to "episodic" procurement of signatures on petition for ballot initiative, Section 2 was not violated because those involved "sought to deceive and in fact deceived both minority and non-minority voters in order to obtain their signatures").

In contrast to *Welch,* there is in this case both racial motivation and state-created impairment of white votes, most particularly with respect to the handling of absentee ballots.[66] The racially discriminatory actions of defendants are thus not isolated or singular instances of misconduct due to their ignorance, as was the case in *Welch,* but a pattern of episodic behavior intended to deny white voters equal participation in the political process.

On the issue of intent, it is often written that "determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Rogers v. Lodge,* 458 U.S. at 618, 102 S.Ct. at 3276 (citing *Arlington Heights,* 429 U.S. at 266, 97 S.Ct. at 564). However, whereas intent to discriminate is often difficult to prove, defendants, and again Brown in particular, have been anything but subtle. Among the factors identified in *Arlington Heights* as potentially relevant evidence of intent are statements reflecting on the purpose of the decision. Most pertinent to the court's finding of intentional discrimination against white voters in this case are the numerous statements by Brown over the years in which he has consistently and repeatedly declared his racial agenda. These statements, together with more slightly veiled statements suggesting a racial purpose, considered alongside his actions, ***483** and those of his NDEC "allies," provide compelling evidence of intent. A second *Arlington Heights* factor bearing on intent in this case is evidence of departures from normal decisionmaking. It is beyond question from the record in this cause that Brown and members of the NDEC (and others acting at his direction) have acted in blatant disregard of party rules and state election laws when it has served their racial purpose to do so; yet Brown in particular has doggedly insisted on strict compliance by others when it does not.

In light of what the court views as substantial direct and circumstantial evidence of intent to discriminate in this case, the relevance of the Senate factors may properly be questioned.[67] *See Nevett,* 571 F.2d at 221–222 ("Where direct evidence of discriminatory motive is proffered, a case is easily made, ... as it is where the circumstantial evidence of racially discriminatory motivation is so strikingly obvious

that no alternative explanation is plausible."). Nevertheless, the Senate factors have been held to bear on intent, and are therefore considered.

The Fifth Circuit has observed that "[a] history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination." *McMillan,* 748 F.2d at 1044. While the Government argues that whites in Noxubee County have experienced a "recent" history of discrimination, the "history" to which the Government refers consists of the very practices that it claims in this cause to be the violation of Section 2. Defendants are correct that unlike black citizens, whites in Noxubee County have not experienced and do not bear the effects of a history of past purposeful official discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.[68] Nor, in the court's opinion, are there in place voting procedures which tend to enhance the opportunity of discrimination against whites (other than those that are the subject of the Government's complaint in this cause). There is no claim or proof that elected officials have been unresponsive to white citizens. And while the Government ***484** contends otherwise, there is scant evidence of a candidate slating process.[69]

As for racial appeals, defendants have sought to minimize the extent of racial appeals by Brown and others, but there is ample evidence that racial appeals are rather standard in Noxubee County. Black officials routinely urge black voters to "stick together," and encourage voting along racial lines by appealing to racial prejudice. In addition to proof of Brown's letter in the *Macon Beacon* claiming Eddie Coleman had engaged in discriminatory road paving practices, the Government offered evidence of public racial appeals by others, including a statement by Justice Court Judge Dirk Dickson at a NAACP candidates forum, stating that in voting, "blacks need to stick together," a statement by the President of the Mississippi NAACP at a forum before the 2005 Macon city election that black candidates had "taken Shuqualak, the county, and Brooksville ... and now it was time to take the City of Macon";[70] and testimony by Larry Tate that one of his campaign slogans is "blacks need to stick together."[71]

Tenuousness is also manifest, for the practices in which defendants have engaged have no arguably legitimate purpose. And defendants have admitted that voting in Noxubee County is racially polarized.[72] The parties have approached the ***485** final factor, the extent to which members of the minority group have been elected to public office, from completely different perspectives. The Government points out that currently, only two of twenty-six elected officials in Noxubee County (7.7%) are white, notwithstanding that whites constitute 32.5% of the voting age population. Defendants, on the other hand, declare that this factor should weigh in their favor given that over the last twenty years, whites have tended to be over-represented in Noxubee County. What they mean, of course, is that some fifteen to twenty years ago, before black voters began fully exercising the franchise, whites held elected office in higher proportion than their voting age population. What is relevant, in the court's view, is not white voters' historical successes at the polls, but their more recent experience.

Having considered the Senate factors, the court remains convinced that Brown and the NDEC have administered and manipulated the political process in ways specifically intended and designed to impair and impede participation of white voters and to dilute their votes. As detailed above, defendants engaged in improper, and in some instances fraudulent conduct, and committed blatant violations of state election laws, for the purpose of diluting white voting strength. Although the extent of the abuses of the absentee ballot processes in Noxubee County by Brown and the NDEC is not known, the court is convinced there have been such abuses, that these abuses have been racially motivated, and that the result of these practices has been an infringement of the rights of white voters. The court is also persuaded that the result of this discriminatory administration of the voting process is the dilution of white voting strength. "The right to vote includes the right to have one's ballot counted. This includes the right to not have one's ballot diluted by the casting of illegal ballots or weighting of one ballot more than another." *Welch,* 592 F.Supp. at 1557–1558 (citing *Reynolds v. Sims,* 377 U.S. 533, 554–55, 84 S.Ct. 1362, 1377–78, 12 L.Ed.2d 506 (1964)).

Noxubee County Election Commission:

The Government acknowledges that most of the evidence in this case addresses actions by Brown and the NDEC, but asserts there is evidence the Election Commission has been directly involved in some of the "election-related problems" in Noxubee County elections, and that in light of that evidence and because the Election Commission is a necessary party for the issuance of effective injunctive relief ***486** in this

case, a liability ruling should be made against it as well. The "problem" to which the Government principally refers is the Commission's alleged failure to purge the voter registration roll to eliminate persons who have moved or died and who are thus no longer eligible voters, a failure which the Government maintains increases the opportunity for absentee ballot fraud.[73] For its part, the Election Commission submits that there is no competent, credible evidence that it has failed in its duty to purge the voter rolls, and that in any event there has been no proof that any omission in that respect has amounted to a violation of Section 2. The court agrees that the Government has not established a Section 2 violation by this defendant, but there remains the question whether its presence is nonetheless needed in order to afford a complete remedy. Accordingly, the Election Commission will not be dismissed at this time.

Conclusion:

The expansion of Section 2 to eliminate the necessity of proving intent was intended to lessen the burden of proving a violation; proving a discriminatory result is easier than proving a discriminatory intent. The court thus would agree with defendants that this case is an "awkward fit" for a strictly results standard. The United States Supreme Court has made it clear that the essence of this Section 2 inquiry is whether the challenged "electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." *Gingles,* 478 U.S. at 47, 106 S.Ct. at 2764. Such interaction simply does not exist when dealing with the voting rights of historically privileged white voters and who as a group do not suffer the effects of past discrimination. However, where the proof establishes a specific racial intent by black election officials to disenfranchise white voters, Section 2 applies with ease. No one could reasonably argue that an election official's racially motivated decision to count the votes of black voters while rejecting those of white voters is discrimination that can be countenanced under any view of Section 2. In purpose and in effect, that is what has occurred in this case.

The court does not doubt that similar discrimination against blacks continues to occur throughout this state, perhaps routinely. And it may be true, though the court makes no judgment about this, that the Justice Department has not been responsive, or fully responsive, to complaints by black voters. But the politics of the decision to prosecute this case, while foregoing intervention in other cases cannot be a factor in the court's decision.[74] If the same facts were presented to the court on behalf of the rights of black voters, this court would find that Section 2 was violated.

***487** Having now found that defendants Brown and the NDEC violated Section 2, it is ordered that within thirty days of the issuance of this ruling on liability issues, the parties are to submit memoranda addressing what they believe would constitute a curative remedy in this case. In addition, attorneys for the parties will make themselves available at a date and time to be set by the court in conference or at a formal hearing to address any remedial issues.

All Citations

494 F.Supp.2d 440

Footnotes

1 The Government also sued Carl Mickens, individually and in his official capacity as Circuit Clerk of Noxubee County, and Noxubee County under Section 11(b) of the Voting Rights Act. A consent decree was entered with these defendants contemporaneously with the filing of the complaint so that they are no longer active parties.

2 According to the 2000 Census data, Noxubee County has a population of 12,548, of whom 3,667 (29.2%) are white, and 8,634 (68.8%) are black. Of the 8,697 persons of voting age, 2,826 (32.5%) are white and 5,711 (65.7%) are black.

3 Although Brown was quoted in an August 5, 2003 article in the *Clarion Ledger* as saying he "didn't know that white voters were covered under the Voting Rights Act," in this case, he does not challenge the proposition that they are. His attorneys argue that "[a]pplication of the facts in this case under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, does not rest easily within the contours of the leading cases interpreting the Act as amended in 1982," and about that, they may be right; but they do not dispute the broader general principle that Section 2 protects the rights of *all* voters, regardless of race, and agree that "it is generally accepted that the section prohibits all forms of voting discrimination."

4 As originally enacted, Section 2 provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973.

5 Prior to the Supreme Court's decision in *Bolden,* "there was relatively little judicial interpretation of section 2. Rather, most courts chose to deal exclusively with the constitutional standards, probably under the assumption that the standard under section 2 was equivalent." *McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1042 n. 9 (5th Cir.1984) (citations omitted). *Bolden* "tied the two standards together," and found that a Section 2 claim "added nothing" to the claim of a Fifteenth Amendment violation. *Id.* (citing *Bolden,* 446 U.S. at 60–61, 100 S.Ct. at 1496).

6 The first seven factors set forth in the Senate Report are essentially the same factors as developed by the Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd per curiam sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), as factors to be considered in vote dilution cases. *United States v. Marengo County Comm'n,* 731 F.2d 1546 (11th Cir.1984), *appeal dismissed, cert. denied,* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984). These are often referred to as either or both the "Senate factors" and the "*Zimmer* factors." The final two factors were identified as additional factors that may in some cases have had probative value to establish a violation. S.Rep. No. 97–417, 207.

7 Examples of such episodic practices have included disparate purging of black voters from voter registration rolls, *Toney v. White,* 488 F.2d 310 (5th Cir.1973) (*en banc*); disparate treatment of absentee ballots, *see Goodloe v. Madison County Bd. of Election Com'rs,* 610 F.Supp. 240, 243 (S.D.Miss.1985), and *Brown v. Post,* 279 F.Supp. 60 (W.D.La.1968); and refusal to appoint minority registration and election officials, *Harris v. Siegelman,* 695 F.Supp. 517, 527 (M.D.Ala.1988).

8 Although he does not deny that it more or less accurately reflected his views, Brown denies that he wrote this letter. The court is convinced that he did.

9 According to an article in the *Macon Beacon* recounting the incident, before focusing his anger on Oliver, Brown had first asked Eddie Coleman, loudly, "You don't think you owe anything to black people?" There was evidence that in previous Board meetings, Brown had accused Coleman of being racist, and had asked Coleman, in a public board meeting, whether Coleman "ever used the 'N' word."

10 Phillip McGuire, who is white and the chairman of the Macon Democratic Executive Committee, testified that when he recently asked Brown why he had made racial statements over the years, Brown responded that he used race "to get the job done."

11 Brown's explanation was that his only intent was to identify Boykin and Coleman as part of the "establishment." This could have been accomplished by identifying them simply as "public officials," yet he made a point to identify them as "white public officials." His explanation is not believable, particularly given that the "establishment" in Noxubee County at the time was mostly black.

12 It is undisputed that the actions of the NDEC and Brown as chairman of NDEC constitute state action.

13 Indeed, not long after he became chairman, Brown attended a meeting of the Board of Supervisors addressed to the subject of redistricting in the wake of the 2000 Census, and proposed adoption of a plan in which all the districts were drawn so that blacks could win in all five districts, and which specifically advocated moving more blacks into District 5, the only district with a white incumbent, Eddie Coleman, for the express purpose of improving the opportunity for a black to be elected. Obviously, merely advocating a plan for redistricting does not violate Section 2; but Brown's position on redistricting is more evidence of his racial motivation. Commenting on the implications of Brown's remarks to the Board, Dr. Arrington, the Government's expert, aptly observed:

> Suppose we had a majority white county where four of the five county commissioners were white and about 30 percent of the population was black and you had a white party official come and say, "I want you to make the one

district that elects a minority representative, I want you to make it much whiter so that the black representative will have a more difficult time." I think we would say right away, "Wait a minute, that sounds like an intent to discriminate," and I think that's exactly what you have here.

14 Under Mississippi law, to be qualified to run for county prosecuting attorney, a person must be a resident of the county in which he proposes to run. The court notes that even if Brown did not actively recruit Thompson and Thompson made the decision on his own to seek the office, Brown certainly knew that Thompson was a nonresident of Noxubee County and that as such he was not qualified to run for office.

15 An April 4, 2006 article by Bill Nichols in *USA Today* reported Brown as noting that Noxubee County has only one countywide elected official, prosecutor Ricky Walker, and saying, "If I could find a black lawyer who lives in the county, we'd get him, too." Even without evidence of this statement, the court would find that Brown's motivation in recruiting Thompson was racial.

Defendants point out that in the preceding sentence in that same article, Brown is reported to have also said "he has no problem supporting whites for office—he campaigned for current Macon Mayor Bob Boykin, who is white." The court finds little probative value in Brown's support of Boykin's mayoral campaign given that it came at a time after this lawsuit was filed and thus at a time when Brown's motivation may have shifted somewhat in light of changed circumstances. Indeed, at the same time he was expressing his public support of Boykin, Brown was secretly trying to convince Kendrick Slaughter, who is black, to lie about his residency so that he could run against a white incumbent rather than running against and splitting the vote with a black candidate. *See infra* p. 26–27.

16 Slaughter testified, "He just told me to change my address because more than likely ... me and the other black guy running, he's going to put the white lady into office."

17 Section 21–3–9 of the Mississippi Code provides that "[t]he mayor and members of the board of aldermen shall be qualified electors of the municipality and, in addition, the aldermen elected from and by wards shall be residents of their respective wards."

18 The Government claims that in addition to attempting to qualify Thompson to run even though they knew he was not qualified, Brown and the NDEC allowed a black candidate, Bruce Brooks, to qualify to run for the Board of Supervisors in District 5 when they knew he probably actually resided in District 3. Brooks had run twice prior to 2003 in District 5 and been defeated by George Robinson, the black incumbent supervisor. Then, in 2003, after he unsuccessfully tried to get the Board of Supervisors to redraw the district lines so that his home on Macon Lynn Creek would be located in District 5, Brooks qualified to run in District 3, claiming an address in that district. Brooks ran against a white candidate, Johnny Kemp, and defeated Kemp in the runoff by a margin of 42 votes. The Government argues that Brown and the NDEC had good reason to question whether Brooks was a permanent resident of District 3 and yet chose to make no inquiry into his residency because they wanted a black candidate to defeat Kemp. Although Brooks did own a home in District 3 and maintained that he was living in the home at the time of the election, the circumstances were certainly suspicious. Brown and the NDEC were likely aware that a question existed as to Brooks' qualification to run in District 3, but in the absence of a challenge by Kemp or some other candidate to Brooks' qualifications, they were arguably entitled to accept Brooks' representations.

19 Mississippi Code Annotated § 23–15–961 states, "Any person desiring to contest the qualifications of another person as a candidate for nomination in a political party primary election shall file a petition specifically setting forth the grounds of the challenge within ten days after the qualifying deadline for the office in question."

20 The State Constitution or the Democratic Party provides that "[t]he seat of any member of any party unit executive committee shall be declared vacant by a two-thirds vote of those members present and voting at any regularly scheduled or called meeting of the executive committee upon the happening of one of the following: (a) it is brought to the attention of the executive committee in writing that a committee member has missed three or more consecutive regular meetings of the committee; ....," provided that before the seat of any executive committee member is declared vacant, all members of the executive committee and the accused member whose seat is proposed to be vacated shall be given 30 days' written notice specifying the cause or causes in reasonable detail as to time, date, place, accusers and witnesses thereof.

Democratic Const. Art. IV, §§ 6. The member is entitled to request a hearing, and if one is requested, it must be provided and followed by a written decision by the committee. *Id.*

21 The court is aware that Brown also barred a black NDEC member, Ms. Gibson, from participating in the Walker hearing at his house and went so far as to threaten to call the police if she would not go into the kitchen with Gray and Cunningham. No evidence was presented as to any ostensible basis for excluding Ms. Gibson but whatever the reason may have been, the fact that Ms. Gibson was excluded does not detract from the court's opinion that Gray and Cunningham were excluded for racial reasons.

22 *See supra* p. 451.

23 These include: students or teachers (and their spouses and dependents) whose studies or employment require them to be away from the county of their voting residence on election day; persons who are away from their county of residence on election day for any reason; persons who will be required to be at work on election day during the times at which the polls will be open; persons who are 65 or older; persons with a temporary or permanent physical disability; members of the Mississippi congressional delegation (and their spouses and dependents) who will be absent from Mississippi on election day; and persons who have a spouse, parent or child hospitalized more than fifty miles away and who will be with the spouse, parent or child on election day. Miss.Code Ann. § 23–15–713.

24 There is no proof that Noxubee County has an unusually higher number of persons that would qualify to vote absentee than any other jurisdiction.

25 *See Roe v. State of Ala. By and Through Evans,* 43 F.3d 574, 582 n. 15 (11th Cir.1995) (taking judicial notice of fact that reducing inconvenience of voting absentee would increase the number of absentee ballots).

26 Those who vote by absentee ballot at the courthouse are required to have their applications and ballots notarized by the circuit clerk.

27 The Government claims that Circuit Clerk Mickens and his staff misinformed one white candidate, Samuel Heard, Jr., as to the allowable methods for requesting an absentee ballot by telling him that the request had to be made in writing, and then requiring Heard to make his own "homemade" request form but failing to tell him that the forms had to include the voter's signature. Only after Heard learned that voters who had completed his homemade forms were not receiving their requested absentee ballots in the mail was he told that the request could be made by phone. While Heard believed he was intentionally misled, it is possible this was nothing more than a misunderstanding (and of course, Mickens is no longer an active defendant and there is no evidence showing that any other defendant was aware of Heard's difficulties).

28 *See* Miss.Code. Ann. § 23–15–753(2) ("It shall be unlawful for any person who pays or compensates another person for assisting voters in marking their absentee ballots to base the pay or compensation on the number of absentee voters assisted or the number of absentee ballots cast by persons who have received the assistance. Any person who violates this section, upon conviction shall, be fined not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00), or imprisoned in the Penitentiary not less than one (1) year nor more than five (5) years, or both.").

29 Although Rickey Cole, Chairman of the State Democratic Executive Committee, was critical of Brown's position on and approach to many issues, he did agree that an absentee ballot program is a legitimate part of an effort to turn out votes.

30 Cole believed that as a result of his denying Brown's request for this funding, Brown no longer considered Cole an ally.

31 The practice of paying more for more ballots would seem to come perilously close to the prohibition against paying "per ballot." *See supra* note 28. The distinction seems more one of phrasing that of substance.

32 Interestingly, Spann was assigned as a poll manager for the Prairie Point precinct, where she did her notary work. She testified that none of her ballots were challenged.

33 The election statutes require that the voter mark her own ballot in secret, then deposit her own ballot in the envelope provided, seal the envelope and sign the flap. *See* Miss.Code Ann. § 23–15–721. Mississippi election laws make it illegal to assist voters in this manner. *See* Miss.Code Ann. § 23–15–555.

34 After testifying on January 22, Halbert was again called to the stand by the Government on January 29, regarding a visit to her home by Windham and Johnson after she had testified. Halbert testified that as she left the courthouse, she overheard Brown tell Dorothy Clanton, Windham's sister and also a member of the NDEC, to "Call Carrie Kate." Twenty minutes after Halbert arrived at home, Windham and Johnson came to her home. According to Halbert, whose testimony the court credits on this subject as well, Windham confronted her about her testimony, told her, "We black people need to stick together," and suggested that she needed "to tell them that you probably didn't understand what you was being asked, the reason you said what you said." When Halbert refused, Windham suggested to Halbert that what had probably happened was that she and Halbert had "got to talking and I let your mother sign your name." Halbert and her mother responded that this was not what had occurred. Windham and Johnson left, but returned twenty minutes later and had Halbert sign her name on a piece of paper. Despite this effort on the part of Windham and Johnson to persuade Halbert to change her testimony, Halbert stated she was still convinced that it is not her signature on the application and ballot envelope.

35 In a 1993 election contest brought by Mary Allsup, a white candidate, alleging absentee voter fraud, there was testimony at the trial by Earline Moore that Windham marked her absentee ballot and sealed the envelope so quickly that Moore could not see whose names she had marked. When Moore protested, Windham told her it was too late, the envelope had already been sealed. Moore reluctantly signed the envelope. Although Moore did not tell Windham she wanted to vote for either candidate in the contest between Allsup and her black opponent, when Moore's ballot was opened at trial, the ballot had been marked for the black candidate. Based on this and other evidence, a jury found that Allsup was entitled to a new election.

36 As additional evidence that white candidates were not afforded equal access to the absentee ballot process, the Government claims that while black candidates were allowed behind the public counter in the circuit clerk's office, Brown once ordered Eddie Coleman to leave when Coleman was behind the counter viewing the absentee ballot book. However, at the time, voters were present voting their absentee ballots and it is undisputed that Brown had previously proposed to Circuit Clerk Mickens a rule that no candidate be behind the public counter when a voter was voting. Brown apparently believed they had agreed on the rule, but Mickens did not, and he allowed Coleman to remain. Although the incident could have been avoided, the court is not persuaded that it amounted to much more than a misunderstanding between Brown and Mickens.

37 John Bankhead, who preceded Brown as chairman of the NDEC, testified that he adhered to this view and this policy, and that the workforce for the Democratic primary in 1999 when he was chairman was 21.2% white.

38 In *Harris v. Graddick,* involving alleged impairment of the rights of black voters, the court recalled the long history of official discrimination against Alabama's black citizens, and acknowledged the negative impact that history has had on black voting:

> They understandably still harbor strong fears of entering all-white public places, even though they are now legally entitled to do so. They find the simple act of registering and voting, especially when the voting officials are all white, an extremely intimidating experience; and as a result, many of them do not register, and many of those who do register do not vote. For these persons, the political process is still not open, is still not available to the same extent it is and has been available to white persons.
>
> The evidence before the court further reflects that the presence of black poll officials, those responsible for conducting the operations at a polling place, goes a long way toward allaying these fears and opening up the political process to those suffering from such fears. The open and substantial presence of black poll officials, according to the evidence, is a significant indication to many black persons that voting places are now open to all, that black persons not only have a legal right to come and vote, they are welcome. And, of course, the more black poll officials there are, the greater the confidence black persons will have in the election process, and the less fear they will have about participating in that process.

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593 F.Supp. 128, 130–31 (M.D.Ala.1984). Of course, Mississippi has the same history.

39 It appears that Patricia Clanton was a poll worker. As for John Clanton, the Government has contended throughout the case that the sheriff's department in Noxubee County operates as the “strong arm” of Ike Brown and the NDEC. It points, for example, to Clanton's actions on this occasion, which were consistent with Brown's directions to poll managers at other polling places, as well as to the facts that Brown was chauffeured around to polling places on election day by the sheriff's department; that he regularly threatened to call “the law” on people and to have them arrested; and that the actions of Deputy Sheriff Terry Grasseree, also a member of the NDEC, suggested a close association with Brown. The court would simply observe that there is considerable evidence that Brown has close ties to the sheriff's department and that he often implies that he has the support of the sheriff's department.

40 Carrie Kate Windham was not a poll manager and it is not clear what her role was in the process.

41 The court notes that a number of the Government's witnesses also claimed that blacks and whites were not treated the same during the ballot counting. Samuel Heard, Jr., claimed, for example, that whereas Deputy Sheriff John Clanton had stood over him and pointed a finger at him, he had not acted this way toward anyone else; yet Heard was the only one who complained. Had others spoken up, they might have been treated rudely, as well.

> Heard also complained that at the Brooksville precinct, Ethel May, who appeared to be in charge, along with Brown, refused to allow him to have more than one poll watcher, even though there were four tables. May finally relented, but only after the Secretary of State's office was contacted and confirmed a candidate's right to have multiple poll watchers if there is more than one table. Eddie Coleman also was told by a Shuqualak policeman to get out of the polling place when both he and Len Coleman were poll watching. Again, while no black candidates were refused more than one poll watcher, there is no evidence that any of them asked or attempted to have more have more than one poll watcher.
>
> Len Coleman testified that when the ballots were being counted at Shuqualak, Table One, he was told to move away from the table whereas a black candidate was in a similar location and was not told to move. This may simply have been a matter of different perspectives; poll workers testified that unlike the black candidate, Coleman was leaning behind them and crowding them and was simply asked to step to the side.

42 All of these witnesses are black.

43 The experiences recounted by these witnesses during the 2003 election mirrored in many respects Sue Sautermeister's experience during the 2002 general election. Sautermeister was a member of the Hinds County Election Commission for 13 years, is a current member of the Ridgeland Election Commission and the Madison County Election Commission, serves on the Election Assistance Commission Board of Advisors and National Task Force for the Election Center on Training of Poll Workers, on the Civil Rights Advisory Commission for the State of Mississippi, and for 11 years has been an instructor for the Election Commissioners Association of Mississippi (ECAM) and the Secretary of State's office. Sautermeister was a poll watcher for Chip Pickering during the November 2002 general election at the Title 1 polling place in Noxubee County. Sautermeister testified that during the counting of absentee ballots, Brown came in and instructed poll workers to count the absentee ballots as long as there was a signature across the flap and to ignore everything else.

> Notwithstanding that by law, the administration of general elections is the province of the Election Commission and that Brown has no authority under the law with respect to the conduct of general elections, as soon as he issued this directive, poll manager Dorothy Clanton McCoy (who is a member of the NDEC and also the sister of Carrie Kate Windham) stopped allowing challenges, saying she was not a handwriting expert and did not want to be there all night. Prior to Brown's directive, Sautermeister had successfully challenged some ballots; afterwards, however, poll managers began to open the ballots rapidly, and did not call out the voters' names and addresses and did not check for anything other than a signature being across the flap. Sautermeister's testimony, which the court found entirely credible,

both lends credence to the accounts of Brown's misconduct in the 2003 election, and highlights the extent of Brown's influence. Brown's order was followed even though he had no lawful authority with respect to the 2002 general election.

44 By statute in Mississippi,

> The executive committee of each county, in the case of a primary election, or the commissioners of election of each county, in the case of all other elections, in conjunction with the circuit clerk, shall sponsor and conduct, not less than five (5) days prior to each election, training sessions to instruct managers as to their duties in the proper administration of the election and the operation of the polling place. No manager shall serve in any election unless he has received such instructions once during the twelve (12) months immediately preceding the date upon which such election is held.... Persons who will serve as poll watchers for candidates and political parties, as well as members of the general public, shall be allowed to attend the sessions.

Miss.Code Ann. § 23–15–239.

45 Consistent with the relevant statutes as described in Sautermeister's testimony, the court is persuaded this right does exist.

46 The evidence indicated that the notaries working for Brown collected absentee ballots exclusively within the black community; and Dr. Arrington testified since Brown usually opposes the candidates favored by white voters, then to the extent his efforts through these notaries resulted in absentee ballots that were either fraudulently cast or where the notaries may have actually voted for the person rather than simply delivering the persons' ballot, those activities would bring in additional votes to candidates that Brown favors and would therefore work against the interests of white voters who tend to favor other candidates.

47 Defendants point to tally reports from each of the precincts which show that for the 2003 primary, only fifteen absentee ballots were rejected, of which only two were cast by white voters. The court is dubious of the accuracy of records maintained by defendants; but the fact that only fifteen ballots were rejected out of over 1,200 cast rather confirms the Government's point that there was little actual scrutiny of ballots.

> Defendants further point out that Samuel Heard, Jr., filed suit to overturn the election for sheriff and that the tribunal, after reviewing over of 400 of the 1,226 absentee ballots cast, found only 33 had a “material departures” from the applicable law, “a mere 2.7%.” The court would agree this rate is low, but also realizes that there were likely additional problems with ballots that scrutiny would not have revealed, such as a voter's ineligibility to vote absentee, or a notary's having marked the ballot rather than the voter.

48 The court finds that the evidence relating to the rejection of the ballots of Emily Michelle Cade, Robert Adam Cade, and acceptance of the ballot of Willie Harris Graham, and of the rejection of the ballot of Judge Earnest L. Brown, Sr. and acceptance of the ballot of Emanuel Mallard, Jr., is too uncertain to permit a conclusion that the difference was racially motivated rather than simply being run-of-the-mill mistakes. The same is true with respect to the ballots of those persons who marked their ballots with an “X”. There could well have been uncertainty among poll workers as to the proper way in which these ballots were to be treated.

49 There was testimony that Brown himself had engaged in this type of voter assistance in the 1990s. Judith Ewing testified that in 1994, Brown entered the Title 1 poll accompanied by a black voter; Brown signed the man in, took his ballot, walked over to the voting booth followed by the man, and started marking the ballot. When Ewing confronted Brown, he claimed he was “assisting” the voter. Ewing objected that Brown could help the man mark his ballot, but could not vote the man's ballot for him. Brown declared that Ewing could not take away the man's constitutional right to vote. When Ewing said she was merely trying to make sure the man was the one doing the voting, Brown ignored her and put the ballot in the ballot box. The court has no doubt this incident occurred as recounted by Ewing.

50 The court is highly skeptical of Stowers' testimony regarding Peggy Brown's alleged activities, especially considering that Stowers, as a seasoned poll worker, would have known she had authority to intervene to stop Ms. Brown's actions, and yet took the position at trial that she thought there was nothing she could do. This court has little doubt that Stowers

would have known Ms. Brown's alleged actions were improper and that if she had any questions about how to handle the situation, she would have asked someone (probably Ike Brown) what she should do in that situation.

51 Another example of Brown's asserting himself inappropriately was described in testimony by Libby Abrams. During discussions over the number of poll workers Heard would be allowed at the Brooksville precinct, Abrams spoke with Brown on the phone, and repeatedly tried to explain her position that Heard had the right to have one poll watcher per table. Brown refused to listen, and finally told her, "I said you can only have one," and "This isn't Mississippi state law you're dealing with. This is Ike Brown's law." When Ms. Abrams told him they still planned to have four poll watchers, Brown said, "Fine, fine, have as many as you want. I'll send the police on around to arrest you."

52 That statute states:

> No person shall be eligible to participate in any primary election unless he intends to support the nominations made in the primary in which he participates.

53 The Attorney General responded, in part:

> [W]e preface our responses to your questions by noting that it is a crime for a poll worker or other persons to deprive one of his suffrage or to refuse the vote of a qualified elector without honestly considering his qualifications. See Mississippi Code Annotated, Sections 97–13–19 and 97–13–33 (Revised 2000). We further note that Section 23–15–241 requires the election bailiff to insure that all qualified electors have "unobstructed access to the polls." Therefore, voters must not be delayed by anyone as they approach the polls.
>
> ...
>
> [W]e find nothing that would allow a poll worker, poll watcher or another voter to ask a voter if he or she intends to support the nominees of the party once the voter presents himself or herself to vote. Challenges may be made pursuant to Section 23–15–579 only for the reasons listed in Section 23–15–571, and for the reason that the voter does not intend to support the nominees of the party per Section 23–15–575.
>
> ...
>
> If a challenge of a voter is properly initiated in strict accordance with Section 23–15–579 and the voter then openly declares that he or she does not intend to support the nominees of the party, the poll workers could find the challenge to be well taken and mark the ballot "challenged" or "rejected" consistent with the provisions of said statute. On the other hand, if the voter openly declares his or her intent to support the nominees, then a challenge is not proper under Section 23–15–575.
>
> ...
>
> [A]bsent an obvious factual situation such as an independent candidate attempting to vote in a party's primary, the stated intent of the voter is controlling. MS AG Op. Hemphill, (January 16, 2003). No past action by a voter can form the basis of a valid challenge under Section 23–15–571(3)(g) and Section 23–15–575.
>
> ...

Cole Opinion, 2003 WL 21962318 (Miss.A.G. July 21, 2003). The Attorney General further wrote that he had been informed by the Department of Justice that "challenging a person's right to vote based on his or her alleged lack of support of party nominees pursuant to Section 23–15–575 would be viewed as a change in practice that requires pre-clearance pursuant to Section 5 of the Voting Rights Act." *Id.*

54 "Racial discrimination need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the Fourteenth and the Fifteenth Amendments to occur. We see no reason why under the amended Voting Rights Act of 1982 this would not be even more so." *Velasquez v. City of Abilene, Tex.,* 725 F.2d 1017, 1022 (5th Cir.1984) (citing *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977)).

55 Prompted in part by the Attorney General's response to Cole's inquiry, the State Democratic Party filed suit in federal court in the Northern District of Mississippi in January 2006 arguing that "the current primary system in Mississippi is unconstitutional because without party registration or any other way to enforce § 23–15–575, the Democrats have no mechanism to prevent non-Democrats from voting in their primaries thereby allowing the possibility of party-raiding—i.e., when dedicated members of one party vote in the primary of an opposing party in order to alter the outcome of the primary in favor of their own party's candidate in the resulting general election." *Mississippi State Democratic Party v. Barbour,* 491 F.Supp.2d 641, 645, 2007 WL 1687467, *1 (N.D.Miss.2007). In a ruling issued June 8, 2007, Judge Allen Pepper concluded that "[s]ince the State of Mississippi does not have mandatory party registration, ... and ... does not have mandatory voter identification for all primary elections in order to verify that the voter in question is in fact a member of the subject party, there is no practical way to enforce § 23–15–575." *Id.* at *18. The court held that "the primary system currently in place in Mississippi violates the Mississippi Democratic Party's First Amendment right to disassociate itself from those who are not in fact affiliates of the Mississippi Democratic Party in Democratic primaries because there is no mechanism in place for the political parties in Mississippi to verify the party affiliation of the prospective primary voter," *id.,* and ordered that "to correct this constitutional problem, the State of Mississippi can either (1) keep Miss.Code Ann. § 23–15–575, require mandatory party registration (with the option for a voter to designate him or herself as unaffiliated) and voter photo identification for all primary elections, and consider the option of authorizing the parties to allow unaffiliated voters to vote in their primaries but not registered members of an opposing party; or (2) the State can fashion some other form of primary system that does not infringe on political parties' right to disassociate opposing-party members from possible party-raiding." *Id.*

56 The Government contends that Brown's public "threat" to challenge persons on the list of 174 white voters if they attempted to vote in the 2003 Democratic primary violates Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C.1973i(b), which prohibits anyone from intimidating, threatening or coercing any person from attempting to vote.

> Although the court does conclude that there was a racial element to Brown's publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b). *Cf. U.S. v. McLeod,* 385 F.2d 734, 741 (5th Cir.1967) (trial court erred in failing to find that acts of county officials in arresting and prosecuting various persons intimidated and coerced prospective black voters). The court notes, too, that the Government has given little attention to this claim, and states that it has found no case in which plaintiffs have prevailed under this section.

57 The Brooksville precinct caucus was held at the home of Catherine Johnson; the High School precinct caucus was held at Ike Brown's home; the West Macon caucus was held at the home of Theotis and Sandra Rice; the Shuqualak caucus was held at the Beehive, a local business establishment; and the caucus for the Title 1 precinct was held at the home of Lucille Hatcher.

58 Prior to the caucuses, the *Macon Beacon* reported the date and time the caucuses were to be held, and indicated they would be held "at their county voting precincts." Scott Boyd, editor, testified that he had asked Brown where the party caucuses would be held, but Brown would not tell him anything; Brown just gave his phone number and said if anybody had questions, they could call him.

59 Boyd testified that he attempted to interview Brown afterwards about these caucuses, and that Brown would not release the names of the delegates chosen at the caucuses. In response to criticism of the way the caucuses were held, Brown responded simply that he was county chairman and could do as he wanted.

60 Defendants have claimed that the Lottie Smith Center, which is the polling place for the Brooksville precinct, was unavailable due to a funeral luncheon having been scheduled for that day. The evidence belies this claim. Not only was there no funeral luncheon or any other kind of activity at the Lottie Smith Center on that date, but Ike Brown had actually telephoned Catherine Johnson a week or two before the caucus date and asked to use her home for the caucus. Brown could not have anticipated in advance that the Lottie Smith Center would be unavailable due to a funeral luncheon. Moreover, Brown made clear in his testimony that the question of availability of any polling place was not an issue, and that he did not bother to determine availability, because as the Democratic chairman, he "had the authority to set the sites, and that's where he chose to set the sites."

61 Under the rules of the State Democratic Party, a caucus may be held by anyone who arrives at the caucus location, and the caucus may elect delegates to the county convention. Thus, those who were aware of the proper procedure were able to take part in a caucus.

62 Before the county convention, complaints were made to the State Democratic Party by a number of persons, including Chancery Clerk Mary Shelton, who made a formal protest and sought instructions as to what steps should be taken to rectify the situation.

> Additional complaints were made following the convention. One such complaint was made by Betty Robinson, who wrote to Rickey Cole that she had been elected chair and requested that Cole "inform Mr. Brown ... that he must dismantle his clandestine attempt to disrupt the Noxubee County democratic process...."

63 The court would note that Brown blatantly misrepresented the facts to the State Party, advising that there had been only one caucus held at a private residence. Brown claimed at trial that he did not misrepresent any facts; he just did not give the State Party all the facts because he did not see it as his job to make the other side's case for them. No matter how he may wish to characterize his actions, what he did, under any reasonable person's understanding of the concept, was misrepresent the facts.

64 This is the same conclusion reached by Dr. Arrington, a conclusion deemed "outrageous" by defendants, but the court comes to its view of Brown's actions based on its independent review of the facts.

65 Defendants purport to find this lawsuit especially appalling based on their perception that the Justice Department for decades ignored complaints by blacks of voting discrimination against them by whites. The Government flatly denies that it has been unresponsive to such complaints by black voters and maintains that it investigates every complaint it receives. This court cannot be certain one way or the other as to whether or not the Government has satisfied its obligations with respect to reports of voting discrimination by black voters. But even if it may not have been as responsive as defendants believe it should have been, this court cannot overlook a proven violation of Section 2 against white voters on the basis that the Government may have failed to press the rights of black voters.

66 The court would note that defendants' arguments to the court are presented in the framework of a "results" claim analysis, and do not account for the Government's claim that all of the defendants' challenged actions were racially motivated and purposefully discriminatory.

67 Notably, defendants Brown and NDEC assert in their memoranda that the framework of the *Gingles* analysis, including the Senate factors, "is not the proper framework" for analysis in this case; yet the court is unable to discern from their brief what they contend is the proper framework.

> The court does agree with the parties that proof of the three *Gingles* preconditions applicable to results claims in district line, e.g., multimember or at-large, is not required here. See *Mississippi State Chapter, Operation Push, Inc. v. Allain,* 674 F.Supp. 1245, 1247 (N.D.Miss.1987), *aff'd sub nom., Mississippi State Chapter, Operation Push, Inc. v. Mabus,* 932 F.2d 400 (5th Cir.1991).

68 As defendants note, it is blacks, not whites, who were the historical victims of discrimination and who continue to suffer the effects of that past purposeful discrimination. Indeed, both the history of discrimination against blacks and its effects are well established. That history has been recounted numerous times, and will not be repeated here. Further, the record discloses manifest socio-economic disparity between the races in Noxubee County in all areas. According to the 2000 Census data, the median household income for black families in Noxubee County was $16,690; for white families $35,543. Of residents aged 25 and older, only 51.4% of the black population had a high school diploma, compared to 71% of the white population. Blacks aged 25 years and older only comprised 36.6% of the total population with a bachelor's degree, as compared to whites, who comprised 63%. The percentage of black families below the poverty level was 89%, while for white families it was 9%.

69 "In jurisdictions where there is an influential official or unofficial slating organization, the ability of minorities to participate in that slating organization and to receive endorsement may be of paramount enforcement." *Marengo County Com'n,* 731 F.2d at 1569. Here, in addition to the 1995 letter sent from Brown in prison, the Government attempted to show that

Brown endorsed a slate of candidates for the 2003 primary based on evidence that Samuel Heard saw a man passing out a sample ballot under the auspices of the East Mississippi Voters League, an organization he evidently had founded, and Heard observed Brown stopped in his car and speaking with this man. However, the Government has not proven to the court's satisfaction that Brown or any organization with which he was affiliated was responsible for presenting this ostensible slate of candidates.

70 Following the Macon elections in 2001, in which a white, Dorothy Baker–Hines was elected mayor, Brown wrote a letter to the *Macon Beacon* addressing the defeat of black candidate Hatcher, in which he wrote: “Mr. Bennett, before you celebrate, remember three things: (1) White population is shrinking (deaths and migration); (2) Annexation will bring in scores of Title One blacks; and (3) Overwhelming majority of blacks in Macon voted black. In other words, it's just a matter of time.” Although Brown claimed in his testimony that the letter was simply a neutral, detached, “middle of the road” political analysis of the election, the letter had a clear racial message: blacks would soon be taking over Macon city government.

71 There was also evidence of private racial appeals. For example, Representative Reecy Dickson went to the home of Peggy Brown, who supported Samuel Heard for sheriff, and told her, “I just [came] to tell you that we don't need a white Sheriff in Noxubee County.” Defendants argue, and the court agrees, that such private comments are not the kind of racial appeals to which the Senate factor is addressed.

72 Although the parties agreed that voting in Noxubee County is racially polarized, Dr. Arrington undertook an ecological regression analysis to determine the degree to which voting is racially polarized. His testimony is summarized as follows: In biracial contests, voting was racially polarized 95% of the time; in races with only black candidates, they were racially polarized 80% of the time; and in all white races, they were polarized about half the time. Overall, 88% of those election contests were racially polarized.

> In 91% of the biracial contests, whites were racially cohesive, meaning they preferred the white candidates or candidates if there was more than one white running. In 82% of these biracial contests, the whites were “strategically cohesive”; that is, two-thirds of them voted for the same single candidate.
>
> In black-only contests, whites were strategically cohesive 76% of the time; but when there were only white candidates, they were strategically cohesive half the time. Overall, whites were strategically cohesive in 78% of the contests analyzed. Though less than is typically seen when black voters are in the minority, it is nevertheless “plenty strong” to support the conclusion that whites are strategically cohesive.
>
> In biracial contests, the candidates supported by the white voters are defeated 78% of the time. In black only contests, the white-preferred candidate is defeated 57% of the time. And in white-only contests (of which only six were analyzed), the white-preferred candidate lost only 17% of the time. Overall, in 66% of the contests, the white-preferred candidate lost.
>
> In 53 of the 61 election (87%) in which Brown's preferred candidate could be identified, whites preferred a different candidate from that preferred by Brown. In only eight elections (13%) were they advocating the same candidate. Those eight elections were unusual, though; in four of them, voting was not racially polarized, as it usually is; and only five of these were biracial contests (two were white-only and one black-only). To factor out party as a consideration in this analysis, 45 Democratic primaries and nonpartisan judicial elections were analyzed: in 38(84%) of these elections, Brown and the white voters preferred different candidates.

73 It does create the potential for persons to vote under others' names. In fact, Kendrick Slaughter testified that during the 2005 Macon election, he saw Ike Brown outside the door of the precinct talking to a young black lady named Bridgette Brown, and heard him tell her to go in there and vote, to use any name, and that no one was going to say anything. Slaughter reported this incident to the Justice Department.

74 The court recognizes “one reason the Senate Committee abandoned the intent test was that ‘the Committee ... heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of

individual officials or entire communities.' " *Gingles*, 478 U.S. at 71, 106 S.Ct. at 2777 (citations omitted). Undeniably, what was sought to be avoided has occurred here; but again, it is this court's function to decide the case on the facts presented.

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113 S.Ct. 1149
Supreme Court of the United States

George VOINOVICH, Governor
of Ohio, et al., Appellants
v.
Barney QUILTER, Speaker Pro Tempore
of Ohio House of Representatives, et al.

No. 91–1618.
|
Argued Dec. 8, 1992.
|
Decided March 2, 1993.

Synopsis

Challenge was brought to validity of Ohio apportionment plan promulgated in 1991 as applied to entire state. The United States District Court for the Northern District of Ohio, 794 F.Supp. 756, ordered Ohio Reapportionment Board to reconsider plan. The board prepared another plan. The District Court, 794 F.Supp. 760, held for members of apportionment board who had voted against plan. On appeal, the Supreme Court, Justice O'Connor, held that: (1) Section 2 of Voting Rights Act prohibiting vote dilution focused on consequences of apportionment and did not contain per se prohibition against majority-minority districts unless necessary to remedy statutory violations; (2) apportionment challengers had burden of proving invalidity of apportionment; (3) challengers were required to show sufficient white majority bloc voting to frustrate election of minority group's candidate of choice in order to prevail on vote dilution claim; (4) holding that board violated Fifteenth Amendment by intentionally diluting minority strength of political reasons was clearly erroneous; and (5) district court failed to accurately consider whether total district size deviations in excess of 10% could be justified by policy of preserving political subdivision boundaries.

Reversed and remanded.

West Headnotes (19)

[1] **Election Law** Discriminatory practices proscribed in general

Section 2 of the Voting Rights Act, guaranteeing that no citizen's right to vote should be denied or abridged on account of race, color, or previous condition of servitude, prohibits any practice or procedure that, interacting with social and historical conditions, impairs ability of protected class to elect its candidate of choice on equal basis with other voters. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

36 Cases that cite this headnote

[2] **Election Law** Vote Dilution

Dilution of racial minority group voting strength may be caused either by dispersal of blacks into districts in which they constitute ineffective minority of voters or from concentration of blacks into districts where they constitute an excessive majority. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

60 Cases that cite this headnote

[3] **Election Law** Vote Dilution

The question of whether influence-dilution claims, under which minority group claims that apportionment plan deprived them of "influence districts" in which they would have constituted an influential minority, violates § 2 of the Voting Rights Act, has not been decided. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

46 Cases that cite this headnote

[4] **Election Law** Vote Dilution

The creation of majority-minority districts does not invariably minimize or maximize minority voting strength, depending on the facts and circumstances of each case. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

29 Cases that cite this headnote

[5] **Election Law** Majority-minority districts

Voting Rights Act section prohibiting denial or abridgment of right to vote on account of race did not prohibit the creation of majority-minority district unless such districts were necessary to remedy a statutory violation. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

23 Cases that cite this headnote

[6] **Election Law** Vote Dilution

Voting Rights Act provision prohibiting denial or abridgement of right to vote on account of race, focuses exclusively on the consequences of apportionment; provision is violated only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

20 Cases that cite this headnote

[7] **States** Judicial Review and Enforcement

In challenge to state legislative district apportionment scheme under Voting Rights Act, district court was required to determine the consequences of the apportionment scheme before ruling on its validity; failure to do so was error. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

[8] **States** Presumptions and burden of proof

By requiring state officials to justify creation of majority-minority districts, district court improperly placed burden of justifying state legislative district apportionment plan on the state, rather than on those challenging the apportionment plan. Voting Rights Act of 1965, §§ 2, 2(a, b), 42 U.S.C.A. §§ 1973, 1973(a, b).

6 Cases that cite this headnote

[9] **Election Law** Majority-minority districts

Federal courts may not order the creation of majority-minority districts unless necessary to remedy of violation of federal law. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

19 Cases that cite this headnote

[10] **Election Law** Power and duty to apportion

Election Law Judicial Review or Intervention

Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law, because it is the domain of the state, and not the federal courts, to conduct apportionment in the first place. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

21 Cases that cite this headnote

[11] **Election Law** Judicial Review or Intervention

Because the states do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law, federal courts are bound to respect the states' apportionment choices unless those choices contravene federal requirements. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

15 Cases that cite this headnote

[12] **States** Dilution of voting power in general

Voting Rights Act plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the state's legislative district apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

17 Cases that cite this headnote

[13] **States** Dilution of voting power in general

States Compactness; contiguity; gerrymandering in general

As in case where vote dilution through multimember districts is claimed, plaintiffs claiming vote dilution through single-member state legislative districts, must prove that minority group is sufficiently large and geographically compact to constitute majority in single-member district, that minority group is politically cohesive, and that white majority votes sufficiently as a bloc to enable it usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

108 Cases that cite this headnote

[14] **States** Dilution of voting power in general

In order for Voting Rights Act plaintiffs to prevail on their "influence-dilution" challenge to state's legislative apportionment plan, plaintiffs had to show sufficient white majority bloc voting to frustrate election of minority group's candidate of choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

61 Cases that cite this headnote

[15] **Constitutional Law** Fifteenth Amendment

Election Law Apportionment and Reapportionment

Election Law Vote Dilution

Supreme Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims or whether any legislative apportionment is inconsistent with Fifteenth Amendment. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 15.

36 Cases that cite this headnote

[16] **States** Equality of Representation and Discrimination; Voting Rights Act

State legislative district apportionment plan drafter's preference for federal over state law when he believed the two in conflict did not raise an inference of intentional discrimination, but instead showed obedience to the supremacy clause of the United States Constitution. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; U.S.C.A. Const. Art. 6, cl. 2.

1 Case that cites this headnote

[17] **States** Equality of Representation and Discrimination; Voting Rights Act

State legislative district apportionment plan drafter's possession of document, in which the opposing party speculated that he might have discriminatory strategy, did not indicate that drafter actually had such a strategy and thus could not support finding of intentional discrimination, particularly absent evidence that drafter relied on documents in preparing plan. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

[18] **Constitutional Law** Population deviation

Election Law Population as basis and deviation therefrom

Equal protection clause requirement that electoral districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives, is not an inflexible requirement. U.S.C.A. Const.Amend. 14.

12 Cases that cite this headnote

[19] **States** Political subdivisions; multi-member districts

States Judgment and relief in general

In Voting Rights Act case in which state legislative district apportionment plan challengers established prima facie case of discrimination by showing maximum total deviation from ideal district size exceeded 10%, district court was required to consider whether deviations from ideal district size were justified by state's policy of preserving the boundaries of political subdivisions. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; Ohio Const. Art. 7, § 1; Art. 11, § 15.

38 Cases that cite this headnote

**1151 *146 *Syllabus*[*]

Pursuant to the Ohio Constitution's requirement that electoral districts for the state legislature be reapportioned every 10 years, appellant James Tilling drafted and the state apportionment board adopted in 1991 an apportionment plan that created several districts in which a majority of the population is a member of a specific minority group. Appellees, Democratic board members who voted against the plan and others, filed suit in the District Court, asking that the plan be invalidated on the grounds that it violated § 2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments. A three-judge District Court ordered the board to reconsider the plan, holding that § 2 of the Voting Rights Act prohibits the wholesale creation of majority-minority districts unless necessary to remedy a § 2 violation; the board, it held, had failed to show such a violation. The District Court reaffirmed that holding when it reviewed the board's revised 1992 plan, rejecting appellants' argument that it should not have invalidated the 1991 plan without finding that, under the totality of the circumstances, the plan diluted minority voting strength. In addition, the court held that the board had violated the Fifteenth Amendment by applying the remedy of creating majority-minority districts intentionally and for the purpose of political advantage. It further held that the plan violated the Fourteenth Amendment by departing from the requirement that all districts be of nearly equal population.

Held:

1. The plan does not violate § 2 of the Voting Rights Act. Pp. 1154–1158.

(a) Appellees raise an "influence-dilution" claim. They contend that, by packing black voters in a few districts with a disproportionately large black voter population, the plan deprived them of a larger number of districts in which they would have been an influential minority capable of electing their candidates of choice with the help of cross-over votes from white voters. While this Court has not decided whether such a claim is viable under § 2, the Court assumes for the purpose of *147 resolving this case that appellees have stated a cognizable § 2 claim. Pp. 1154–1155.

(b) Plaintiffs can prevail on a § 2 dilution claim only if they show that, under the totality of the circumstances, the State's apportionment **1152 scheme has the effect of diminishing or abridging the voting strength of the protected class. The District Court erred in holding that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation, since § 2 contains no *per se* prohibitions against any particular type of district. Instead, it focuses exclusively on the consequences of apportionment. The court also mistakenly placed the burden of justifying apportionment on Ohio by requiring appellants to justify the creation of majority-minority districts. Section 2(b) places at least the initial burden of proving an apportionment's invalidity on the plaintiff's shoulders. Although the *federal courts* may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law, that prohibition does not extend to the States. The federal courts are barred from intervening in state apportionment in the absence of such a violation precisely because it is the domain of the States and not the federal courts to conduct apportionment in the first place. Pp. 1156–1157.

(c) The District Court, had it applied the three-part vote-dilution test of *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25, would have rejected appellees' § 2 claim on the ground that appellees failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The court specifically found, and appellees agree, that Ohio does not suffer from racially polarized voting. Pp. 1157–1158.

2. The District Court's holding that the board violated the Fifteenth Amendment by intentionally diluting minority voting strength for political reasons is clearly erroneous. Tilling's preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause. Nor does the fact that Tilling, a Republican, possessed Democratic documents speculating about possible discriminatory strategies Tilling might use demonstrate that Tilling in fact had such a discriminatory strategy. Nothing in the record indicates that Tilling relied on those documents in preparing the plan. Indeed, the record indicates that Tilling and the board relied on sources, such as the National Association for the Advancement of Colored People, Ohio Conference of Branches, that were wholly unlikely to engage in or tolerate intentional discrimination

against black voters. This Court expresses no view on the relationship between the Fifteenth Amendment and ***148** race-conscious redistricting; it concludes only that the finding of intentional discrimination was clear error. Pp. 1158–1159.

3. The District Court erred in holding that the plan violated the Fourteenth Amendment requirement that electoral districts be of nearly equal population. When the court found that the maximum total deviation from ideal district size exceeded 10%, appellees established a prima facie case of discrimination and appellants were required to justify the deviation. They attempted to do so, arguing that the deviation resulted from Ohio's constitutional policy in favor of preserving county boundaries. However, the District Court mistakenly held that total deviations in excess of 10% cannot be justified by a policy of preserving political subdivision boundaries. On remand, the court should consider whether the deviations from ideal district size are justified using the analysis employed in *Brown v. Thomson,* 462 U.S. 835, 843–846, 103 S.Ct. 2690, 2696–2697, 77 L.Ed.2d 214, and *Mahan v. Howell,* 410 U.S. 315, 325–330, 93 S.Ct. 979, 985–987, 35 L.Ed.2d 320, which requires the court to determine whether the plan could reasonably be said to advance the State's policy, and, if it could, whether the resulting population disparities exceed constitutional limits. Pp. 1159–1160.

Reversed and remanded.

****1153** O'CONNOR, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

N. Victor Goodman, Columbus, OH, for appellants.

Thomas G. Hungar, Washington, DC, for U.S. as amicus curiae by special leave of the Court.

Armistead W. Gilliam, Jr., Dayton, OH, for appellees.

Opinion

***149** Justice O'CONNOR delivered the opinion of the Court.

This is yet another dispute arising out of legislative redistricting and reapportionment. See, *e.g., Growe v. Emison,* 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). Today we consider whether Ohio's creation of several legislative districts dominated by minority voters violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973.

I

Under the Ohio Constitution, the state apportionment board must reapportion electoral districts for the state legislature every 10 years. Ohio Const., Art. XI, § 1. In 1991, the board selected James Tilling to draft a proposed apportionment plan. After conducting public hearings and meeting with members of historically underrepresented groups, Tilling drafted a plan that included eight so-called majority-minority districts—districts in which a majority of the population is a member of a specific minority group. The board adopted the plan with minor amendments by a 3–to–2 vote along party lines. The board's three Republican members voted for the plan; the two Democrats voted against it. 794 F.Supp. 695, 698, 716–717 (ND Ohio 1992); App. to Juris. Statement 160a–167a, 183a.

Appellees Barney Quilter and Thomas Ferguson, the two Democratic members of the board who voted against the plan, and various Democratic electors and legislators filed this lawsuit in the United States District Court for the Northern District of Ohio seeking the plan's invalidation. They alleged that the plan violated § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 794 F.Supp., at 695–696. According to appellees, the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, appellees contended, minimized the total number of districts in which black voters could select their candidate of ***150** choice. In appellees' view, the plan should have created a larger number of "influence" districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice. See App. to Juris. Statement 141a–142a. Appellants, by contrast, argued that the plan actually enhanced the strength of black voters by providing "safe" minority-dominated districts. The plan, they pointed out, compared favorably with the 1981 apportionment and had the backing of the National Association for the Advancement of Colored People, Ohio Conference of Branches (Ohio NAACP). 794 F.Supp., at 706.

A three-judge District Court heard the case and held for appellees. Relying on various statements Tilling had made in the course of the reapportionment hearings, the court

found that the board had created minority-dominated districts "whenever possible." *Id.,* at 698. The District Court rejected appellants' contention that § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, requires that such districts be created wherever possible. 794 F.Supp., at 699. It further held that § 2 actually prohibits the "wholesale creation of majority-minority districts" unless necessary to " 'remedy' " a § 2 violation. *Id.,* at 701. The District Court therefore ordered the board to draft a new plan or demonstrate that it was remedying a § 2 violation. *Id.,* at 702.

****1154** Judge Dowd dissented, arguing that the majority's analysis "place[d] the cart before the horse." *Id.,* at 709. In his view, § 2 does not require the State to show a violation before creating a majority-minority district. Rather, the State may create any district it might desire, so long as minority voting strength is not diluted as a result. Because appellees failed to demonstrate that the 1991 plan diluted the balloting strength of black voters, Judge Dowd thought their challenge should fail. *Id.,* at 710.

***151** The apportionment board responded by creating a record that, in its view, justified the creation of majority-minority districts. The board also adjusted the plan to correct "technical" errors that the Ohio Supreme Court had identified in its independent review of the plan. This revised 1992 plan created only five majority-black districts. App. to Juris. Statement 258a–263a. The District Court, however, was not satisfied with the board's proof. In an order issued on March 10, 1992, it held that "the [b]oard fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." 794 F.Supp. 756, 757 (ND Ohio). The court then appointed a special master to prepare a redistricting plan. *Ibid.* Once again, Judge Dowd dissented. *Id.,* at 758.

Nine days later, on March 19, 1992, the District Court issued an order reaffirming its view that the creation of majority-minority districts is impermissible under § 2 unless necessary to remedy a statutory violation. App. to Juris. Statement 128a–141a. The order also restated the court's conclusion that the board had failed to prove a violation. Specifically, it noted "the absence of racial bloc voting, the [ability of black voters] to elect both black and white candidates of their choice, and the fact that such candidates ha[d] been elected over a sustained period of time." *Id.,* at 130a. In addition, the order rejected as "clever sophistry" appellants' argument that the District Court should not have invalidated the 1991 plan without finding that, under the totality of the circumstances, it diluted minority voting strength:

> "Having implemented the Voting Rights Act remedy in the absence of a violation, [appellants] suggest that we are now required to establish a violation as a prerequisite to removing the remedy. Actually, however, this task is not as difficult as it seems. The totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly ***152** elected from districts with only a 35% black population. Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes...." *Id.,* at 141a, 142a (footnotes omitted).

The District Court further concluded that, because the board had applied the " 'remedy' intentionally" and for the purpose of political advantage, it had violated not only § 2 but the Fifteenth Amendment as well. *Id.,* at 142a–143 a. Finally, the court held that the plan violated the Fourteenth Amendment because it departed from the requirement that all districts be of nearly equal population. *Id.,* at 146a–148a.

On March 31, 1992, the District Court ordered that the primary elections for Ohio's General Assembly be rescheduled. 794 F.Supp. 760 (ND Ohio). On April 20, 1992, this Court granted appellants' application for a stay of the District Court's orders, 503 U.S. 979, 112 S.Ct. 1663, 118 L.Ed.2d 382; and on June 1, 1992, we noted probable jurisdiction, 504 U.S. 954, 112 S.Ct. 2299, 119 L.Ed.2d 223. We now reverse the judgment of the District Court and remand only for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment.

II

[1] Congress enacted § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be ****1155** denied or abridged ... on account of race, color, or previous condition of servitude," U.S. Const., Amdt. 15. See *NAACP v. New York,* 413 U.S. 345, 350, 93 S.Ct. 2591, 2595, 37 L.Ed.2d 648 (1973). Section 2(a) of the Act prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." Section 2(b), in relevant part, specifies that § 2(a) is violated if:

"[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election ***153** in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Section 2 thus prohibits any practice or procedure that, "interact[ing] with social and historical conditions," impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. *Thornburg v. Gingles,* 478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986).

A

In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines. A politically cohesive minority group that is large enough to constitute the majority in a single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.

[2] This case focuses not on the fragmentation of a minority group among various districts but on the concentration of minority voters within a district. How such concentration or "packing" may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be ***154** assured only two candidates. As a result, we have recognized that "[d]ilution of racial minority group voting strength may be caused" either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Id.,* at 46, n. 11, 106 S.Ct. at 2764, n. 11.

[3] Appellees in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have constituted an influential *minority.* Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters. We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2, *Growe,* 507 U.S., at 41, n. 5, 113 S.Ct., at 1084, n. 5; see *Gingles, supra,* 478 U.S., at 46–47, nn. 11–12, 106 S.Ct., at 2764, nn. 11–12 (leaving open the possibility of influence-dilution claims); nor do we decide that question today. Instead, we assume for the purpose of resolving this case that appellees in fact have stated a cognizable § 2 claim.

****1156** B

[4] The practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice. Which effect the practice ***155** has, if any at all, depends entirely on the facts and circumstances of each case.

[5] **[6]** **[7]** The District Court, however, initially thought it unnecessary to determine the effect of creating majority-black districts under the totality of the circumstances. In fact, the court did not believe it necessary to find vote dilution at all. It instead held that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation. 794 F.Supp., at 701. We disagree. Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal

opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter. See 42 U.S.C. § 1973(b). Indeed, in *Gingles* we expressly so held: "[E]lectoral devices ... may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." 478 U.S., at 46, 106 S.Ct., at 2764. As a result, the District Court was required to determine the consequences of Ohio's apportionment plan before ruling on its validity; the failure to do so was error.

[8] The District Court's decision was flawed for another reason as well. By requiring appellants to justify the creation of majority-minority districts, the District Court placed the burden of justifying apportionment on the State. Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders. Section 2(b) specifies that § 2(a) is violated if "*it is shown* " that a state practice has the effect of denying a protected group equal access to the electoral process. ***156** 42 U.S.C. § 1973(b) (emphasis added). The burden of "show [ing]" the prohibited effect, of course, is on the plaintiff; surely Congress could not have intended the State to prove the invalidity of its own apportionment scheme. See *Gingles,* 478 U.S., at 46, 106 S.Ct., at 2764 (plaintiffs must demonstrate that the device results in unequal access to the electoral process); *id.,* at 49, n. 15, 106 S.Ct. at 2766, n. 15 (plaintiffs must "prove their claim before they may be awarded relief"). The District Court relieved appellees of that burden in this case solely because the State had created majority-minority districts. Because that departure from the statutorily required allocation of burdens finds no support in the statute, it was error for the District Court to impose it.

[9] **[10]** **[11]** Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. See *Growe, supra,* 507 U.S., at 40–41, 113 S.Ct., at 1084–1085. But that does not mean that the State's powers are similarly limited. Quite the opposite is true: Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have ****1157** emphasized that " 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " *Growe, supra,* at 34, 113 S.Ct., at 1081 (quoting *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975)). Accord, *Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination' " (quoting *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964)). Because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law," Brief for United States as *Amicus Curiae* 12, the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements. Cf. ***157** *Katzenbach v. Morgan,* 384 U.S. 641, 647–648, 86 S.Ct. 1717, 1721, 16 L.Ed.2d 828 (1966) ("Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers" and such qualifications are valid unless they violate the Constitution or a federal statute).

[12] Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated. We hold only that, under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.

C

In its order of March 19, 1992, the District Court found that the 1992 plan's creation of majority-minority districts "ha[d] a dilutive effect on black votes." App. to Juris. Statement 141a. Again we disagree.

[13] In *Thornburg v. Gingles, supra,* this Court held that plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.' " *Growe,* 507 U.S., at 40,

113 S.Ct., at 1084 (quoting *Gingles, supra,* 478 U.S., at 50–51, 106 S.Ct., at 2766). The District Court apparently thought the three *Gingles* factors inapplicable because Ohio has single-member rather than multimember districts. 794 F.Supp., at 699 ("*Gingles'* preconditions are not applicable to the apportionment of single-member districts"). In *Growe,* ***158** however, we held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts. 507 U.S., at 40–41, 113 S.Ct., at 1084–85.

[14] Had the District Court employed the *Gingles* test in this case, it would have rejected appellees' § 2 claim. Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo,* to be actionable today. *Supra,* at 1155. The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority,* but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority. See *ibid.* We need not decide how *Gingles'* first ****1158** factor might apply here, however, because appellees have failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F.Supp., at 700–701. Accord, App. to Juris. Statement 132a–134a, and n. 2, 139a–140a. Even appellees agree. See Tr. of Oral Arg. 25. Here, as in *Gingles,* "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles,* 478 U.S., at 49, n. 15, 106 S.Ct., at 2766, n. 15. The District Court's finding of a § 2 violation, therefore, must be reversed.

III

[15] The District Court also held that the redistricting plan violated the Fifteenth Amendment because the apportionment board intentionally diluted minority voting strength for political reasons. App. to Juris. Statement 142a–143a. ***159** This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment. *Beer v. United States,* 425 U.S. 130, 142–143, n. 14, 96 S.Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976). Nonetheless, we need not decide the precise scope of the Fifteenth Amendment's prohibition in this case. Even if we assume that the Fifteenth Amendment speaks to claims like appellees', the District Court's decision still must be reversed: Its finding of intentional discrimination was clearly erroneous. See *Mobile v. Bolden,* 446 U.S. 55, 62, 100 S.Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion); *id.,* at 101–103, 100 S.Ct., at 1516–1518 (WHITE, J., dissenting); *id.,* at 90–92, 100 S.Ct., at 1511–1513 (STEVENS, J., concurring in judgment); *id.,* 446 U.S., at 80, 100 S.Ct., at 1506 (BLACKMUN, J., concurring in result).

[16] **[17]** The District Court cited only two pieces of evidence to support its finding. First, the District Court thought it significant that the plan's drafter, Tilling, disregarded the requirements of the Ohio Constitution where he believed that the Voting Rights Act of 1965 required a contrary result. App. to Juris. Statement 142a–143a, n. 8. But Tilling's preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution. Second, the District Court cited Tilling's possession of certain documents that, according to the court, were tantamount to "a road-map detailing how [one could] create a racial gerrymander." *Id.,* at 143a, n. 9. Apparently, the District Court believed that Tilling, a Republican, sought to minimize the Democratic Party's power by diluting minority voting strength. See *ibid.* The District Court, however, failed to explain the nature of the documents. Contrary to the implication of the District Court opinion, the documents were not a set of Republican plans for diluting minority voting strength. In fact, they were not even created by Tilling or the Republicans. They were created by a Democrat who, concerned about possible Republican manipulation of apportionment, ***160** set out the various types of political gerrymandering in which he thought the Republicans might engage. App. 99–100. That Tilling possessed documents in which the opposing party speculated that he might have a discriminatory strategy does not indicate that Tilling actually had such a strategy. And nothing in the record indicates that Tilling relied on the documents in preparing the plan.

Indeed, the record demonstrates that Tilling and the board relied on sources that were wholly unlikely to engage in or tolerate intentional discrimination against black voters, including the Ohio NAACP, the Black Elected Democrats of Ohio, and the Black Elected Democrats of Cleveland, Ohio.

Tilling's plan **1159 actually incorporated much of the Ohio NAACP's proposed plan; the Ohio NAACP, for its part, fully supported the 1991 apportionment plan. 794 F.Supp., at 726–729; App. to Juris. Statement 164a–167a, 269a–270a. Because the evidence not only fails to support but also directly contradicts the District Court's finding of discriminatory intent, we reverse that finding as clearly erroneous. In so doing, we express no view on the relationship between the Fifteenth Amendment and race-conscious redistricting. Cf. *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 155–165, 97 S.Ct. 996, 1004–1009, 51 L.Ed.2d 229 (1977) (plurality opinion). Neither party asserts that the State's conscious use of race by itself violates the Fifteenth Amendment. Instead, they dispute whether the District Court properly found that the State intentionally discriminated against black voters. On that question, we hold only that the District Court's finding of discriminatory intent was clear error.

IV

[18] **[19]** Finally, the District Court held that the plan violated the Fourteenth Amendment because it created legislative districts of unequal size. App. to Juris. Statement 146a–148a. The Equal Protection Clause does require that electoral districts be "of nearly equal population, so that each *161 person's vote may be given equal weight in the election of representatives." *Connor,* 431 U.S., at 416, 97 S.Ct., at 1834. But the requirement is not an inflexible one.

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson,* 462 U.S. 835, 842–843, 103 S.Ct. 2690, 2696, 77 L.Ed.2d 214 (1983) (internal quotation marks and citations omitted).

Here, the District Court found that the maximum total deviation from ideal district size exceeded 10%. App. to Juris. Statement 148a. As a result, appellees established a prima facie case of discrimination, and appellants were required to justify the deviation. Appellants attempted to do just that, arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries. See Ohio Const., Arts. VII–XI. The District Court therefore was required to decide whether the "plan 'may reasonably be said to advance [the] rational state policy' " of preserving county boundaries "and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of th[e] plan exceed constitutional limits.' " *Brown, supra,* at 843, 103 S.Ct., at 2696 (quoting *Mahan v. Howell,* 410 U.S. 315, 328, 93 S.Ct. 979, 986, 35 L.Ed.2d 320 (1973)). Rather than undertaking that inquiry, the District Court simply held that total deviations in excess of 10% cannot be justified by a policy of preserving the boundaries of political subdivisions. Our case law is directly to the contrary. See *Mahan v. Howell, supra* (upholding total deviation of over 16% where justified by the rational objective of *162 preserving the integrity of political subdivision lines); see also *Brown v. Thomson, supra.* On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra,* 462 U.S., at 843–846, 103 S.Ct., at 2696–2697, and *Mahan, supra,* 410 U.S., at 325–330, 93 S.Ct., at 985–987.

**1160 The judgment of the District Court is reversed, and the case is remanded for further proceedings in conformity with this opinion.

So ordered.

All Citations

507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500, 61 USLW 4199

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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96 S.Ct. 2040
Supreme Court of the United States

Walter E. WASHINGTON, etc., et al., Petitioners,

v.

Alfred E. DAVIS et al.

No. 74-1492.
|
Argued March 1, 1976.
|
Decided June 7, 1976.

Synopsis

Unsuccessful black applicants for employment as police officers by the District of Columbia brought class action claiming that recruiting procedures, including a written personnel test administered to determine whether applicants have acquired a particular level of verbal skill, were racially discriminatory. The United States District Court for the District of Columbia, 348 F.Supp. 15, granted defendants' motions for summary judgment and plaintiffs appealed. The Court of Appeals, 168 U.S.App.D.C. 42, 512 F.2d 956, reversed and directed summary judgment for plaintiff and certiorari was granted. The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment; that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose; that the disproportionate impact of the test, which was neutral on its face, did not warrant conclusion that test was a purposely discriminatory device; and that a positive relationship between the test and training school performance was sufficient to validate the test, wholly aside from its possible relationship to actual performance as a police officer.

Judgment of Court of Appeals reversed.

Mr. Justice Stewart joined in parts of the opinion.

Mr. Justice Stevens filed concurring opinion.

Mr. Justice Brennan, with whom Mr. Justice Marshall joined, filed dissenting opinion.

West Headnotes (16)

[1] **Federal Courts** Presentation of Questions Below or on Review; Record; Waiver

Although petition for certiorari to United States Court of Appeals did not present as ground for reversal the Court of Appeals' erroneous application of statutory standards in resolving constitutional issue before it, occasion was appropriate for the Supreme Court to invoke plain error rule. Supreme Court Rules, rule 40, subd. 1(d)(2), 28 U.S.C.A.

30 Cases that cite this headnote

[2] **Constitutional Law** Discrimination and Classification

The standard for adjudicating claims of invidious racial discrimination under the due process clause of the Fifth Amendment is not identical to the standards applicable under the Equal Employment Opportunity Act. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amends. 5, 14.

199 Cases that cite this headnote

[3] **Constitutional Law** Race, National Origin, or Ethnicity

The central purpose of the equal protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. U.S.C.A.Const. Amend. 14.

774 Cases that cite this headnote

[4] **Constitutional Law** Race, National Origin, or Ethnicity

Constitutional Law Relationship to equal protection guarantee

Though the due process clause of the Fifth Amendment contains an equal protection

component prohibiting the government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. U.S.C.A.Const. Amend. 5.

1159 Cases that cite this headnote

[5] **Constitutional Law** Race, National Origin, or Ethnicity

A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on basis of race. U.S.C.A.Const. Amends. 5, 14.

95 Cases that cite this headnote

[6] **Constitutional Law** Race, National Origin, or Ethnicity

An invidious discriminatory purpose in application of a statute may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. U.S.C.A.Const. Amends. 5, 14.

367 Cases that cite this headnote

[7] **Constitutional Law** Race, national origin, or ethnicity

Constitutional Law Intentional or purposeful action

Disproportionate impact of a statute is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution and, standing alone, does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. U.S.C.A.Const. Amends. 5, 14.

289 Cases that cite this headnote

[8] **Constitutional Law** Intentional or purposeful action

In proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor in determining a constitutional violation. U.S.C.A.Const. Amends. 5, 14.

501 Cases that cite this headnote

[9] **Public Employment** Examination

The Constitution does not prevent the government from seeking through a written test of verbal skill modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. U.S.C.A.Const. Amends. 5, 14.

18 Cases that cite this headnote

[10] **Constitutional Law** Public employees and officials

Negro applicants for employment as police officers could no more successfully claim that written test of verbal skill denied them equal protection than could white applicants who also failed the test. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

59 Cases that cite this headnote

[11] **Civil Rights** Educational requirements; ability tests

The disproportionate impact on Negroes of written test of verbal skill administered to applicants for employment as police officers did not warrant the conclusion that the test, which was neutral on its face, was a purposely discriminatory device. U.S.C.A.Const. Amend. 5; 5 U.S.C.A. § 3304(a); 42 U.S.C.A. § 1981; D.C.C.E. §§ 1–320, 4–103.

115 Cases that cite this headnote

[12] **Civil Rights** Admissibility of evidence; statistical evidence

The affirmative efforts of police department to recruit black officers, the changing racial

composition of the recruit classes and of the force in general, and the relationship of written test of verbal skill to the training program negated any inference that the department discriminated on the basis of race notwithstanding the disproportionate impact of the test on Negro applicants. U.S.C.A.Const. Amend. 5; 5 U.S.C.A. § 3304(a); 42 U.S.C.A. § 1981; D.C.C.E. §§ 1–320, 4–103.

245 Cases that cite this headnote

[13] **Civil Rights** Judicial review and enforcement of administrative decisions

The statutory standard of review of the Equal Employment Opportunity Act involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact of written personnel test is claimed. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amends. 5, 14.

19 Cases that cite this headnote

[14] **Constitutional Law** Civil rights

Extension of a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another, beyond those areas where the rule is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

27 Cases that cite this headnote

[15] **Civil Rights** Educational requirements; ability tests

Positive relationship between test of verbal skill administered applicants for employment as police officers to training course performance was sufficient to validate the test, wholly aside from its possible relationship to actual performance as a police officer. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

38 Cases that cite this headnote

[16] **Civil Rights** Educational requirements; ability tests

District court's conclusion that test of verbal skill administered to applicants for employment as police officers was directly related to the requirements of the police training program was supported by a validation study as well as by other evidence of record. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

68 Cases that cite this headnote

**2042 Syllabus*

*229 Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 42 U.S.C. s 1981, and D.C.Code s 1-320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for **2043 summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment,

in view of the facts that 44% Of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on ***230** appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use ofests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. Held:

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases. Pp. 2046-2052.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional Solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Pp. 2047-2050.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed. P. 2050.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted. Pp. 2050-2051.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is ***231** appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription. Pp. 2051-2052.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion ****2044** that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate. Pp. 2052-2054.

168 U.S.App.D.C. 42, 512 F.2d 956, reversed.

Attorneys and Law Firms

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Mark L. Evans, Washington, D. C., for the federal respondents.

Richard B. Sobol, Washington, D. C., for respondents Davis et al.

Opinion

***232** Mr. Justice WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

I

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission.[1] An amended complaint, filed December 10, alleged that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. The respondents Harley and Sellers were permitted to intervene, their amended complaint asserting ***233** that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. s 1981 and under D.C.Code s 1-320."[2] Defendants answered, and discovery ****2045** and ***234** various other proceedings followed.[3]Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds.[4] The District Court granted petitioners' and denied respondents' motions. 348 F.Supp. 15 (DC1972).

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," ***235** and which was "designed to test verbal ability, vocabulary, reading and comprehension." *Id.,* at 16.

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Ibid. Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." Ibid. This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% Of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates (Sic) to discriminate ***236** against otherwise qualified blacks' Id., at 17. It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance "The lack of job performance validation does not defeat the Test, given its direct relationship ****2046** to recruiting and the valid part it plays in this process." Ibid. The District Court ultimately concluded that "(t)he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence."[5] Id., at 18.

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one.[6] 168 U.S.App.D.C. 42, 512 F.2d 956 (1975). ***237** The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks four times as many failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison (not) material to this appeal." Id., at 46 n. 24, 512 F.2d, at 960 n. 24. The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorari, 423 U.S. 820, 96 S.Ct. 33, 46 L.Ed.2d 37 (1975), filed by the District of Columbia officials.[7]

***238** II

[1] Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal,[8] our Rule 40(1)(d)(2) provides that we "may notice a ****2047** plain error not presented";[9] and this is an appropriate occasion to invoke the Rule.

[2] As the Court of Appeals understood Title VII,[10] employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion ***239** practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

[3] **[4]** The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.

Almost 100 years ago, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." Akins v. Texas, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696 (1945). A defendant in a criminal case is entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." Alexander v. Louisiana, 405 U.S. 625, 628-629, 92 S.Ct. 1221, 1224, 31 L.Ed.2d 536 (1972). See also Carter v. Jury Comm'n, 396 U.S. 320, 335-337, 339, 90 S.Ct. 5, 526-528, 529, 24 L.Ed.2d 549, 560-561, 562 (1970); Cassell v. Texas, 339 U.S. 282, 287-290, 70 S.Ct. 629, 631-633, 94 L.Ed. 839, 847-849 (1950); Patton v. Mississippi, 332 U.S. 463, 468-469, 68 S.Ct. 184, 187, 92 L.Ed. 76, 80 (1947).

***240** The rule is the same in other contexts. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their ****2048** boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York

Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." Id., at 56, 58, 84 S.Ct., at 605, 11 L.Ed.2d, at 515. The dissenters were in agreement that the issue was whether the "boundaries . . . were purposefully drawn on racial lines." Id., at 67, 84 S.Ct., at 611, 11 L.Ed.2d, at 522.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of De jure segregation is "a current condition of segregation resulting from intentional state action. Keyes v. School Dist. No. 1, 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed.2d 548 (1973). The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate." Id., at 208, 93 S.Ct., at 2696, 37 L.Ed.2d, at 561. See also Id., at 199, 211, 213, 93 S.Ct. at 2692, 2698, 2699, 37 L.Ed.2d, at 558, 564, 566. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "(t)he acceptance of appellants' ***241** constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Jefferson v. Hackney*, 406 U.S. 535, 548, 92 S.Ct. 1724, 1732, 32 L.Ed.2d 285, 297 (1972). And compare Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), with James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).

[5] This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." Akins v. Texas, supra, 325 U.S., at 404, 65 S.Ct., at 1279, 89 L.Ed., at 1696. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Pierre v. Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.Ed. 1559, 1562 (1942), or with racially non-neutral selection procedures, Alexander v. Louisiana, supra ; Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Alexander, supra, 405 U.S., at 632, 92 S.Ct., at 1226, 31 L.Ed.2d, at 542. See also Turner v. Fouche, 396 U.S. 346, 361, 90 S.Ct. 532, 540, 24 L.Ed.2d 567, 579 (1970); Eubanks v. Louisiana, 356 U.S. 584, 587, 78 S.Ct. 970, 973, 2 L.Ed.2d 991, 994 (1958).

[6] **[7]** ***242** Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including ****2049** the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), the city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated.

Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that ***243** racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance to preserve peace and avoid deficits were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

[8] Wright v. Council of City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972), also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." Id., at 459, 92 S.Ct., at 2202, 33 L.Ed.2d, at 60. There was thus no need to find "an independent constitutional violation." Ibid. Citing Palmer v. Thompson, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither Palmer Nor Wright was understood to have changed the prevailing rule is apparent from Keyes v. School Dist. No. 1, supra, where the principal issue ***244** in litigation was whether to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, Alexander v. Louisiana, supra, and Jefferson v. Hackney, supra, indicate that either ****2050** Palmer or Wright had worked a fundamental change in equal protection law.[11]

Both before and after Palmer v. Thompson, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The ***245** cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

[9] **[10]** As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that ***246** the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been ****2051** disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

[11] **[12]** Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be

said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F.Supp., at 18.

[13] Under Title VII, Congress provided that when hiring ***247** and promotion practices disqualifying substantially disprortionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.[13] However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes ***248** of applying the Fifth and the Fourteenth Amendments in cases such as this

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[14]

****2052** **[14]** Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

III

We also hold that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds.

***249** The submission of the defendants in the District Court was that Test 21 complied with all applicable statutory as well as constitutional requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied.[15] The District Court also assumed that Title VII standards were to control the case identified the determinative issue as whether Test 21 was sufficiently job related and proceeded to uphold use of the test because it was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy." 348 F.Supp., at 17. The Court of Appeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement ***250** of a direct relationship between performance on Test 21 and performance on the policeman's job.

[15] We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence ****2053** placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties

to the case.[16] Nor is the ***251** conclusion closed by either Griggs or Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement.

[16] The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record;[17] ***252** and we are not convinced that this conclusion was erroneous.

The federal parties, whose views have somewhat changed since the decision of the Court of Appeals and who still insist that training-program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training-program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that Title.

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

Mr. Justice STEWART joins Parts I and II of the Court's opinion.

****2054** Mr. Justice STEVENS, concurring.

While I agree with the Court's disposition of this case, I add these comments on the constitutional issue discussed ***253** in Part II and the statutory issue discussed in Part III of the Court's opinion.

The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

***254** My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 or Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.[*]

My agreement with the conclusion reached in Part II of the Court's opinion rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District

administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second, ***255** the same test is used throughout the federal service. The applicants for employment in the District of ****2055** Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purposes" that term is used in constitutional adjudication.

My study of the statutory issue leads me to the same conclusion reached by the Court in Part III of its opinion. Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though as the Court makes clear, Ante, at 238 n.10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 U.S.C. s 1981 and s 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application.

The parties argued the case as though Title VII standards were applicable. In a general way those standards shed light on the issues, but there is sufficient individuality and complexity to that statute, and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history. Moreover, the subject matter of this case the validity of qualifications for the law enforcement profession is one in which federal district judges have a greater expertise than in many others. I therefore do not regard this as a case in which the District Court was required to apply Title VII standards as strictly as would ***256** be necessary either in other contexts or in litigation actually arising under that statute.

The Court's specific holding on the job-relatedness question contains, I believe, two components. First, as a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job. I regard this as a reasonable proposition and not inconsistent with the Court's prior holdings, although some of its prior language obviously did not contemplate this precise problem. Second, as a matter of fact, the District Court's finding that there was a correlation between success on the test and success in the training program has sufficient evidentiary support to withstand attack under the "clearly erroneous" standard mandated by Fed.Rule Civ.Proc. 52(a). Whether or not we would have made the same finding of fact, the opinion evidence identified in n. 17 of the Court's opinion and indeed the assumption made by the Court of Appeals quoted therein is surely adequate to support the finding under the proper standard of appellate review.

On the understanding that nothing which I have said is inconsistent with the Court's reasoning, I join the opinion of the Court except to the extent that it expresses an opinion on the merits of the cases cited Ante, at 2050, n. 12.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

The Court holds that the job qualification examination (Test 21) given by the District of Columbia Metropolitan Police Department does not unlawfully discriminate on the basis of race under either constitutional or statutory standards.

***257** Initially, it seems to me that the Court should not pass on the statutory questions, because they are not presented by this case. The Court says that respondents' summary judgment motion "rested on purely constitutional grounds," Ante, at 2046, and that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it," Ante, at 2046. There is a suggestion, however, that petitioners are entitled to prevail because they met the burden of proof imposed by 5 U.S.C. s 3304. Ante, at 2052 n. 15. As I understand the opinion, ****2056** the Court therefore holds that Test 21 is job-related under s 3304, but not necessarily under Title VII. But that provision, by the Court's own analysis, is no more in the case than Title VII; respondents' "complaint asserted no claim under s 3304." Ante, at 2045 n. 2. Cf. Ante, at 2046-2047 n. 10. If it was "plain error" for the Court of Appeals to apply a statutory standard to this case, as the Court asserts, Ante,

at 2046-2047, then it is unfortunate that the Court does not recognize that it is also plain error to address the statutory issues in Part III of its opinion.

Nevertheless, although it appears unnecessary to reach the statutory questions, I will accept the Court's conclusion that respondents were entitled to summary judgment if they were correct in their statutory arguments, and I would affirm the Court of Appeals because petitioners have failed to prove that Test 21 satisfies the applicable statutory standards.[1] All parties' arguments and ***258** both lower court decisions were based on Title VII standards. In this context, I think it wrong to focus on s 3304 to the exclusion of the Title VII standards, particularly because the Civil Service Commission views the job-relatedness standards of Title VII and s 3304 as identical.[2] See also Infra, at 2058-2059.

In applying a Title VII test,[3] both the District Court and the Court of Appeals held that respondents had offered sufficient evidence of discriminatory impact to shift to petitioners the burden of proving job relatedness. 348 F.Supp. 15, 16; 168 U.S.App.D.C. 42, 45-47, 512 F.2d 956, 959-961. The Court does not question these rulings, and the only issue before us is what petitioners were required to show and whether they carried their burden. The Court agrees with the District Court's conclusion that Test 21 was validated by a positive relationship between Test 21 scores and performance in police training courses. This result is based upon the Court's reading of the record, its interpretation of instructions ***259** governing testing practices issued by the Civil Service Commission (CSC), and "the current views of the Civil Service Commissioners who were parties to the case." We are also assured that today's result is not foreclosed by *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Finally, the Court asserts that its conclusion is "the much more sensible construction of the job relatedness requirement." *Ante,* at 2053.

But the CSC instructions cited by the Court do not support the District Court's conclusion. More importantly, the brief filed in this Court by the CSC takes the position that petitioners did not satisfy the burden of proof imposed by the CSC guidelines. It also appears that longstanding regulations of the Equal Employment Opportunity Commission (EEOC) previously ****2057** endorsed by this Court require a result contrary to that reached by the Court. Furthermore, the Court's conclusion is inconsistent with my understanding of the interpretation of Title VII in Griggs and Albemarle. I do not find this conclusion "much more sensible" and with all respect I suggest that today's decision has the potential of significantly weakening statutory safeguards against discrimination in employment.

I

On October 12, 1972, the CSC issued a supplement to the Federal Personnel Manual containing instructions for compliance with its general regulations concerning employment practices.[4] The provision cited by the Court ***260** requires that Test 21 "have a demonstrable and rational relationship to important job-related performance objectives identified by management." "Success in training" is one example of a possible objective. The statistical correlation established by the Futransky validity study, Ante, at 2053 n. 17, was between applicants' scores on Test 21 and recruits' average scores on final examinations given during the police training course.

It is hornbook law that the Court accord deference to the construction of an administrative regulation when that construction is made by the administrative authority responsible for the regulation. E. g., Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965). It is worthy of note, therefore, that the brief filed by the CSC in this case interprets the instructions in a manner directly contrary to the Court, despite the Court's claim that its result is supported by the Commissioners' "current views."
"Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).

"The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There ***262** is little evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant." Brief for CSC 14-15 (emphasis added).

The CSC maintains that a positive correlation between scores on entrance examinations and the criterion of success in training may establish the job relatedness of an entrance test thus relieving an employer from the burden of providing a relationship to job performance after training but only subject to certain limitations.

"Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the entrance examination. There must also be evidence the nature of which will depend on the particular circumstances of the case showing that the achievement test scores are an appropriate measure of **2058 the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job." Id., at 24-25.

Applying its standards[5] the CSC concludes that none of the evidence presented in the District Court established "the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer." Id., at 30.[6]

The CSC's standards thus recognize that Test 21 can be validated by a correlation between Test 21 scores and recruits' averages on training examinations only if (1) the training averages predict job performance or (2) the averages are proved to measure performance in job-related training. There is no proof that the recruits' average is correlated with job performance after completion of training. See n. 10, Infra. And although a positive relationship to the recruits' average might be sufficient to validate Test 21 if the average were proved to reflect mastery of material on the training curriculum that was in turn demonstrated to be relevant to job performance, the record is devoid of proof in this regard. First, there is no demonstration by petitioners that the training-course examinations measure comprehension of the training curriculum; indeed, these examinations do not even appear in the record. Furthermore, the Futransky study simply designated an average of 85 on the *263 examination as a "good" performance and assumed that a recruit with such an average learned the material taught in the training course.[7] Without any further proof of the significance of a score of 85, and there is none in the record, I cannot agree that Test 21 is predictive of "success in training."

II

Today's decision is also at odds with EEOC regulations issued pursuant to explicit authorization in Title VII, 42 U.S.C. s 2000e-12(a). Although the dispute in this case is not within the EEOC's jurisdiction, as I noted above, the proper construction of Title VII nevertheless is relevant. Moreover, the 1972 extension of Title VII to public employees gave the same substantive protection to those employees as had previously been accorded in the private sector, Morton v. Mancari, 417 U.S. 535, 546-547, 94 S.Ct. 2474, 2480-2481, 41 L.Ed.2d 290, 298-299 (1974), and it is therefore improper to maintain different standards in the public and private sectors. Chandler v. Roudebush, 425 U.S. 840, 864, 96 S.Ct. 1949, 1961, 48 L.Ed.2d 416, 433 (1976). See n. 2, Supra.

As with an agency's regulations, the construction of a statute by the agency charged with its administration is entitled **2059 to great deference. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415, 419 (1972); Udall v. Tallman, 380 U.S., at 16, 85 S.Ct., at 801, 13 L.Ed.2d, at 625; Power Reactor Co. v. Electricians, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961). The deference *264 due the pertinent EEOC regulations is enhanced by the fact that they were neither altered nor disapproved when Congress extensively amended Title VII in 1972.[8] Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 410, 95 S.Ct. 1066, 1075, 43 L.Ed.2d 279, 290 (1975); Cammarano v. United States, 358 U.S. 498, 510, 79 S.Ct. 524, 531, 3 L.Ed.2d 462, 470 (1959); Allen v. Grand Central Aircraft Co., 347 U.S. 535, 547, 74 S.Ct. 745, 752, 98 L.Ed. 933, 943 (1954); Massachusetts Mut. Life Ins. Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L.Ed. 739, 742 (1933). These principles were followed in Albemarle where the Court explicitly endorsed various regulations no fewer than eight times in its opinion, 422 U.S., at 431-436, 95 S.Ct., at 2378-2381, 45 L.Ed.2d, at 304-307[9] and Griggs, 401 U.S., at 433-434, 91 S.Ct., at 854-855, 28 L.Ed.2d, at 165-166.

The EEOC regulations require that the validity of a job qualification test be proved by "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR s 1607.4(c) (1975). This construction of Title VII was approved in Albemarle, where we quoted this provision and remarked that "(t)he message of these

Guidelines is the same as that of the Griggs case." 422 U.S., at 431, 95 S.Ct., at 2378, 45 L.Ed.2d, at 304. The regulations also set forth minimum standards for ***265** validation and delineate the criteria that may be used for this purpose.

"The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 CFR s 1607.5(b)(3) (1975).

This provision was also approved in Albemarle, 422 U.S., at 432, 95 S.Ct., at 2379, 45 L.Ed.2d, at 304, and n. 30.

If we measure the validity of Test 21 by this standard, which I submit we are bound to do, petitioners' proof is deficient in a number of ways similar to those noted above. First, the criterion of final training examination averages does not appear to be "fully described." Although the record contains some general discussion of the training curriculum, the examinations are not in the record, and there is no other evidence completely elucidating the subject matter tested by the training examinations. Without this required description we cannot determine whether the correlation with training examination averages is sufficiently related to petitioners' need to ascertain "job-specific ability." See Albemarle, 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305. Second, the EEOC regulations do not expressly permit validation by correlation to training performance, unlike the CSC instructions. ****2060** Among the specified criteria the closest to training performance is "training time." All recruits to the Metropolitan Police Department, however, go through the ***266** same training course in the same amount of time, including those who experience some difficulty. See n. 7, *supra*. Third, the final requirement of s 1607.5(b)(3) has not been met. There has been no job analysis establishing the significance of scores on training examinations, nor is there any other type of evidence showing that these scores are of 'major or critical " importance.

Accordingly, EEOC regulations that have previously been approved by the Court set forth a construction of Title VII that is distinctly opposed to today's statutory result.

III

The Court also says that its conclusion is not foreclosed by Griggs and Albemarle, but today's result plainly conflicts with those cases. Griggs held that "(i)f an employment practice which operates to exclude Negroes cannot be shown to be Related to job performance, the practice is prohibited." 401 U.S., at 431, 91 S.Ct., at 853, 28 L.Ed.2d, at 164 (emphasis added). Once a discriminatory impact is shown, the employer carries the burden of proving that the challenged practice "bear(s) a Demonstrable relationship to successful performance of the jobs for which it was used." Ibid. (emphasis added). We observed further:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Id., at 436, 91 S.Ct., at 856, 28 L.Ed.2d, at 167.

Albemarle read Griggs to require that a discriminatory test be validated through proof "by professionally acceptable methods" that it is " 'predictive of or significantly ***267** correlated with *important* elements of work behavior *which comprise or are relevant to the job or jobs* for which candidates are being evaluated.' " 422 U.S., at 431, 95 S.Ct., at 2378, 45 L.Ed.2d, at 304 (emphasis added), quoting 29 CFR s 1607.4(c) (1975). Further, we rejected the employer's attempt to validate a written test by proving that it was related to supervisors' job performance ratings, because there was no demonstration that the ratings accurately reflected job performance. We were unable "to determine whether the criteria Actually considered were sufficiently related to the (employer's) legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305 (emphasis in original). To me, therefore, these cases read Title VII as requiring proof of a significant relationship to job performance to establish the validity of a discriminatory test. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 678 and n. 14 (1973). Petitioners do not maintain that there is a demonstrated correlation between Test 21 scores and job performance. Moreover, their validity study was unable to discern a significant positive relationship between training averages and job performance.[10] Thus, there is no proof of a correlation either direct or indirect between Test 21 and performance of the job of being a police officer.

It may well be that in some circumstances, proof of a relationship between a discriminatory qualification test and training **2061 performance is an acceptable substitute for establishing a relationship to job performance. But this question is not settled, and it should not be resolved *268 by the minimal analysis in the Court's opinion.[11] Moreover, it is particularly inappropriate to decide the question on this record. "Professionally acceptable methods" apparently recognize validation by proof of a correlation with training performance, rather than of performance, if (1) the training curriculum includes information proved to be important to job performance and (2) the standard used as a measure of training performance is shown to reflect the trainees' mastery of the material included in the training curriculum. See Brief for CSC 24-29; Brief for the Executive Committee of Division 14 of the American Psychological Assn. as Amicus Curiae 37-43. But no authority, whether professional, administrative, or judicial, has accepted the sufficiency of a correlation with training performance in the absence of such proof. For reasons that I have stated above, the record does not adequately establish either factor. As a result, the Court's conclusion cannot be squared with the focus on job performance in Griggs and Albemarle, even if this substitute showing is reconcilable with the holdings in those cases.

Today's reduced emphasis on a relationship to job performance is also inconsistent with clearly expressed congressional intent. A section-by-section analysis of the 1972 amendments to Title VII states as follows:
"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would *269 continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7166 (1972).

The pre-1972 judicial decisions dealing with standardized tests used as job qualification requirements uniformly follow the EEOC regulations discussed above and insist upon proof of a relationship to job performance to prove that a test is job related.[12] Furthermore, the Court ignores Congress' explicit hostility toward the use of written tests as job-qualification requirements; Congress disapproved the CSC's "use of general ability tests which are not aimed at any direct relationship to specific jobs." H.R.Rep. No. 92-238, p. 24 (1971). See S.Rep. No. 92-415, pp. 14-15 (1971). Petitioners concede that Test 21 was devised by the CSC for general use and was not designed to be used by police departments.

Finally, it should be observed that every federal court, except the District Court in this case, presented with proof identical to that offered to validate Test 21 has reached a conclusion directly opposite to that of the *270 Court today.[13] Sound policy considerations **2062 support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition. Today's result will prove particularly unfortunate if it is extended to govern Title VII cases.

Accordingly, accepting the Court's assertion that it is necessary to reach the statutory issue, I would hold that petitioners have not met their burden of proof and affirm the judgment of the Court of Appeals.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

1 Under s 4-103 of the District of Columbia Code, appointments to the Metropolitan Police force were to be made by the Commissioner subject to the provisions of Title 5 of the United States Code relating to the classified civil service. The District of Columbia Council and the Office of Commissioner of the District of Columbia, established by Reorganization

Plan No. 37 of 1967, were abolished as of January 2, 1975, and replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia.

2 Title 42 U.S.C. s 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1-320 of the District of Columbia Code (1973) provides:

"In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin."

One of the provisions expressly made applicable to the Metropolitan Police force by s 4-103 is 5 U.S.C. s 3304(a), which provides:

"s 3304. Competitive service; examinations.

"(a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for

"(1) open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought; and

"(2) noncompetitive examinations when competent applicants do not compete after notice has been given of the existence of the vacancy."

The complaint asserted no claim under s 3304.

3 Those proceedings included a hearing on respondents' motion for an order designating the case as a class action. A ruling on the motion was held in abeyance and was never granted insofar as the record before us reveals.

4 In support of the motion, petitioners and the federal parties urged that they were in compliance with all applicable constitutional, statutory, and regulatory provisions, including the provisions of the Civil Service Act which since 1883 were said to have established a "job relatedness" standard for employment.

5 When summary judgment was granted, the case with respect to discriminatory promotions was still pending. The District Court, however, made the determination and direction authorized by Fed.Rule Civ.Proc. 54(b). The promotion issue was subsequently decided adversely to the original plaintiffs. Davis v. Washington, 352 F.Supp. 187 (DC 1972).

6 "Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inapplicable to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." 168 U.S.App.D.C. 42, 44 n. 2, 512 F.2d 956, 958 n. 2 (1975).

7 The Civil Service Commissioners, defendants in the District Court, did not petition for writ of certiorari but have filed a brief as respondents. See our Rule 21(4). We shall at times refer to them as the "federal parties."

8 Apparently not disputing the applicability of the Griggs and Title VII standards in resolving this case, petitioners presented issues going only to whether Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), had been misapplied by the Court of Appeals.

9 See, E. g., Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962); Carpenters v. United States, 330 U.S. 395, 412, 67 S.Ct. 775, 784, 91 L.Ed. 973, 987 (1947); Sibbach v. Wilson & Co., 312 U.S. 1, 16, 61 S.Ct. 422, 427, 85 L.Ed. 479, 486 (1941); Mahler v. Eby, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549, 557 (1924); Weems v. United States, 217 U.S. 349, 362, 30 S.Ct. 544, 547, 54 L.Ed. 793, 796 (1910).

10 Although Title VII standards have dominated this case, the statute was not applicable to federal employees when the complaint was filed; and although the 1972 amendments extending the Title to reach Government employees were adopted prior to the District Court's judgment, the complaint was not amended to state a claim under that Title, nor did the case thereafter proceed as a Title VII case. Respondents' motion for partial summary judgment, filed after the 1972 amendments, rested solely on constitutional grounds; and the Court of Appeals ruled that the motion should have been granted.

At the oral argument before this Court, when respondents' counsel was asked whether “this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional overtones,” counsel responded: “My trouble honestly with that proposition is the procedural requirements to get into court under Title VII, and this case has not met them.” Tr. of Oral Arg. 66.

11 To the extent that Palmer suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases as indicated in the text are to the contrary; and very shortly after Palmer, all Members of the Court majority in that case joined the Court's opinion in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

12 Cases dealing with public employment include: Chance v. Board of Examiners, 458 F.2d 1167, 1176-1177 (CA2 1972); Castro v. Beecher, 459 F.2d 725, 732-733 (CA1 1972); Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1337 (CA2 1973); Harper v. Mayor of Baltimore, 359 F.Supp. 1187, 1200 (D.Md.), aff'd in pertinent part Sub nom. Harper v. Kloster, 486 F.2d 1134 (CA4 1973); Douglas v. Hampton, 168 U.S.App.D.C. 62, 67, 512 F.2d 976, 981 (1975); but cf. Tyler v. Vickery, 517 F.2d 1089, 1096-1097 (CA5 1975), cert. pending, No. 75-1026. There are also District Court cases: Wade v. Mississippi Cooperative Extension Serv., 372 F.Supp. 126, 143 (ND Miss. 1974); Arnold v. Ballard, 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975); United States v. City of Chicago, 385 F.Supp. 543, 553 (N.D. Ill. 1974); Fowler v. Schwarzwalder, 351 F.Supp. 721, 724 (D.Minn. 1972), rev'd on other grounds, 498 F.2d 143 (CA8 1974).

In other contexts there are Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (CA2 1968) (urban renewal); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (CA9 1970) (dictum) (zoning); Metropolitan H. D. Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), cert. granted, December 15, 1975, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975) (zoning); Gautreaux v. Romney, 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); Crow v. Brown, 332 F.Supp. 382, 391 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (CA5 1972) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F.2d 1171 (1972) (municipal services).

13 It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation: “empirical” or “criterion” validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); “construct” validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and “content” validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the Equal Employment Opportunity Commission in fashioning its Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue. See, E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280, 304 (1975); Douglas v. Hampton, 168 U.S.App.D.C., at 70, 512 F.2d, at 984; Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 394 (CA2 1973).

14 Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif.L.Rev. 275, 300 (1972), suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . .; (s)ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. Silverman, Equal Protection, Economic Legislation, and Racial Discrimination, 25 Vand.L.Rev. 1183 (1972). See also Demsetz, Minorities in the Market Place, 43 N.C.L.Rev. 271 (1965).

15 In their memorandum supporting their motion for summary judgment, the federal parties argued:

"In Griggs, supra, the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883. In that act Congress has mandated that the federal government must use '. . . examinations for testing applicants for appointment . . . which . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought.' 5 U.S.C. s 3304(a)(1). Defendants contend that they have been following the job-related standards of Griggs, supra, for the past eighty-eight years by virtue of the enactment of the Civil Service Act which guaranteed open and fair competition for jobs."

They went on to argue that the Griggs standard had been satisfied. In granting the motions for summary judgment filed by petitioners and the federal parties, the District Court necessarily decided adversely to respondents the statutory issues expressly or tacitly tendered by the parties.

16 See n. 17, Infra. Current instructions of the Civil Service Commission on "Examining, Testing, Standards, and Employment Practices" provide in pertinent part:

"S2-2 Use of applicant appraisal procedures

a. Policy. The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.

"(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.

"(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:

"(a) Effective job performance;

"(b) Capability;

"(c) Success in training;

"(d) Reduced turnover; or

"(e) Job satisfaction." 37 Fed.Reg. 21557 (1972).

See also Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR s 1607.5(b)(3) (1975), discussed in Albemarle Paper Co. v. Moody, 422 U.S., at 430-435, 95 S.Ct. 2362, 2378-2380, 45 L.Ed.2d 280, 304-307.

17 The record includes a validation study of Test 21's relationship to performance in the recruit training program. The study was made by D. L. Futransky of the Standards Division, Bureau of Policies and Standards, United States Civil Service Commission. App., at 99-109. Findings of the study included data "support(ing) the conclusion that T(est) 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School." Id., at 103. Opinion evidence, submitted by qualified experts examining the Futransky study and/or conducting their own research, affirmed the correlation between scores on Test 21 and success in the training program. E. g., Affidavit of Dr. Donald J. Schwartz (personnel research psychologist, United States Civil Service Commission), App. 178, 183 ("It is my opinion . . . that Test 21 has a significant

positive correlation with success in the MPD Recruit School for both Blacks and whites and is therefore shown to be job related . . .”); affidavit of Diane E. Wilson (personnel research psychologist, United States Civil Service Commission), App. 185, 186 (“It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training”).

The Court of Appeals was “willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive of further progress in Recruit School.” 168 U.S.App.D.C., at 48, 512 F.2d, at 962.

* Specifically, I express no opinion on the merits of the cases listed in n. 12 of the Court's opinion.

1 Although I do not intend to address the constitutional questions considered by the Court in Part II of its opinion, I feel constrained to comment upon the propriety of footnote 12, Ante, at 2049-2050. One of the cases “disapproved” therein is presently scheduled for plenary consideration by the Court in the 1976 Term, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), cert. granted, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975). If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.

2 The only administrative authority relied on by the Court in support of its result is a regulation of the Civil Service Commission construing the civil service employment standards in Title 5 of the United States Code. Ante, at 2052-2053 n. 16. I note, however, that 5 U.S.C. s 3304 was brought into this case by the CSC, not by respondents, and the CSC's only reason for referring to that provision was to establish that petitioners had been “following the job-related standards of Griggs (V. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971),) for the past eighty-eight years.” Ante, at 2052 n. 15.

3 The provision in Title VII on which petitioners place principal reliance is 42 U.S.C. s 2000e-2(h). See Griggs v. Duke Power Co., supra, 401 U.S., at 433-436, 91 S.Ct., at 854-856, 28 L.Ed.2d, at 165-167.

4 See 5 CFR s 300.101 Et seq. (1976). These instructions contain the “regulations” that the Court finds supportive of the District Court's conclusion, which was reached under Title VII, but neither the instructions nor the general regulations are an interpretation of Title VII. The instructions were issued “under authority of sections 3301 and 3302 of title 5, United States Code, and E.O. 10577, 3 CFR 1954-58 Comp., p. 218.” 37 Fed.Reg. 21552 (1972). The pertinent regulations of the CSC in 5 CFR s 300.101 Et seq. were promulgated pursuant to the same authorities, as well as 5 U.S.C. ss 7151, 7154 and Exec.Order No. 11478, 3 CFR (1966-1970 Comp.) 803.

5 The CSC asserts that certain of its guidelines have some bearing on Test 21's job relatedness. Under the CSC instructions, “ ‘criterion-related’ validity,” see Douglas v. Hampton, 168 U.S.App.D.C. 62, 70 n. 60, 512 F.2d 976, 984 n. 60 (1975), can be established by demonstrating a correlation between entrance examination scores and “a criterion which is legitimately based on the needs of the Federal Government.” P S3-2(a)(2), 37 Fed.Reg. 21558 (1972). Further, to prove validity, statistical studies must demonstrate that Test 21, “to a significant degree, measures performance or qualifications requirements which are relevant to the job or jobs for which candidates are being evaluated.” P S3-3(a), 37 Fed.Reg. 21558 (1972). These provisions are ignored in the Court's opinion.

6 On this basis, the CSC argues that the case ought to be remanded to enable petitioners to try to make such a demonstration, but this resolution seems to me inappropriate. Both lower courts recognized that petitioners had the burden of proof, and as this burden is yet unsatisfied, respondents are entitled to prevail.

7 The finding in the Futransky study on which the Court relies, Ante, at 2053 n. 17, was that Test 21 “is effective in selecting trainees who can learn the material that is taught at the Recruit School,” because it predicts averages over 85. On its face, this would appear to be an important finding, but the fact is that Everyone learns the material included in the training course. The study noted that all recruits pass the training examinations; if a particular recruit has any difficulty, he is given assistance until he passes.

8 Still another factor mandates deference to the EEOC regulations. The House and Senate committees considering the 1972 amendments to Title VII recognized that discrimination in employment, including the use of testing devices, is a “complex and pervasive phenomenon.” S.Rep. No. 92-415, p. 5 (1971); H.R.Rep. No. 92-238, p. 8 (1971); U.S.Code

Cong. & Admin.News 1972, p. 2137. As a result, both committees noted the need to obtain "expert assistance" in this area. S.Rep. No. 92-415, Supra, at 5; H.R.Rep. No. 92-238, Supra, at 8.

9 Indeed, two Justices asserted that the Court relied too heavily on the EEOC guidelines. 422 U.S. 449, 95 S.Ct. 2389, 45 L.Ed.2d 316 (Blackmun, J., concurring in judgment); Id., at 451, 95 S.Ct., at 2387, 45 L.Ed.2d, at 317 (Burger, C. J., concurring in part and dissenting in part).

10 Although the validity study found that Test 21 predicted job performance for white officers, but see Albemarle, 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305, no similar relationship existed for black officers. The same finding was made as to the relationship between training examination averages and job performance. See Id., at 435, 95 S.Ct., at 2380, 45 L.Ed.2d, at 306.

11 The Court of Appeals recognized that deciding whether 42 U.S.C. s 2000e-2(h) permitted such proof "is not a simple or insignificant endeavor." 168 U.S.App.D.C. 42, 50 n. 59, 512 F.2d 956, 964 n. 59. The court declined to express any view on this issue on the ground that petitioners had not satisfied this standard even if it were acceptable, which seems to me the proper treatment of the question.

12 Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418, 456-457 (CA5 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); Hicks v. Crown Zellerbach Corp., 319 F.Supp. 314, 319-321 (E.D.La.1970) (issuing preliminary injunction), 321 F.Supp. 1241, 1244 (1971) (issuing permanent injunction). See also Castro v. Beecher, 334 F.Supp. 930 (D.Mass.1971), aff'd in part and rev'd in part on other grounds, 459 F.2d 725 (CA1 1972); Western Addition Community Org. v. Alioto, 330 F.Supp. 536, 539-540 (N.D.Cal.1971), 340 F.Supp. 1351, 1354-1356 (1972) (issuing preliminary injunction), 360 F.Supp. 733 (1973) (issuing permanent injunction); Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y.1971), aff'd, 458 F.2d 1167 (CA2 1972); Baker v. Columbus Mun. Sep. School Dist., 329 F.Supp. 706, 721-722 (N.D.Miss.1971), aff'd, 462 F.2d 1112 (CA5 1972); Arrington v. Massachusetts Bay Transp. Auth., 306 F.Supp. 1355 (D.Mass.1969).

13 United States v. City of Chicago, 385 F.Supp. 543, 555-556 (N.D.Ill.1974) (police department); Officers for Justice v. CSC, 371 F.Supp. 1328, 1337 (N.D.Cal.1973) (police department); Smith v. City of East Cleveland, 363 F.Supp. 1131, 1148-1149 (N.D.Ohio 1973) (police department), aff'd in part and rev'd in part on other grounds, 520 F.2d 492 (CA6 1975); Harper v. Mayor of Baltimore, 359 F.Supp. 1187, 1202-1203 (D.Md.) (fire department), modified and aff'd, 486 F.2d 1134 (CA4 1973); Pennsylvania v. O'Neill, 348 F.Supp. 1084, 1090-1091 (E.D.Pa.1972) (police department), aff'd in pertinent part and vacated in part, 473 F.2d 1029 (CA3 1973).

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-204

§ 17-204. Definitions

Effective: August 6, 2024
Currentness

For the purposes of this title:

1. "At-large" method of election means a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which the candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities. For the purposes of this title, at-large method of election does not include ranked-choice voting, cumulative voting, and limited voting.

2. "District-based" method of election means a method of electing members to the governing body of a political subdivision using a districting or redistricting plan in which each member of the governing body resides within a district or ward that is a divisible part of the political subdivision and is elected only by voters residing within that district or ward, except for a member of the governing body that holds exclusively executive responsibilities.

3. "Alternative" method of election means a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting, cumulative voting, and limited voting.

4. "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.

5. "Protected class" means a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau.

5-a. “Language minorities” or “language-minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

6. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.

7. “Federal voting rights act” means the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., as amended.

8. The “civil rights bureau” means the civil rights bureau of the office of the attorney general.

9. “Government enforcement action” means a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action.

10. Repealed by L.2024, c. 216, § 2, eff. Aug. 6, 2024.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 1, 2, eff. Aug. 6, 2024.)

McKinney's Election Law § 17-204, NY ELEC § 17-204
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
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Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: August 6, 2024
Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative

than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that

would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a "NYVRA notification letter" in this title. The NYVRA notification letter shall specify the potential violation or violations alleged and shall contain a statement of facts to support such allegation; provided, however, that failure to so specify shall not be a basis for dismissal of such judicial action, but may affect the calculation of reimbursement pursuant to paragraph (e) of this subdivision. The prospective plaintiff shall also send by first class mail or email a copy of the NYVRA notification letter to the civil rights bureau. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a "NYVRA resolution" in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff

shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law. Within seven days of passing a NYVRA resolution, the political subdivision shall send by first class mail or email a copy of the resolution to the civil rights bureau.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau no later than one hundred twenty days after the passage of the NYVRA resolution. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within sixty days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal. The civil rights bureau may invoke an extension of up to twenty days to review the proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title cited in the NYVRA notification letter and would not give rise to any other violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any relevant federal law; and (D) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision

for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 3 to 8, eff. Aug. 6, 2024.)

McKinney's Election Law § 17-206, NY ELEC § 17-206

Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices [Statutory Text & Notes of Decisions subdivisions I to V]

Currentness

<Notes of Decisions for 42 USCA § 2000e-2 are displayed in multiple documents.>

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

CREDIT(S)

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102-166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

Notes of Decisions (6803)

42 U.S.C.A. § 2000e-2, 42 USCA § 2000e-2
Current through P.L. 118-137. Some statute sections may be more current, see credits for details.

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52 U.S.C.A. § 10301
Formerly cited as 42 USCA § 1973

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

Effective: September 1, 2014
Currentness

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

CREDIT(S)

(Pub.L. 89-110, Title I, § 2, Aug. 6, 1965, 79 Stat. 437; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 94-73, Title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Notes of Decisions (1352)

52 U.S.C.A. § 10301, 52 USCA § 10301
Current through P.L. 118-137. Some statute sections may be more current, see credits for details.

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